IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TAMMY J. KITZMILLER, et al., Plaintiffs	:	
vs.	:	Case Number 4:04-CV-02688
DOVER AREA SCHOOL DISTRICT; DOVER AREA SCHOOL DISTRICT BOARD OF DIRECTORS, Defendants	:	

AFTERNOON SESSION

TRANSCRIPT OF PROCEEDINGS
OF BENCH TRIAL

Before: HONORABLE JOHN E. JONES, III

Date : November 4, 2005

Place : Courtroom Number 2, 9th Floor
Federal Building
228 Walnut Street
Harrisburg, Pennsylvania

COUNSEL PRESENT:

ERIC J. ROTHSCHILD, ESQ.
WITOLD J. WALCZAK, ESQ.
STEPHEN G. HARVEY, ESQ.
THOMAS B. SCHMIDT, III, ESQ.
RICHARD B. KATSKEE, ESQ.
ALFRED WILCOX, ESQ.
For - Plaintiffs

PATRICK T. GILLEN, ESQ.
ROBERT J. MUISE, ESQ.
EDWARD L. WHITE, III, ESQ.
For - Defendants

THE COURT: All right. Consistent with what we discussed immediately prior to lunch, is your pleasure, gentlemen, to take the exhibits first? Can we do that?

MR. MUISE: Yes, Your Honor. We've reached, I believe, an agreement on how we're going to handle the demonstrative exhibits for the experts. And for the defendants, the exhibits for Dr. Behe and the exhibits for Dr. Minnich, we provided them. They'll be in a binder for the Court.

Dr. Behe's exhibits will be marked as Defendants' Exhibit 300, all the demonstratives. And then the ones that we've agreed to that will come in substantively we've marked as subparts with an L, 300-L, so forth. And we'll be providing copies of those binders to the Court before the close of business.

THE COURT: All right.

MR. MUISE: And then Dr. Minnich's exhibits are Defendants' Exhibits 301 with the subparts L through the completion. The subparts are the ones that come in substantively. I believe the plaintiffs have a similar formulation for their demonstratives for their experts.

MR. WALCZAK: Yes, Your Honor, and that's

agreeable to the plaintiffs. We have used a slightly different marking system, but we have binders of the entire Padian and Miller slide shows, and those will all come in for demonstrative purposes.

The ones that we are moving in substantively are marked on a separate sheet of paper that we will put at the start of the exhibit binder. We also are moving in substantively about a dozen slides from the Barbara Forrest presentation. And those are graphs, those are not representations of any of the articles or cases.

THE COURT: So at this point do I understand that I don't have to rule on any of the demonstratives?

MR. MUISE: That's correct, Your Honor. There are none that there's any objection. We've reached agreement on all of them. All the exhibits -- all the demonstratives come in for demonstrative purposes, and the ones that are separately marked as subparts will come in substantively, move for admission of those exhibits.

THE COURT: All right.

MR. MUISE: And those are all separately marked. We have a different marking system, but it's fairly consistent.

THE COURT: So for the record, we'll just indicate that pursuant to both of the proffers then, we'll admit them for the purposes as designated by counsel. Is that sufficient?

MR. MUISE: That's sufficient, Your Honor.

THE COURT: All right. Then that covers the demonstratives. Now, let's -- do you want to say something, Mr. Walczak?

MR. WALCZAK: If we're moving to the newspaper articles, before we do, we just have a couple of exhibits that do not appear to have been admitted.

THE COURT: All right. Let's take those up. And we'll give the defense the same courtesy if we missed any specific exhibits, non-demonstrative.

MR. WALCZAK: Plaintiffs' Exhibit 124A and B, it's not clear that both of those -- it's not clear to us if both of those are in. That's the administrator's biology statement that was read in January, January 18th of 2005.

THE COURT: What do you have, Liz?

COURTROOM DEPUTY: I just have they're admitted, not specifically A and B, so that's fine.

MR. WALCZAK: I think the difference is that A has handwriting on it. So, for instance, where it

said Mr. Riedel, it has Mr. Baksa written over that.

THE COURT: So is there a 124 and a 124A and B?

MR. WALCZAK: No, there's 124A and there's 124B.

THE COURT: And, Liz, you just have a listing for 124 generally?

COURTROOM DEPUTY: Yes.

THE COURT: Any objection to 124A and B from the defense?

MR. GILLEN: I can't see any basis for an objection to that.

THE COURT: All right. Well, then we'll admit 124A and B clarified by Mr. Walczak.

MR. WALCZAK: Plaintiffs' Exhibit 670 is the Aryani declaration that came in attendant to the chart for the letters and the op-eds.

THE COURT: Any objection to that?

MR. GILLEN: No, Your Honor, I have no objection to the affidavit used to establish authenticity, but our standard objection to admissibility.

MR. WALCZAK: Plaintiffs --

THE COURT: Well, now, wait. Hold it. Are you moving to admit it?

MR. WALCZAK: We are moving to admit it for the limited purpose of authentication.

THE COURT: And I think it should be admitted for that purpose only. That's really what the basis of your objection is, isn't it? You don't want it admitted for any purpose other than authenticity?

MR. GILLEN: Correct.

THE COURT: All right. Well, then we'll admit it for that purpose.

MR. WALCZAK: Plaintiffs' Exhibit 681 is a letter from Casey Brown to Michael Baksa dated September 22nd, 2004. I have a copy.

THE COURT: My recollection is that she testified to it and she authenticated it during her testimony.

MR. GILLEN: Yes. I have no objection, Your Honor.

THE COURT: Well, then that's admitted. That would be 681.

MR. WALCZAK: And then we have a copy of Plaintiffs' Exhibit 688, which is the Carol Casey Brown resignation speech.

THE COURT: Any objection?

MR. GILLEN: It's hearsay. As I recall,

she --

THE COURT: I think she read it into the record.

MR. GILLEN: She did.

THE COURT: I'll admit it under those circumstances. You may have a technical objection, I understand, Mr. Gillen, but it's in.

MR. GILLEN: That's fine.

THE COURT: It's really cumulative, but we'll put it in.

MR. WALCZAK: Your Honor, then we have Plaintiffs' Exhibits 671, 672, 674, 675. Those are the letters to the editor and the editorials.

THE COURT: All right. We're going to wait on those.

MR. WALCZAK: That's all we have.

THE COURT: Now, on the defense side, do you need to pick up any exhibits that we missed? Go ahead.

MR. MUISE: My understanding, Your Honor, is we are going to leave the record open so we can, perhaps, clean up some things next week.

THE COURT: Yes.

MR. MUISE: And that would probably be a more appropriate time.

THE COURT: We'll note that. And what I would ask that you do in that vein so that we don't lose track of this is, if you determine -- and this goes for both parties or all parties -- if you determine that there's an exhibit that we missed, consult with the opposing party. And if you reach an agreement as to that exhibit, simply notify my chambers by letter, and we'll admit that after the fact.

If, in fact, there is a dispute as to a particular exhibit, obviously notify us of that fact and we'll set up a conference call on the record so that you can argue that particular exhibit at that time. And wait until the process is finished so that we don't have successive small telephone arguments. We can pick it up in one wrap-around argument if that's necessary. All right?

Now, moving to the articles. Now, the news articles, let's -- I'm going to ask for somebody to prompt me, and probably best the plaintiffs, someone on the plaintiffs' side. Would you give me the exhibit numbers of the newspaper articles? This is not -- I am not referring to the editorials, and I'm not referring to the letters to the editor. These are the news articles themselves.

MR. WALCZAK: Your Honor, just to complicate things a little bit more --

THE COURT: Good, great.

MR. WALCZAK: Some of the newspaper articles were actually referred to in separate exhibits. So many of the plaintiffs referred to the Internet printout copies of the exhibits. Steve Stough was the one who actually went through every single one of the articles. And then when the reporters testified, most of the articles they were referring to were the printouts. So I have the corresponding numbers for each of those articles, if that's useful.

THE COURT: So you're saying that they duplicate?

MR. WALCZAK: They duplicate, but the format is -- they appear to be different, and when the witnesses are referring to them, they may be referring to one or the other.

THE COURT: Is that distinction important if the extraneous material, which I don't care about anyway -- and I recall the format. Some of them were pulled down off the Internet, some of them were photocopies of the actual articles as they appeared in newsprint. Can we take, so that we don't jumble up the record, a single copy of each article with

whatever the exhibit number is, or do you not have that?

MR. WALCZAK: I'd be concerned, Your Honor, without looking at the articles, that if there is some reference in the testimony to look at the third paragraph of the second column, it may not be the same.

THE COURT: I understand. Okay. On that basis, that certainly makes sense. All right. I see your point.

Let me tell you what I have. Liz just handed it up. Maybe this will help. We have then, with that potential duplication, as to -- and we'll take them in order of testimony. As to Ms. Bernhard-Bubb, we have P804, 805, 806, 807, 808, 809, 810, and 813.

Now, as to Maldonado, we have 790, 791, 792, 793, 794, 795, 797, and 798. Now, that would probably indicate that there are others that you may have. I'm not sure. Or does that pick it all up?

MR. WALCZAK: That's the universe of the articles testifying about -- or testified to by the reporters. I also have, if Your Honor would like, the corresponding numbers to the same articles testified to by the plaintiffs. Is that useful?

THE COURT: Say it again.

MR. WALCZAK: We were just talking about the plaintiffs referred to a different version. So, for instance, 804 is also Plaintiffs' 44.

THE COURT: Well, because your concern is that they may have, if I understand it, referred to parts of those duplicates formated in a different way, why don't you recite those numbers now so we have them. Because your purpose then, based on what you said, is to move for the admission of all of them. Is that correct?

MR. WALCZAK: Yes, Your Honor.

THE COURT: All right. Then name the additional numbers that I didn't name.

MR. WALCZAK: Under Ms. Bubb, 804 corresponds to Plaintiffs' Exhibit 44. 805 corresponds to Plaintiffs' 45. 806 corresponds to Plaintiffs' 54. 807 corresponds to Plaintiffs' 683. There is no corresponding for 808. 809 corresponds to 684. Plaintiffs' 687 corresponds to 810. And there is no corresponding exhibit for 813.

On Mr. Maldonado's articles, Plaintiffs' 46 corresponds to 790. Plaintiffs' 47 corresponds to 791. Plaintiffs' 51 corresponds to 792. Plaintiffs' 53 corresponds to 793. There is no corresponding for

794. 795 corresponds to 682. 797 corresponds to 678. And there is no corresponding on 798.

THE COURT: All right.

MR. WALCZAK: And we would move the admission of all of those articles, both for the fact that this is what was printed and also under the Rule 607 residual hearsay exception.

THE COURT: 807.

MR. WALCZAK: I'm sorry, 807.

THE COURT: All right. Well, it goes to both. You said for the fact of what was printed and also under 807, but I think it's not distinct, is it? You want them in for the fact of what's in the articles?

MR. WALCZAK: We do, Your Honor.

THE COURT: Which would be permitted under 807. You couch it "or," but it's really not, is it?

MR. WALCZAK: I'm sorry?

THE COURT: If you let them in under 807 under the residual hearsay exception, then it can go to the truth, can it not?

MR. WALCZAK: That's right. We want them in for both. These particular articles, we want them in --

THE COURT: Both what, though? The truth

and what else?

MR. WALCZAK: And the fact that this is what was printed, sort of the verbal act of these articles having been printed and distributed.

THE COURT: To the effect prong?

MR. WALCZAK: I mean, that's a question that I understood we were leaving for another day.

THE COURT: Well, that's what I thought, and I just want to make sure that I'm clear. And what I want to elicit -- and you've argued considerably. I'll add some additional argument as needed, and I think I understand expressly what the plaintiffs' position is with respect to the admissibility of the articles on the -- and we're talking about, here, the somewhat narrow or at least narrower grounds of the statements that are in dispute by the various board members and others as referenced in the articles.

And I want you, on the defendants' side, I think -- Mr. White, I'm not sure if you're going to argue this -- but argue only as to the admissibility of the articles for the -- as they relate to the disputed statements as recited within the articles, in other words, the statements that were denied by the various speakers but are set forth in the articles. And we'll take up the other purposes, as I said -- and

I'm going to speak to this after we're finished with that -- by a separate mechanism.

So whoever is going to argue on the defense, I'll hear you on what I assume is your objection to the admissibility of the articles for that narrower purpose.

MR. WHITE: Our objection to the articles being admitted through the residual hearsay exception is that these articles are hearsay. There has to be a showing that there's trustworthiness, which has not been done.

THE COURT: Why hasn't it been done?

MR. WHITE: Because the reporters testified that these were conversations -- a lot of them were summarized statements that they put down there. It goes through a filtering process through their perception or their perspective.

So these are all slanted, as would naturally be done, statements that are then written, gone through an editorial process, unlike a situation where you have live testimony coming from people who were there and were testifying to it.

But the key hurdle would be with regard to these articles are not more probative than any other evidence that could have been reasonably procured.

You could have had live testimony brought in here by people who were actually there who could testify, who would then be subject to thorough cross-examination, not the limited nature --

THE COURT: Didn't we have some of that?

MR. WHITE: You did. That's one reason why you don't even need these articles, since you've already had testimony coming in. And in that regard, these articles, even if they were relevant, would just be cumulative under 403.

THE COURT: Aren't the articles somewhat cumulative to the testimony of the reporters?

MR. WHITE: They would be cumulative to the testimony of the reporters, but the reporters weren't brought in here to be fact witnesses regarding what was going on at these meetings, it was only the --

THE COURT: They weren't?

MR. WHITE: No. My understanding from your orders is that they were limited here just to testify as through their affidavit to the authenticity --

THE COURT: Well, what's the effect of their testimony? They were at the meetings. They have testified. What do you suggest that the Court does with their testimony? How do I take that testimony? They were at the meetings, and they testified

expressly as to what they saw. Now, what do I consider that testimony for?

MR. WHITE: The testimony was for the purposes of whether the articles come within the residual hearsay exception. That's why we were limited to how we could cross-examine them about their bias, et cetera, unlike other people who were actually --

THE COURT: Well, that's not the only reason, Mr. White, that you were limited in your examination. But if, in fact, their testimony proves that the articles are accurate and if the Court so finds, doesn't it deflect back and, in effect, make the reporters' testimony relevant for a factual determination as to who said what? Could I not consider it for that basis?

MR. WHITE: Well, under the case law, exactly, the fact that the reporters can come in and testify shows that you don't need the articles. Our point as far as the testimony of the reporters should not be admitted for any fact reason just because they were brought in to authenticate and to testify to their articles, and that was the scope of your orders.

THE COURT: Understand. All right. I understand your point.

MR. WHITE: But beyond that, I mean, none of these articles should be brought in, I mean, as we've briefed before and as we can brief out further for you, Your Honor.

THE COURT: All right. Under the circumstances, making specific reference then to Rule 807 and finding as we do in this particular case that the articles meet the tests of the residual hearsay exception in Rule 807, including that the evidence has been offered, that is, the articles, of a material fact, they are probative for a point which is offered, more probative than other evidence which the proponent could procure through reasonable efforts, we will specifically find that the interest of justice and the general purposes of the rules of evidence are served by admitting the articles.

We'll find, certainly, that in this case the parties seeking to admit the articles, the plaintiffs, have notified the defendants of their intention to offer the evidence sufficiently in advance of trial in order to provide the defendants with the opportunity to prepare to meet it.

Having heard the testimony of the reporters, Mr. Maldonado and Ms. Bernhard-Bubb, and understanding the broad provisions as contained in Rule 807 of the

Federal Rules of Evidence, we will admit the articles. However, we do so at this time for the limited purpose of those disputed statements as have come up during the course of this trial and in order to aid the Court in making and resolving factual determinations as to those statements.

Now, having so ruled, that leaves us with the use of the articles for other purposes, presumably on the effect prong under the *Lemon* test, and the use of the -- and, in fact, the admissibility of any editorials and letters. And as I previewed before lunch, I think it is most appropriate for counsel to address that.

I do have a submission from the plaintiffs, although the plaintiffs can feel free to amend that within your submission or submissions after trial. But specifically, I would ask that the defendants speak to that issue. I think they're intertwined, and I think I would like to get more argument on that point. Yes, Mr. Walczak.

MR. WALCZAK: Your Honor, before we leave the news articles, I believe that under Rule 807, the Court needs to make a specific finding that no other hearsay exception is available under either Rule 803 or 804.

THE COURT: And that's so found, that's so found. And I appreciate that. But there is no other exception that would apply to admit the articles under the circumstances, which is why we deflect to Rule 807.

MR. GILLEN: And we will address your concerns, Your Honor, in connection with the proposed findings of fact and conclusions of law. Is that what you envision?

THE COURT: I think that's best, and I will tell you why. It's because you're going to argue, both sides, on the applicability of the -- not the applicability so much, but as to how to apply the effect prong. And intertwined with that, necessarily, would be how we use these exhibits. And if we choose to take a certain course, we may not need these exhibits. So there's no reason, in my mind, not to give you the opportunity to have a combined argument which goes to both the admissibility and obviously the use. Yes, sir.

MR. WALCZAK: So there still is a question, Your Honor, about admissibility, leaving aside the relevance prong, about the letters and the articles. Because we would be moving them not for the truth of the matter asserted --

THE COURT: I understand that.

MR. WALCZAK: So under 801, it's not hearsay.

THE COURT: No, I understand that. And that's the argument that you've made via the submission, and I've had an opportunity to just really glance at your submission. And in fairness to the defendants, I think they should be able to meet that. But because we could argue extensively about this and, frankly, because I need more time to look at it. I think it's an important question. I recognize that it doesn't go to the truth.

And then that brings up -- well, before I get to the next area, does that cover all of the exhibits we have, other than those that you may, as Mr. Muise notes, that you may want to supplement after you peruse the record and see if we've dropped any?

MR. WALCZAK: The only other point is the designations, and I think by agreement of counsel we've agreed to a process whereby we will identify them in the next week or two.

THE COURT: And consistent with what we discussed before lunch then, I would say, you know, anywhere within the 21-day window, you can get that to me, and there will be some key that I can follow on

the submissions. All right?

MR. GILLEN: Yes, Your Honor.

THE COURT: Now, I want you to pay attention in your submissions, in addition to the myriad of other things that you've got to deal with and I recognize -- and I'm not attempting to narrow your focus, I'm just telling you what's on my mind as we get into this.

First of all, we appear to agree, based on the submissions that I have thus far, that the entanglement prong of *Lemon* is not applicable. Do we agree on that?

MR. ROTHSCHILD: Yes, Your Honor.

THE COURT: All right. I just want to clarify that. There has been an argument interposed at various times by the plaintiffs that we should apply the endorsement test, if I understand it.

MR. ROTHSCHILD: Yes, we are reserving that position, Your Honor.

THE COURT: Well, I want you to flesh that out in your submission, and certainly the defendants will have the same opportunity. Are you suggesting that I perform an analysis in the alternative?

MR. ROTHSCHILD: I think, Your Honor, that -- and we will brief this more, but because the

Third Circuit has employed the endorsement test -- and I realize, given that we've now had more recent Supreme Court jurisprudence, the reliability of that test might be in question, but that's certainly part of what the Third Circuit has applied.

You know, I know there are arguments about whether it only applies to certain kinds of establishment law cases rather than others, but, you know, based on our reading so far, I think there is -- that is something we would want to consider presenting.

THE COURT: Well, I think you should pay some attention to that and give that some thought. And I say that to all parties because, to me, it's less than clear.

As you know, the endorsement test combines certain aspects of the *Lemon* test, and I know that certain courts have performed an analysis in the alternative. You know that. I think that's a tortuous way to proceed, but it's the way that we'll proceed if we must, and we can take a look at that.

Now, I know preliminarily, at least from the defendants' submissions, that you believe the endorsement test doesn't apply under any circumstances. Is that correct?

MR. GILLEN: Correct, Your Honor.

THE COURT: And certainly you can elaborate on that in your submissions, as well. And that will pick up any new jurisprudence, as Mr. Rothschild has referred to, so that we can take a look at that. But it is something that I'm a little bit puzzling over, and I wanted to make you aware of that.

And I think both sides -- well, I understand the defense position is that the endorsement test doesn't apply at all, but from the plaintiffs' standpoint, if you're going to argue the endorsement test, tell me how you want me to do it next to the *Lemon* test.

I may not do it that way, obviously, but I'm interested in your view of what the best way is to proceed, and then that will give defendants fair notice so they can argue particularly on that point.

You understand the time constraints for the submissions, 14 days, and then seven days to respond to the -- to the counter-submission? So we should have everything in 21 days. Is that correct? Mr. Gillen has a rather pained look on his face when I say that.

MR. GILLEN: Truly I do, Judge. This has been a pleasant prospect, but still, as we draw it

closed, would you -- and I don't want to ask for an extension unless we need it, but looking at the size of the record we've generated over these 21 trial days --

THE COURT: I can't believe you'd say that.

MR. GILLEN: -- would you be at least open to the possibility of perhaps adding a week?

THE COURT: I'd like you to use your best efforts, and I'll tell you why, because as I intended to say but I'll say now, it is my strong desire to try to get this case decided this year. And the later you push the submissions, the harder it is for me to do that.

MR. GILLEN: You can be assured, Judge.

THE COURT: And so give it a try, and we'll take it up later. I don't want to anticipate an extension that you may not need. And these things, having practiced law myself and knowing how this is, these don't get better with age. They're best tackled at the front end rather than the back end. So do your level best, and we'll take up the issue of an extension if necessary later on.

But, you know, 21 days, quite obviously, takes us right to Thanksgiving or so, and I can't do much until I get your submissions, it would appear to

me. And that doesn't leave me a lot of time if I'm going to try to work -- and I'm not going to try to set a time frame that's hard and fast because as I get into it, I may need a little bit more time. But I think in the interest of justice and because this is important to everyone, I'm going to make every effort to try to get it in, at the latest I would say by early January, but hopefully, very much I hope, by the end of the year. We're going to do our level best.

MR. GILLEN: We will too, Your Honor.

THE COURT: All right. Anything else? Liz is giving me a note, and that says -- one other area in your briefs and prompted by Adele. Under the effects prong, or the effect prong, I want you to pay some special attention, too -- and this is the plaintiffs' burden, obviously -- on the audience issue.

I know you will, but I note that anyway, because as you well know, you could construe the case law as limiting it to the intended audience that would be within the class or the much broader audience, and I'd like if you'd pay some attention to that. That's probably a superfluous reference because you're going to do it anyway, but I would mention that as it relates to the effect prong, as well. Anything

further before we hear closings?

MR. WALCZAK: Your Honor, just one minor point. On the additional exhibits and the deposition designations, could we ask that the Court impose a deadline of 14 days from now so that we have a closed record, and then when we're doing the replies, you know, we're not going to be surprised with new evidence after the fact?

THE COURT: I did mention that I thought that was a good idea, but I didn't make that hard and fast. Can you live with that, 14 days? I think that makes sense.

MR. GILLEN: I think we should be able to clean everything up in that time.

THE COURT: And I think it makes sense only because then you've got -- for both sides you have the additional seven days if something comes up during that 14-day period. You don't want to extend it out 21 days and then have an issue that you need to extend the response time to. So let's say that we'll get all of those ancillary matters, identify any exhibits that got dropped for any reason within the 14-day period. So the record --

MR. GILLEN: Thank you, Your Honor.

THE COURT: Mr. White, do you have a point?

MR. GILLEN: The additional newspaper points will be briefed in connection with the findings of fact and conclusions of law?

THE COURT: Exactly. That's understood. To clarify, Mr. White, that's something that I'll rule on concurrently with my opinion when it's handed down. What I'm interested in for these purposes are those things that you think you can agree on or, as I said, exhibits that you dropped and you're going to get it in.

So we're going to close the record, let's say, in 14 days from today's date. That's game, set, match, we're done, everything should be in by that point, and so we'll close the record at that time. Anything further? Mr. Rothschild.

MR. ROTHSCHILD: Thank you, Your Honor.

THE COURT: You may close. And you have -- you're on a loose clock of --

COURTROOM DEPUTY: 44 minutes.

THE COURT: 44 minutes. And you may reserve for rebuttal.

MR. ROTHSCHILD: Thank you. I think there are probably a lot of people in this courtroom who will hope that I don't.

Good afternoon, Your Honor. I want to echo

Mr. Thompson's comments before lunch. This has been a long and exhausting trial, but it has been a privilege to appear before you and your entire chambers.

I agree with Mr. Thompson that both parties have been given the opportunity to fully and fairly present their case, and on the plaintiffs' behalf I want to summarize that case.

"What am I supposed to tolerate? A small encroachment on my First Amendment rights? Well, I'm not going to. I think this is clear what these people have done, and it outrages me." That's a statement of one citizen of Dover, Fred Callahan, standing up to the wedge that has been driven into his community and his daughter's high school by the Dover School Board's anti-evolution, pro-intelligent design policy.

The strategy that the Discovery Institute announced in its Wedge document for promoting theistic and Christian science and addressing cultural conditions that it disagrees with is to denigrate evolution and promote supernatural intelligent design as a competing theory.

This is the Discovery Institute that advised both William Buckingham and Alan Bonsell before the board voted to change the biology curriculum. This is the Discovery Institute the defendants' experts

Michael Behe and Scott Minnich proudly associate with, along with intelligent design leaders William Dembski, Paul Nelson, Jonathan Wells, Stephen Meyer, Nancy Pearcey, and Phillip Johnson.

This group's strategy of Christian apologetics and cultural renewal includes the integration of intelligent design into public school science curriculum, which is now on trial in this courtroom. Dover is now the thin edge of the wedge.

Let's review how we got here. Beginning with Alan Bonsell's election to the Dover Area School Board in the end of 2001, the teaching of evolution in biology class became a target of the board, and teaching creationism was suggested as an alternative.

As Mr. Gillen told the Court in his opening statement, Mr. Bonsell had an interest in creationism. He wondered whether it could be discussed in the classroom. He didn't just wonder to himself, he wondered out loud about teaching creationism at two board retreats. He made his opposition to the teaching of evolution known to Mr. Baksa and the science teachers.

In 2004, Mr. Bonsell became the president of the board and chose Bill Buckingham to head the curriculum committee. When the teachers and members

of the community tried to get a new biology book approved, members of the board, including particularly Mr. Buckingham, but also Mr. Bonsell, insisted in public board meetings that any new biology book include creationism.

There is no evidence that any of the board members that eventually voted to change the biology curriculum objected to this idea. Heather Geesey emphatically endorsed it in her letter to the York Sunday News.

At the same meetings in June where he discussed creationism, Mr. Buckingham also made the unforgettable statement that, quote, 2,000 years ago a man died on a Cross, can't we take a stand for Him now, and after one meeting said to a reporter that we are not a nation founded on Muslim ideas or evolution, but on Christianity, and our children should be taught as such.

Around the time of those June meetings, Mr. Buckingham received materials and guidance from the Discovery Institute, the sponsors of theistic Christian science. After that, intelligent design became the label for the board's desire to present creationism.

At this trial, plaintiffs have submitted

overwhelming evidence that intelligent design is just a new name for creationism discarding a few of traditional creationism tenets, such as direct reference to God or the Bible and a specific commitment to a young earth, but maintaining essential aspects, particularly the special creation of kinds by a supernatural actor.

Make no mistake, the leading sponsors on the board for the change to the biology curriculum and Administrators Nilsen and Baksa knew that intelligent design was a form of creationism when they added it to the curriculum.

Matt, could you pull up Plaintiffs' Exhibit 149, the second page Bates stamped 213. This is the views on the origins of the universe chart that both Casey Brown and Jennifer Miller testified that Assistant Superintendent Baksa circulated to members of the board curriculum committee and faculty. Mrs. Harkins testified that she had this document as early as June of 2004.

The second column of this chart provided to members of the board curriculum committee and administration demonstrates clearly that intelligent design is a form of progressive creation or old earth creation. At the bottom of the chart of that column,

the second column, under Progressive Creation and Old Earth Creation, you see the words, Intelligent Design Movement, Phillip Johnson and Michael Behe.

Matt, could you pull up D35. Mr. Baksa testified in response to questions from his lawyer that he researched intelligent design and *Pandas* before the board adopted both into the district's curriculum and that his research included this order form from the Institute for Creation Research, which promotes *Pandas*, describing it as a book that contains interpretations of classic evidences in harmony with the creation model.

Board President Bonsell and Superintendent Nilsen testified that they understood the definition of intelligent design found on Pages 99 to 100 of *Pandas* to be a tenet of creationism.

Matt could you pull up P70. The district solicitor, Stephen Russell, sent this e-mail to Richard Nilsen advising Dr. Nilsen and eventually the board members who received this e-mail that, quote, Thomas More refers to the creationism issue as intelligent design. You can take that down, Matt. Thank you.

Board members Jeff and Casey Brown and the science teachers also warned the board that *Pandas* and

intelligent design are creationism or too close for comfort, and there could be legal consequences for teaching it.

This information, equating intelligent design with creationism, did not deter the school board at all. It emboldened them. They rushed the curriculum change to a vote, discarding all past practices on curriculum adoption, such as placing the item on a planning meeting agenda before bringing it to a vote, involving the citizens' curriculum advisory committee with a meeting, or showing deference to the district's experts on the curriculum item, the school science teachers.

The record is overwhelming that board members were discussing creationism at the meetings in June of 2004. Two separate newspaper reporters, Heidi Bernhard-Bubb and Joe Maldonado, reported this in articles about the meeting which they confirmed in sworn testimony in this court. Former board members Casey and Jeff Brown and Plaintiffs Barrie Callahan and Christy and Bryan Rehm also testified to these facts.

Finally, at the end of this trial, Assistant Superintendent Mike Baksa, an agent of the defendant Dover Area School District in this case, admitted that

Bill Buckingham discussed creationism at the June board meetings when discussing the biology curriculum. After a year of denying that fact, forcing reporters to testify, the truth was confirmed by defendants' own witness.

And, of course, we saw Mr. Buckingham talk about creationism on the tape of the Fox 43 interview using language almost identical to the words attributed to him by newspaper reporters covering the June, 2004 board meetings.

His explanation that he misspoke the word "creationism" because it was being used in news articles, which he had just previously testified he had not read, was, frankly, incredible. We all watched that tape. And per Mr. Linker's suggestion that all the kids like movies, I'd like to show it one more time. (Tape played.) That was no deer in the headlights. That deer was wearing shades and was totally at ease.

Testimony from many witnesses called by the plaintiffs and the same newspaper reports established that Bill Buckingham made the statement "2,000 years ago" when discussing the biology textbook in June.

After preparing together for their January, 2004 depositions, four witnesses for the defense --

Richard Nilsen, Bill Buckingham, Alan Bonsell, and Sheila Harkins -- all testified that Buckingham, Mr. Buckingham, did not make that statement at that meeting, but rather only at a different meeting in November when the Pledge of Allegiance was discussed.

But every plaintiff, teacher, reporter, and dissenting board member who testified at trial about the June 14th meeting knows this is not true, and defendants' witnesses Harkins and Baksa conceded that the statement could have been made in June as the contemporaneous, unchallenged news reports suggest.

What I am about to say is not easy to say, and there's no way to say it subtly. Many of the witnesses for the defendants did not tell the truth. They did not tell the truth at their depositions, and they have not told the truth in this courtroom.

They are not telling the truth when they assert that only intelligent design and not creationism was discussed at the June, 2004 board meetings. They are not telling the truth when they placed the "2,000 years ago" statement at the meeting discussing the pledge and not at the June 14th, 2004 meeting discussing the biology textbook. They did not tell the truth in their depositions or, for that matter, to the citizens of Dover about how the

donation of the *Pandas* books came about.

Truth is not the only victim here. In misrepresenting what occurred in the run-up to the change to the biology curriculum, there were human casualties. Two hard-working freelance reporters had their integrity impugned and were dragged into a legal case solely because the board members would not own up to what they had said. They could have just asked Mike Baksa. He knew.

Trudy Peterman, the former principal, has not testified in this case, but we know she was negatively evaluated for what she reported in her April, 2003 memo about her conversation with Bertha Spahr. And Superintendent Nilsen continued to question her truthfulness in this court, but he never asked Mrs. Spahr what she told Dr. Peterman on the subject of creationism.

Had he asked her, he would have heard exactly what you heard from Mrs. Spahr in this courtroom. Mr. Baksa did tell her that Board Member Bonsell expressed his desire to have creationism taught 50/50 or in equal time with evolution.

And, of course, you've heard from board members who were at that meeting, including Casey Brown and Barrie Callahan, that Mr. Bonsell did say he

wanted creationism taught 50/50 with evolution. In fact, Mrs. Callahan had contemporaneous notes recording Mr. Bonsell saying just that. And Dr. Nilsen also had contemporaneous notes showing that Mr. Bonsell talked about creationism at the March board retreat, March, 2003 board retreat.

Confronted with Dr. Nilsen's notes, Mr. Bonsell finally admitted he talked about creationism, at least then. Defendants' smear of Dr. Peterman is unpersuasive and inexcusable.

There are consequences for not telling the truth. The board members and administrators who testified untruthfully for the defendants are entitled to no credibility, none. In every instance where this Court is confronted with a disputed set of facts as between the plaintiffs' witnesses and defendants' witnesses that the Court deems to have been untruthful, the plaintiffs' witnesses account should be credited.

And furthermore, and perhaps more importantly, this Court should infer from their false statements that defendants are trying to conceal an improper purpose for the policy they approved and implemented, namely an explicitly religious purpose.

The board's behavior mimics the intelligent

design movement at large. The Dover board discussed teaching creationism, switched to the term "intelligent design" to carry out the same objective, and then pretended they had never talked about creationism.

As we learned from Dr. Forrest's testimony, the intelligent design movement used the same sleight of hand in creating the *Pandas* textbook. They wrote it as a creationist book and then, after the *Edwards* decision outlawed teaching creationism, simply inserted the term "intelligent design" where "creationism" had been before.

Dean Kenyon wrote the book at the same time that he was advocating creation science to the Supreme Court in *Edwards* as the sole scientific alternative to the theory of evolution. But now, like the Dover board, the intelligent design movement now pretends that it never was talking about creationism.

I want to make a very important point here. In this case, we have abundant evidence of the religious purpose of the Dover School Board that supports a finding that its policy is unconstitutional. However, if the board had been more circumspect about its objectives or better at covering its tracks, it would not make the policy it passed any

less unconstitutional.

Your Honor, you have presided over a six-week trial. Both parties have had a fair opportunity to present their cases about what happened in the Dover community and about the nature of intelligent design. Leading experts from both sides of the issue have given extensive testimony on the subject.

This trial has established that intelligent design is unconstitutional because it is an inherently religious proposition, a modern form of creationism. It is not just a product of religious people, it does not just have religious implications, it is, in its essence, religious. Its central religious nature does not change whether it is called creation science or intelligent design or sudden emergence theory. The shell game has to stop.

If there's any doubt about the religious nature of intelligent design, listen to these exemplary descriptions of intelligent design by its leading proponents, which are in evidence in this case:

Phillip Johnson said, "Intelligent design means that we affirm that God is objectively real as Creator and that the reality of God is tangibly

recorded in evidence accessible to science, particularly in biology."

William Dembski: "In its relation to Christianity, intelligent design should be viewed as a ground-clearing operation that gets rid of the intellectual rubbish that for generations has kept Christianity from receiving serious consideration." William Dembski again, "Intelligent design is just the logos theology of John's Gospel restated in the idiom of information theory."

Michael Behe told this Court that intelligent design is not a religious proposition, but he told the readers of the New York Times the question intelligent design poses is whether science can make room for religion. He acknowledges that the more one believes in God, the more persuasive intelligent design is. The religious nature of intelligent design is also proclaimed loudly and repeatedly in the Wedge document.

The other indisputable fact that marks intelligent design as a religious proposition that cannot be taught in public schools is that it argues that a supernatural actor designed and created biological life. Supernatural creation is the religious proposition that the Supreme Court said in

Edwards cannot be taught in public schools.

And it's obvious why this has to be the case. When we talk about an actor outside nature with the skills to design and create and build biological life, we are talking about God.

The experts that testified at this trial admit that in their view, the intelligent designer is God. The Discovery Institute's Wedge document's first paragraph bemoans the fact that the proposition that human beings are created in the image of God has been undermined by the theory of evolution. Professor Behe admitted that his argument for intelligent design was essentially the same as William Paley's, which is a classic argument for the existence of God.

Who else could it be? Michael Behe suggests candidates like aliens or time travelers with a wink and a nod, not seriously. Intelligent design hides behind an official position that it does not name the designer, but as Dr. Minnich acknowledged this morning, all of its advocates believe that the designer is God. Intelligent design could not come closer to naming the designer if it was spotted with the letters G and O.

The case for intelligent design as a religious proposition is overwhelming. The case for

it as a scientific proposition, by contrast, is nonexistent. It has been unanimously rejected by the National Academy of Science, the American Association for the Advancement of Science, and every other major scientific and science education organization that has considered the issue, including, we learned this morning, the American Society of Soil Scientists.

The fact that it invokes the supernatural is, by itself, disqualifying. As William Dembski stated, unless the ground rules of science are changed to allow the supernatural, intelligent design has, quote, no chance Hades, close quote.

In this courtroom, Steve Fuller confirmed that changing the ground rules of science is intelligent design's fundamental project, and if defendants get their way, those ground rules get changed first in Dover High School.

There's a reason that science does not consider the supernatural. It has no way of measuring or testing supernatural activity. As Professor Behe testified, you can never rule out intelligent design.

Defendants' comparisons to the big bang or Newton's work make no sense, for those, as with many scientific propositions, we may have at one time attributed natural phenomena to supernatural or divine

action before working out the natural explanations that fall under the heading "science."

Intelligent design is moving in the opposite direction, replacing a well-developed natural explanation for the development of biological life with a supernatural one which it has no evidence to support.

The positive case for intelligent design described by plaintiffs' experts Michael Behe, the leading light of the intelligent design movement, and Scott Minnich over the last couple of days is a meager little analogy that collapses immediately upon inspection.

Professor Behe and Professor Minnich's argument, summed up by the amorphous phrase "purposeful arrangement of parts" is that if we can tell that a watch or keys or a mousetrap or a cell phone was designed, we can make the same inference about the design of a biological system by an intelligent designer. This is, as both experts acknowledge, the same argument that Paley made, the argument that Paley made for the existence of God.

Plaintiffs' witnesses Robert Pennock and Kenneth Miller explained and under cross-examination defendants' expert Professor Behe admitted that the

difference between inferences to design of artifacts and objects and to design of biological systems overwhelms any purported similarity.

Biological systems can replicate and reproduce and have had millions or billions of years to develop in that fashion, providing opportunities for change that the keys, watches, stone tools, and statutes designed by humans do not have.

And, of course, those objects and artifacts we recognize as design in our day-to-day life are all the product of human design. We know the designer. In the case of intelligent design of biological life, however, that crucial information is, to use Professor Behe's own phrase, a black box.

Because we know that humans are the designers of the various inanimate objects and artifacts discussed by Professor Behe, we also know many other useful pieces of information, what the designer's needs, motives, abilities, and limitations are. Because we are that designer, we can actually re-create the designer's act of creation.

Professor Behe admitted that none of this information is available for the inference to intelligent design of biological systems. In fact, the only piece of information that is available to

support that inference is appearance. If it looks designed, it must be designed. But if that explanation makes sense, then the natural sciences must be retired. Almost everything we see in our marvelous universe -- biological, chemical, physical -- could be subsumed in this description.

Other than this meager analogy, intelligent design is nothing but a negative argument against evolution, and a poor one at that. This was made strikingly clear when Professor Behe was asked about his statement that intelligent design's only claim is about the proposed mechanism for complex biological systems, and he admitted that intelligent design proposes no mechanism for the development of biological systems, only a negative argument against one of the mechanisms proposed by the theory of evolution.

And, of course, Professor Behe also had to admit, reluctantly, that intelligent design, as explained in *Pandas*, goes far beyond the argument about mechanism to attack another core proposition of the theory of evolution, common descent. In page after page of *Pandas*, the authors argue against common descent in favor of the creationist biblical argument for the abrupt appearance of created kind, birds with

beaks, fish with fins, et cetera.

The arguments in *Pandas* are based on wholesale misrepresentations of scientific knowledge, much of which has been known for years or even decades before *Pandas* was published and some of which has been developed after its last publication, demonstrating that science marches on while intelligent design stands still.

Kevin Padian was the only evolutionary biologist who testified in this trial. He described massive and pervasive misrepresentations of the fossil record and other scientific knowledge in *Pandas*. His testimony went completely unrebutted by any qualified expert.

The board members cannot claim ignorance about the flaws in *Pandas*. Dr. Nilsen and Mr. Baksa testified that the science teachers warned them that *Pandas* had faulty science, was outdated, and beyond the reading level of ninth-graders.

The board members had no contrary information. They have no meaningful scientific expertise or background and did not even read *Pandas* thoroughly. Their only outside input in favor of *Pandas* was a recommendation from Mr. Thompson of the Thomas More Law Center, a law firm with no known

scientific expertise. What these board members are doing then, knowingly, is requiring administrators or teachers to tell the students, go read that book with the faulty science.

It's not just *Pandas* that's faulty, it's the entire intelligent design project. They call it a scientific theory, but they have done nothing, they have produced nothing. Professor Behe wrote in *Darwin's Black Box* that if a scientific theory is not published, it must perish. That is the history of intelligent design.

As Professor Behe testified, there are no peer-reviewed articles in science journals reporting original research or data that argue for intelligent design. By contrast, Kevin Padian, by himself, has written more than a hundred peer-reviewed scientific articles.

Professor Behe's only response to the intelligent design movement's lack of production was repeated references to his own book, *Darwin's Black Box*. He was surprised to find out that one of his purported peer-reviewers wrote an article that revealed he had not even read the book.

But putting that embarrassing episode aside, consider the following facts: Professor Behe admitted

in his article *Reply to My Critics* that his central challenge to natural selection, irreducible complexity, is flawed because it doesn't really match up with the claim made for evolution. It works backwards from the completed organism rather than forward. But he hasn't bothered to correct that flaw. He also admits that there is no original research reported in *Darwin's Black Box*, and in the almost ten years since its publication, it has not inspired research by other scientists.

Professor Behe's testimony and his book *Darwin's Black Box* is really one extended insult to hard-working scientists and the scientific enterprise. For example, Professor Behe asserts in *Darwin's Black Box* that, quote, The scientific literature has no answers to the question of the origin of the immune system, close quote, and, quote, The complexity of the system dooms all Darwinian explanations to frustration.

I showed Professor Behe more than 50 articles, as well as books, on the evolution of the immune system. He had not read most of them, but he confidently, contemptuously dismissed them as inadequate. He testified that it's a waste of time to look for answers about how the immune system evolved.

Thankfully, there are scientists who do search for answers to the question of the origin of the immune system. It's the immune system. It's our defense against debilitating and fatal diseases. The scientists who wrote those books and articles toil in obscurity, without book royalties or speaking engagements. Their efforts help us combat and cure serious medical conditions. By contrast, Professor Behe and the entire intelligent design movement are doing nothing to advance scientific or medical knowledge and are telling future generations of scientists, don't bother.

Not only does intelligent design not present its argument in the peer-reviewed journals, it does not test its claims. You heard plaintiffs' experts Pennock, Padian, and Miller testify that scientific propositions have to be testable. Defendants' expert Stephen Fuller agreed that for intelligent design to be science, it must be tested, but he admitted that so far, intelligent design had not done so.

Of course, there's an obvious reason that intelligent design hasn't been tested. It can't be. The proposition that a supernatural intelligent designer created a biological system is not testable and can never be ruled out.

Intelligent design does not even test its narrower negative claims. As plaintiffs' experts explained and again Dr. Fuller agreed, arguments like irreducible complexity, even if correct, only negate aspects of the theory of evolution. They do not demonstrate intelligent design. It does not logically follow. But intelligent design does not even test this negative argument.

Professor Behe and Professor Minnich articulated the test of irreducible complexity. Grow a bacterial flagellum in the laboratory. The test is, as I think Dr. Minnich acknowledged this morning, somewhat ridiculous. Evolution doesn't occur over two or five or -- that evolution that doesn't occur over two or five or ten years in a laboratory population doesn't rule out evolution over billions of years.

But if Professor Behe and Professor Minnich think this is a valid test of their design hypothesis, they or their fellow intelligent design adherents should be running it, but they haven't. Their model of science is, we've brought an idea, sit back, do no research, and challenge evolutionists to shoot it down. That's not how science works. Sponsors of a scientific proposition offer hypotheses, and then they test it.

Consider the amazing example that Ken Miller gave. Evolutionary biologists were confronted with the fact that we humans have two fewer chromosomes than chimpanzees, the creatures hypothesized to be our closest living ancestors based on molecular evidence and homology. Evolutionary biologists didn't sit back and tell creationists to figure out this problem. They rolled up their sleeves, tackled it themselves, and they figured it out. That's real science.

And, in fact, the common ancestry of chimpanzees and humans is real science. It's the real science that William Buckingham and Alan Bonsell and all their fellow board members who voted for the change to the curriculum made sure that the students of Dover would never hear.

Make no mistake about it, William Buckingham was determined that Dover students would not be taught anything that conflicts with the special creation of humans, no mural, no monkeys to man, no Darwin's descent of man, his wife's sermon from Genesis. This was all focused on protecting the biblical proposition that man was specially created by God.

Similarly, Alan Bonsell ensured that the entire biology curriculum was molded around his religious beliefs. He testified in this courtroom

that it is his personal religious belief that the individual kinds of animals -- birds, fish, humans -- were formed as they currently exist and do not share common ancestors with each other.

Macroevolution is inconsistent with his religious beliefs. The only aspect of the theory of evolution that conforms to his religious beliefs is microevolution, change within a species. He also believes in a young earth, thousands, not billions of years old.

Sure enough, in the fall of 2003, as the older of his two children prepare to take biology, Mr. Bonsell sought assurances the teachers only taught microevolution and not what the board members call origins of life, macroevolution, speciation, common ancestry, including common ancestry of humans, all the things that contradict his personal religious beliefs.

He received the assurances he was looking for that most of evolution wasn't being taught. On October 18, this practice of depriving students of the thorough teaching of the theory of evolution, in the minds of the board members, became board policy.

Now, in fairness to the teachers, they weren't really short-changing the students to the extent Mr. Bonsell hoped. Mrs. Miller testified that

she does teach speciation with Darwin's finches, her attempt to teach evolutionary theory as nonconfrontationally as possible.

Mr. Buckingham and Mr. Bonsell also wanted to make sure that the teachers pointed out gaps and problems with the parts of the theory of evolution they did teach. None of the board members cared whether students knew about gaps and problems in the theory of plate tectonics or germ theory or atomic theory. But for evolution, it was essential that the students see all the purported warts.

The resource the board relied upon for information about problems with evolution was not from any of the mainstream scientific organizations, but rather the Discovery Institute, the think-tank pursuing theistic science.

For Mr. Bonsell, however, making sure that the teaching of evolution didn't contradict his religious beliefs wasn't enough. He then joined Mr. Buckingham in promoting an idea that affirmatively supported his religious beliefs. Intelligent design asserts that birds are formed with beaks, feathers, and wings and fish with fins and scales, created kinds just like Mr. Bonsell believes. And intelligent design accommodates Mr. Bonsell's belief in young

earth creationism. He is welcome in intelligent design's big tent.

And if there was any doubt that the board wanted to trash evolution and not teach it, it was confirmed by the development of the statement read to the students. There was nothing administration or faculty could do about intelligent design because that's what the board wanted.

But the language they developed about evolution was actually quite honest and reasonable. "Darwin's theory of evolution continues to be the dominant scientific explanation of the origin of species. Because Darwin's theory is a theory, there is a significant amount of evidence that supports the theory, although it is still being tested as new evidence is discovered. Gaps in the theory exist for which there is yet no evidence."

If this language had made it into the version read to the students, it would not have cured the harm caused by promoting the religious argument for intelligent design and directing students to the deeply flawed *Pandas* book, but at least it would have conveyed to students that the theory of evolution is well accepted and supported by substantial evidence.

The board would have none of it. The only

thing that the board -- all that language came out. The board would have none of it. The only things that the board wanted the students to hear about evolution were negative things. There are gaps, it's a theory, not a fact, language that the defendants' own expert, Steve Fuller, admitted is misleading and denigrates the theory of evolution. As Dr. Fuller and plaintiffs' expert Brian Alters agreed, the board's message was, we're teaching evolution because we have to.

As if their views weren't clear enough, the board issued a newsletter which accused the scientific community of using different meanings of the word "evolution" to their advantage as if scientists were trying to trick people into believing something that there isn't evidence to support.

Your Honor, you may remember Cindy Sneath's testimony about her 7-year-old son Griffin who is fascinated by science. This board is telling Griffin and children like him that scientists are just tricking you. It's telling students like Griffin the same thing Mr. Buckingham told Max Pell, don't go off to college or you'll just be brainwashed, don't research the theory of evolution.

The board is delivering Michael Behe's

message. Don't bother studying the development of the immune system, you're just doomed to failure. In science class, they are promoting the unchanging certainty of religion in place of the adventure of open-ended scientific discovery that Jack Haught described.

How dare they. How dare they stifle these children's education, how dare they restrict their opportunities, how dare they place a ceiling on their aspirations and on their dreams. Griffin Sneath can become anything right now. He could become a science teacher like Bert Spahr or Jen Miller or Bryan Rehm or Steven Stough turning students on to the wonders of the natural world and the satisfaction of scientific discovery, perhaps in Dover or perhaps some other lucky community.

He could become a college professor and renowned scientist like Ken Miller or Kevin Padian. He might solve mysteries about the immune system because he refused to quit. He might even figure out something that changes the whole world like Charles Darwin.

This board did not act to improve science education. It took one area of the science curriculum that has historically been the object of religiously

motivated opposition and molded it to their particular religious viewpoints.

You heard five board members testify in this court. I focus today on Mr. Buckingham and Mr. Bonsell who are most explicit about their creationist objectives and who worked hardest to browbeat administrators and teachers to their will. But Mrs. Geesey's letter to the editor establishes her creationist position. Her testimony and Mrs. Cleaver's also demonstrates that they abdicated their decision-making responsibility to Mr. Bonsell and Mr. Buckingham.

In Mrs. Harkins' case, it's hard to discern what her motives were beyond depriving students of the book their teachers said they needed while supplying them with books describing a concept intelligent design that to this day she candidly admits she does not understand.

The board never discussed what intelligent design is or how it could improve science education. Clearly no valid secular purpose can be derived from those facts. All that remains is the religious objectives represented in Mr. Bonsell and Mr. Buckingham's statements about teaching creationism and Christian values, the same values that animate the

entire Wedge strategy.

Mr. Buckingham said that separation of church and state is a myth, and then he acted that way. Mr. Buckingham and his fellow board members wanted religion in the public schools as an assertion of their rights as Christians. But Christianity and all religious exercise have thrived in this country precisely because of the ingenious system erected by our founders which protects religious belief from intervention by government.

The law requires that government not impose its religious beliefs on citizens, not because religion is disfavored or unimportant, because it is so important to so many of us and because we hold a wide variety of religious beliefs, not just one.

The Supreme Court explained in *McCreary* that one of the major concerns that prompted adoption of the religion clauses was that the framers and the citizens of their time intended to guard against the civil divisiveness that follows when the government weighs in on one side of a religious debate.

We've seen that divisiveness in Dover: School board member pitted against school board member. Administrators and board members no longer on common ground with the schoolteachers. Julie Smith's

daughter asking "what kind of Christian are you?" because her mother believes in evolution. Casey Brown and Bryan Rehm being called atheists.

It even spilled over into this courtroom where Jack Haught, a prominent theologian and practicing Catholic, had his religious beliefs questioned, not as they relate to the subject of evolution, but on basic Christian tenets like the virgin birth of Christ. That was impeachment by the defendants' lawyers in this case.

It's ironic that this case is being decided in Pennsylvania in a case brought by a plaintiff named Kitzmiller, a good Pennsylvania Dutch name. This colony was founded on religious liberty. For much of the 18th Century, Pennsylvania was the only place under British rule where Catholics could legally worship in public.

In his declaration of rights, William Penn stated, "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man can of right be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent. No human authority can, in any case whatever, control or interfere with the rights of

conscience, and no preference shall ever be given by law to any religious establishment or modes of worship."

In defiance of these principles which have served this state and this country so well, this board imposed their religious views on the students in Dover High School and the Dover community. You have met the parents who have brought this lawsuit. The love and respect they have for their children spilled out of that witness stand and filled this courtroom.

They don't need Alan Bonsell, William Buckingham, Heather Geesey, Jane Cleaver, and Sheila Harkins to teach their children right from wrong. They did not agree that this board could commandeer the religious education of their children, and the Constitutions of this country and this Commonwealth do not permit it. Thank you, Your Honor.

THE COURT: Thank you very much, Mr. Rothschild. Arguing then for the defendants will be Mr. Gillen. Mr. Gillen, you're up. You have about 35 minutes.

MR. GILLEN: Loose clock, Judge. Right?

THE COURT: Loose clock.

MR. GILLEN: All right. Good afternoon, Your Honor. I want to echo the sentiments of everyone

who has appeared in these proceedings and thank you for your cordiality, your respect for the lawyers who appeared before you, and that of your staff. I would also compliment my opposing counsel and, of course, my colleagues.

That said, I'd like to address the argument of plaintiffs' counsel. And I think that for all the magnificent vista of science and religious liberty that he has discussed in detail, what is missing is due attention to the facts of this matter.

Because as I appear before you today, I am confident that upon a full deliberation and reflection on the evidence of record, not rhetoric, that, as I said at the beginning of these proceedings, you will find that the plaintiffs have failed to prove that the predominant purpose or primary effect of the curriculum change which was approved by the Dover Area School District on October 18, 2004, is to advance religion.

Quite the contrary, the evidence of record demonstrates that the curriculum change at issue here had, as its primary purpose and has as its primary effect, science education. It is true that it attracts attention to a new and fledgeling science movement. But look at Steve Fuller. See it through

his eyes. See it through the eyes of history and watch how he can see what may be the next great paradigm shift in science, a wholly new vista that does service to the children of this district by allowing them to put together scientific fields in a new and exciting way which is ultimately productive of scientific progress.

Let's look at the facts of the matter as it relates to the conduct of these board members. Sheila Harkins does not fit the bill the plaintiffs would have her fit, a religiously motivated co-conspirator who has no interest in the welfare of the children of the district. Not at all. She voted against the text in 2004 because she was trying to save taxpayers money and knew that teachers weren't using the one they had. That's a simple, common sense reason.

She was for making students aware of other theories, including, but not limited to, intelligent design because she believed it would encourage critical thinking. As she said, when those students cross the stage at Dover, it's more important we told them, you know, how to think than what to think. And she thought this small and modest measure would contribute to that.

Jane Cleaver is the same. She has an

eighth-grade education. She loved the kids in this district. She thought this was a good idea. She has no interest whatsoever in imposing creationism on the children of the district, and she did not. As she said, creationism is based on the Bible. That's for the church, that's for the family.

Heather Geesey cannot be cast as a religious co-conspirator. She went to Christian schools and her child -- was taught creationism as a child. She knew intelligent design was not creationism because it's not based on the Bible, which she grew up learning. She thought it was good education to make students aware of other scientific theories. She voted to delay the text purchase because she thought the board could reach consensus.

She took it for granted, quite rightly it turns out, that the text recommended by the faculty would be purchased. She did not vote in August to hold up the text indefinitely, she did not vote to make *Of Pandas* the basal text. She was voting for a supplemental text.

Here again, her actions speak louder than words. Her whole point in sending her children to public school is to introduce them to those broader vistas that she did not experience as a child. And as

she explained in her letter to the editor, her whole purpose was to make clear there that Dover does cooperate with parents by leaving religion to the family.

At the end of the day, Alan Bonsell cannot be regarded as a creationist bent on violating the law, either. While a board member since December of 2001, he has never initiated any change to the biology text curriculum or instruction. Bonsell's questions concerning the presentation of evolutionary theory derived from his personal reading cannot be disregarded out of hand as the tendentious assertions of one with a religious agenda.

He had legitimate questions, scientific questions, about the claims made for evolutionary theory, statistical probability of biological life developing through a random and undesigned process, the conclusory assertions which seem to underlie claims for change from one species to another.

For that matter, he knows that Jen Miller teaches speciation through the finches, and he has no objection. True, he is not a scientist, but what of it? Highly credentialed biologists, yes, in the minority, like all discoverers are, offered highly technical expert opinion substantiating the

reservations that Bonsell had based upon his personal reading.

As for Bonsell's interest in creationism, this interest is not illegal and provides no grounds to void the actual policy at issue here. He understands creationism to be based upon a literal reading of the Bible, the Book of Genesis, and, yes, he does believe it.

When he met with the science faculty in the fall of 2003, he learned that faculty mentioned creationism but did not teach it because they believed it would be illegal. He left that meeting pleased because teachers mentioned creationism as an introductory matter but did not teach it. He regards this as a matter for church and family. And he was pleased to see that teachers did not tell the children creationism was wrong, for as the plaintiffs' expert Brian Alters has testified, that is not the place of the science faculty.

Yes, our nation does guarantee religious liberty, and Bonsell is entitled to it like everyone else. He can express his interest so long as he acts within the law, and he has done so here.

More importantly, neither Bonsell nor the board can be penalized for interest because the law

prescribes improper purpose, not interest. Bonsell had an interest in creationism, but the evidence shows he never took any action to require the teaching of creationism in Dover.

Quite the contrary, the net result of the curriculum policy challenged in this litigation has been to absolutely prohibit the teaching of creationism. Indeed, the record shows that interest and action are two very different things, and it's an important distinction, Your Honor.

Bonsell had an interest in how Dover School has treated prayer -- students have a constitutional right to pray if they want -- but he never took action requiring prayer in schools.

Bonsell had an interest in the social studies curriculum. In 2002, he gave Mike Baksa a book advancing a wholly legitimate historical and legal analysis that has endured for 65 years concerning the separation of church and state and what it means, a line of argument advanced by no less than the late Chief Justice of the United States Supreme Court, William Rehnquist, a line of argument that has generated thousands of books and law review articles.

More importantly, Your Honor, here we are in November of 2005, and he has never taken any action to

change the social studies curriculum. Interest and action are two very different things.

More fundamentally, in the areas at the very heart of this case, Bonsell's actions show that he did not let his religious convictions affect his service to the students of this district. When Bill Buckingham tried to hold up the purchase of the biology text recommended by the science teachers in August of 2004, Bonsell voted against Buckingham's motion because he believed the students should have the text recommended by the science faculty regardless of whether *Of Pandas* was approved.

And on the night of the board policy approved here, Bonsell added a note which ensured that intelligent design was not taught in biology class as desired by the science faculty. Bonsell's motion was seconded by Jeff Brown, who opposed the curriculum change, but also shared Bonsell's goal of ensuring that intelligent design was not taught at present.

And it was approved unanimously by the board, including members who opposed the curriculum change, because it was understood to have the effect Alan intended, to prohibit the teaching of intelligent design right now.

Finally, any implication that Bonsell acted

to influence the curriculum to shield his daughter from evolutionary theory or tailor the curriculum to his religious beliefs is wholly untenable. His daughter is in biology class. She will learn evolutionary theory as required by state standards, and he will not have his daughter opt out. Alan Bonsell is not afraid of the truth. He is afraid of something that we have seen here, science taught as dogma.

Angie Yingling is another member of the board who voted for the curriculum change at issue here. The whole notion that the text selection process or curriculum change were rigged to secure a religious end is wholly undermined by her role.

In August of 2004, she initially voted with Buckingham to link approval of the basal text with the supplemental text *Of Pandas*. Although she did so, she changed her vote in response to the reaction of the crowd, not because she had some sudden revelation that her action was illegal, but because she was responding to her constituents.

In any event, we can tell that by the way she voted on October 18th, in favor of the curriculum change. There is no evidence in this case that she ever did anything for a religious purpose.

Even Bill Buckingham, for all the statements attributed to him, cannot defy the great weight of the evidence in this case which has been ignored by the plaintiffs. Based upon his personal reading, he believed the biology text made claims for evolutionary theory far in advance of what had been demonstrated by science. He wanted students to be aware of intelligent design theory, a scientific theory he believed to be supported by numerous scientists.

In June of 2004, biology teachers reviewed the materials he received from Discovery Institute. Yesterday you heard Bob Linker. He was glad to review the tape, a sign of his intellectual integrity, curiosity. He thought it was beneficial to receive information about gaps and problems with evolutionary theory, the same sort of information that these board members wanted children to have.

Maybe that would excite them, either to fill those gaps and problems or think this is a deficient theory, we need another. Certainly that's what Mike Behe thinks. That's what Dr. Scott Minnich thinks. That also is a step to scientific progress. And, in fact, at every stage in the history of science, as recounted by Steve Fuller, is the dissatisfaction with the cumulating problems which have been testified to

in this court which has become the spur for scientific advance. It's not just all fall in line and work by the guidelines established in a dominant theory.

Again, Buckingham's concerns with evolutionary theory cannot be discounted out of hand. Yesterday you heard Mike Baksa, an impartial administrator with no ax to grind against evolutionary theory. Baksa's review in comparison of the 2002 and 2004 editions of Miller and Levine conducted with the science teachers tended to accredit Buckingham's concerns, for the changes to the 2004 edition of Miller and Levine implicitly legitimized many of Buckingham's complaints that the text was overstating achievements for evolutionary theory.

It is true that Buckingham wanted approval of the basal text recommended by the teachers to be linked to approval of the supplemental text *Of Pandas*. That's true. But he never intended to block approval of the basal text. He wanted the students to have two books, not one.

In a similar way, the plaintiffs cannot prove that the board was bent on a religious purpose, ramroding a curriculum change through, heedless to the science faculty or community, given the evidence of the actual process which produced the curriculum

change. The starting point here must be the actual context for the development of the policy.

On the day of the board administrative retreat on March 26th, 2003, the very day that Alan Bonsell mentioned creationism, Mike Baksa attended a seminar on creationism and the law sponsored by the Pennsylvania School Board Association. The presenter had a law degree from Harvard and had authored the Equal Access Act, a provision that guarantees religious liberty. The facilitator had a Ph.D. in the history of science.

Mike Baksa had been sent to the seminar by Rich Nilsen, who knew that the science text and curriculum were up for review and that knowledge of the law in this area was important.

At that seminar, Mike Baksa learned two things which informed his part in this policy-making process. He learned that creationism could not be taught, but also that the discussion of creationism might add to the fullness of the presentation of evolutionary theory, place it in context. We're not talking about a religious doctrine here now. It's a scientific doctrine as testified to by the defendants' experts.

Five days later, after attending this

seminar, Baksa received a memo from Trudy Peterman, the principal of Dover High School, indicating that teachers did discuss creationism as another theory of evolution. Mike knew that the memo was inaccurate, but the more significant point is through the Peterman memo and subsequent discussions with teachers such as Bob Linker, Mike learned that the practice of the teachers seemed to reflect the very sort of idea he had heard described at the seminar, one described as conducive to good science education, one, which it can easily be seen, would reduce resistence to scientific theory and progress by students with religious convictions.

Taking Bert Spahr's assumption that Bonsell was talking about creationism, as a starting point, Mike Baksa thought he might be able to respond to Bonsell's interest by including a mention of creationism in the curriculum, but at no point did Mike entertain an illegal objective.

To see him testify, unvarnished and matter of fact, yielding points to both sides as required by honesty, is to see the very administrator who stood at the center of this process and that he facilitated no agenda he believed to be illegal.

And Mike Baksa was not the sole source of

input into the board's deliberation. While the plaintiffs have alleged that neither the science faculty nor the community advisory committee were consulted with respect to the curriculum change, the evidence shows that both the faculty and the community advisory committee were consulted.

Rich Nilsen ensured that the community advisory committee was given an opportunity to provide feedback despite the objections of Bill Buckingham, because Nilsen valued the input, and he knew, as have many in this process, that Bill Buckingham was not the board.

The teachers were also consulted. The critical benchmark here is the recognition that Buckingham sought to secure balance by tying approval of the two texts together. He lost that vote. The same is true with respect to Buckingham's effort to ensure that the supplemental text *Of Pandas* was given to students in the classroom. He lost that vote. Teachers agreed to its use as a reference text, ultimately was placed in the library.

Teachers were also consulted with respect to Buckingham's effort to secure the teaching of intelligent design theory. Members of the board curriculum committee and the science faculty met

throughout the summer of 2004. Science teachers reviewed materials regarding intelligent design provided by Discovery Institute and agreed that evolutionary theory, like any theory, had gaps and problems.

Teachers agreed to make students aware of gaps. The basal text mentioned strengths and weaknesses of evolutionary theory because it is good science education, on that consensus became part of the curriculum change.

Here, Your Honor, you must notice that any argument to the effect that the teachers were coerced into making these concessions is belied by their own words and actions. They have adamantly refused to implement the curriculum change at issue here.

Finally, the plaintiffs cannot prove an improper religious purpose given the board's consultation with teachers regarding implementation of the curriculum change. The board agreed to a statement designed to address teacher concerns with respect to that implementation.

You heard Jen Miller, the senior biology teacher at Dover. In a meeting with administrators, she demanded to be told exactly what they were to say to students about intelligent design, exactly how to

answer questions from students.

Faced with a request plainly impossible to satisfy, Mike and the board fell back on the idea that Bert Spahr had given him when the curriculum change was discussed in the spring and summer of 2004, an informational statement.

In sum, teachers were also consulted extensively in connection with the curriculum change, and their final result reflects, in very large measure, their input. In fact, the final result has much more to do with the teachers' input than Bill Buckingham's.

As you decide this case, I ask you to consider this, Judge: On the one hand, the teachers resisted implementation of the curriculum change on the grounds that they were not educated in or trained to teach intelligent design, but somehow they felt qualified to opine that it was not science. What sense does that make if you're sitting on the board?

Surely the board was well within its rights when it decided to resolve any doubts in favor of the likes of Mike Behe, who does have a Ph.D. and is doing work in the sciences but doesn't use intelligent design because papers that use that term can't be published.

There may well have been an honest disagreement between the board and faculty, but the law on this point is clear. The board has the final say in such cases.

It speaks volumes that the actual result of the deliberative process is so far removed from Buckingham's objectives as chair of the board curriculum committee. And this, in turn, shows that the plaintiffs' efforts to portray the board as a faction bent on a religious mission cannot withstand close scrutiny.

In addition, the plaintiffs' effort to establish a religious purpose based on isolated comments with a religious thrust must be rejected. Carol Brown's testimony, histrionic, even if believed, provides no basis for such a claim. Can it really be claimed with any sort of integrity that comments made by two board members, friends by their own admission, who dared to mention religion on two separate occasions, are evidence of a religious purpose?

Both denied, because of memory, perhaps, but both innocuous. One comment invited by Casey Brown when she visited with her friend Jane Cleaver and remarked in a religious display. The other when Bill Buckingham, in a display of charity, drove her home

from a meeting.

And what weight do Casey Brown's objections and complaints deserve when she's asking Sheila Harkins about Quakerism, her religious convictions, and what she believes? What weight to Jeff Brown's objections when he's voting on board resolutions because he's got a message from on high?

To hear the testimony presented to the Court in this area is to realize that religious liberty cuts both ways, and it would be absurd to penalize board actions based on a few isolated comments with a religious thrust.

In any event, as you well know, the plaintiffs cannot show that the defendants had a religious purpose based on statements made by individuals. What matters here is the action of the public body as a whole determined first and foremost by the actual language of the policy that is at issue and its actual effect.

The purpose of a public body, likewise, cannot be proven by the evidence of the motives or purposes of third parties, whether scientists, academics, editors, authors, or publishers, because, again, the purpose of public bodies must be determined with reference to the collective purpose of the public

body.

Therefore, as you make your findings in this case, Judge, you must be mindful of something that is very clear and was stated throughout this case. Bill Buckingham is not the board, as Jeff Brown, Alan Bonsell, Sheila Harkins, Mike Baksa, and Rich Nilsen all took pains to point out at various points in this process we have scrutinized.

Likewise, the documents in 2002 and 2003 do not satisfy the plaintiffs' burden of proof, because, again, actions speak louder than words. It is simply not the law that the mere mention of the word "creationism" is illegal in these United States. Certainly Dover's principal and biology teachers didn't think so, for they mentioned creationism in their introduction to evolutionary theory.

The whole net result of this policy is to replace that introductory mention of creationism with an introductory mention of intelligent design. There is simply no meaningful way in which this outcome can be said to advance religion in any way given the nature of the statement at issue in this case, something Bob Linker acknowledged yesterday when he asserted his honest, objective, and wholly reasonable belief that mentioning creationism is not teaching it.

Now, it is true that the board did not agree with all the assertions and recommendations of the science faculty or the administration, for that matter, but, of course, it's the board's right and duty to exercise its judgment when adopting measures designed to serve the citizens of Dover. After all, consultation designed to help the board perform its functions does not mean capitulation to the science faculty.

Quite the contrary, the board's decision is entitled to great deference precisely because the board is elected by citizens who entrust the board with public responsibility, and it's those citizens who have the ultimate say.

It is these plain facts of the matter which explain why the plaintiffs have been forced so far afield in order to advance their claims, offering evidence with no meaningful connection to this case.

Although the plaintiffs have focused a great deal of attention on Discovery's Wedge strategy, there is no evidence that the defendants had ever seen this so-called Wedge document or discussed the so-called Wedge strategy with anyone at any time before they learned about it in the plaintiffs' complaint.

Although the plaintiffs focus on Phillip

Johnson, there is no evidence at all that the defendants know the man. Although the plaintiffs focus on the Foundation for Thought and Ethics, statements made by Jon Buell, there is no evidence that the defendants ever spoke to him or knew anything about the origins, purpose, or mission of FTE.

Although the plaintiffs have focused on prior drafts of the text *Of Pandas* and the motives or statements of its authors or editors, there is no evidence that the defendants had any knowledge of or interest in these statements or, for that matter, the motives, purposes, or metaphysical commitments of these strangers.

And that is why the main support for the plaintiffs' claim is a mountain of press clippings built on a molehill of statements allegedly made by one board member who, troubled and wrestling with the addiction of Oxycontin, occasionally allowed people to put words in his mouth.

The real purpose at issue here is the purpose that underlies the four-paragraph statement that mentions intelligent design twice, that does not even describe the hypothesis advanced by intelligent design theorists, but simply informs students that it's an explanation for the origins of life different

from evolutionary theory and tells students that there are books on the subject in the library.

This modest result, so far removed from what various board members contemplated at different times, shows that the plaintiffs have failed to prove, as they must prove to prevail, that the actual primary purpose of the actual policy at issue here is a religious purpose.

The evidence has also demonstrated that the plaintiffs have failed to show that the primary effect of the curriculum change is to advance religion. As an initial matter, the primary effect of a curriculum policy is the effect it has on instruction in the class.

As you will see in our briefing, the Supreme Court has never applied the endorsement test when assessing the primary effect of a curriculum policy. It focuses on the student in the classroom, and that makes perfect sense.

It is likewise clear that the primary effect of a curriculum change is not the secondary collateral and indirect effect of newspaper articles written by reporters. The effects of newspaper articles are just that, the effect of the words and deeds of third parties, third parties not authorized to speak for the

defendants, not under their control, and therefore third parties for whose acts the defendants cannot in justice be held responsible.

Indeed, the primary effect of the board's curriculum change is not even the district's press release or newsletter, for these were secondary and collateral consequences, by no means an integral or intended consequence of the curriculum change when it was passed on October 18th, 2004, but simply the wholly legitimate efforts of a public body to address misinformation and questions on the part of the public.

Plaintiffs have failed to prove that the actual primary effect of the defendants' policy is to advance religion. Your Honor, a four-paragraph statement, an informational statement which does not detail the claims of intelligent design, may serve to prompt the curiosity of students, may lead them to the library, but it does not advance religion.

Apart from this four-paragraph statement lasting about one minute, science teachers teach evolutionary theory as required by state standards. They use the basal text recommended by the science faculty, a text recommended by the plaintiffs' expert. In this way, the evidence shows that while the

students are taught evolutionary theory in the class, they are merely made aware of intelligent design theory through a one-minute statement.

And while students are assigned the basal text authored by the plaintiffs' expert, they are merely made aware that there is a reference text in the library dealing with intelligent design, as well as other books on the subject. And students are made aware that they will be tested on evolutionary theory.

Further, the evidence has shown that to allay any concerns on the parts of parents or faculty, Rich Nilsen put in place guidelines to make sure that intelligent design theory would not be taught at present, it can't be under the policy, it is a fledgeling scientific theory, that teachers would not teach creationism, the religious beliefs of Bonsell and Buckingham, that teachers wouldn't teach their own religious beliefs, either.

Indeed, the plaintiffs have not proven that the primary effect of the curriculum change is any significant change in science education at Dover. The note designed to allay the faculty's fears that they would be required to teach intelligent design was not intended to and did not, in fact, cause any change in the presentation of material.

As the teachers have uniformly stated, they never taught the origins of life. And there is no evidence whatsoever that whatever changes teachers may put in place or may have already, that those changes were authorized or required by the board. Those were changes put in place by the teachers in the exercise of their discretion and changes for which the board cannot be held liable.

In many respects, the most interesting result of this policy change is the addition of books to the collection of the high school library. Two donations by two different groups of individuals, both readily accepted by the board and administration without questioning the identity or motives of the donors.

How can adding books to the library be a bad thing? It is not. And for this reason, when all is said and done, the circumstances surrounding the donation volunteered by a father trying to protect his son from what he saw as politically motivated attacks, must not be allowed to undermine the legitimate educational benefit those books confer.

In this regard, Your Honor, it must be remembered that as the matter now stands, the text *Of Pandas* is counterbalanced by three texts critical of

intelligent design authored by the plaintiffs' experts. Indeed, if a student goes to the Dover High School library and inputs "intelligent design" into the catalog, he'll be directed to one book, a book written by plaintiffs' expert, Robert Pennock, that is critical of intelligent design.

Such results are not consistent with an effort to advance a religious agenda, but such results are quite consistent with the board's actual primary purpose here, that is, good science education.

The plaintiffs have failed to prove that the primary effect of Dover's curriculum change is to advance religion for another reason. The evidence shows that intelligent design is science, a theory advanced in terms of empirical evidence and technical knowledge proper to scientific and academic specialties. It is not religion.

The evidence has failed to support the claim that intelligent design is a nonscientific argument that is inherently religious. The testimony and evidence offered by Behe and Dr. Scott Minnich proved that IDT is science.

It's true to say that they are confronting some of the sociological dimensions of scientific progress, dimensions that Steve Fuller and others have

studied. That doesn't mean they're wrong. Only time will tell.

Although the plaintiffs have objected to the defendants' observation that evolutionary theory has gaps, the evidence has shown and the plaintiffs' experts have conceded that evolutionary theory does have gaps. Indeed, it has problems. The evidence also shows that the theory of evolution is just that, a theory, not a fact, something that the plaintiffs' experts have conceded.

Moreover, to hear Steve Fuller testify, Your Honor, is to see that IDT's openness to the possibility of causation, which some might classify as supernatural, at least in light of current knowledge, does not place intelligent design theory beyond the bounds of science.

Quite the contrary, intelligent design theory's refusal to rule out this possibility represents the essence of scientific inquiry, precisely because the hypothesis is advanced by means of reasoned argument, based not on the Bible, but on empirical evidence and existing knowledge.

As Fuller has explained, it is merely a philosophical commitment to so-called methodological naturalism, adopted as a convention by the bulk of the

scientific community, which bars reference to the possibility of supernatural causation, again, at least so far as such causation is currently regarded as supernatural. Even Pennock agrees that philosophers of science, those who have examined these matters in detail, do not agree as to the viability or benefits of this so-called methodological commitment.

Moreover, the evidence shows that this philosophical, nonscientific commitment is in no way an essential feature of scientific inquiry. One should be reluctant, truly loathed to impose as a matter of federal law a current convention of the scientific community when the consequences would be to greatly harm scientific progress, at least if the history of science can shed any light on its future. But that would be the practical effect of accepting the artificially narrow view of science espoused by the plaintiffs' experts.

This Procrustean effort to confine science within bounds set by nothing greater than present-day convention displays a deplorable lack of historical perspective and philosophical sophistication. Such a view of science is not science, it is bad philosophy of science.

This Court must eschew the plaintiffs'

invitation to declare the laws of science from the bench if only because history demonstrates that all such efforts are doomed to failure. In this regard, the plaintiffs cannot hope to meet their burden of proof by changing it.

Although we will brief it at length, it behooves me now to say that the plaintiffs cannot prove that Dover's curriculum policy fails the establishment clause because it is an endorsement of religion that they would attribute to Dover's policy. Of course, the endorsement test is improper because the controlling case law is clear.

One need look no further than the plaintiffs' argument to see the absurd results that would follow from an effort to apply the endorsement test in this case, for by some strange alchemy, not science, it is the plaintiffs who seek to conjure an endorsement of religion from newspaper stories asserting that Dover's policy is religious when it addresses a scientific theory.

By this sleight of hand, a change to the ninth-grade curriculum, which results in a one-minute statement designed to spark curiosity and lead kids to the library, becomes a policy that has the primary effect of advancing religion, not just in Dover, but

anywhere the paper is read. The world, the Court, must reject this effort to equate primary effect, butterfly effect, precisely because it has no support in the law and would create chaos.

In sum, Your Honor, I respectfully submit that the evidence of record shows that the plaintiffs have failed to prove that the primary purpose or primary effect of the reading of a four-paragraph statement to make the students aware of intelligent design, explaining that it's an explanation for the origins of life different from Darwin's theory, letting students know there are books in the library on this subject, does not, by any reasonable measure, threaten the harm which the establishment clause of the First Amendment to the United States Constitution prohibits, but, instead, the evidence shows that the defendants' policy has the primary purpose and primary effect of advancing science education by making students aware of a new scientific theory, one which Steve Fuller, accomplished by any man's measure, believes may well open a fascinating prospect to a new scientific paradigm.

This is the very sort of legitimate educational goal which the United States Supreme Court acknowledged in *Edwards versus Aguillard*. For these

reasons, I respectfully submit that this Court must deny the plaintiffs' request for relief and instead declare that Dover's curriculum is constitutional and enter a judgment dismissing the plaintiffs' claims with prejudice. Thank you, Your Honor.

THE COURT: I thank you, Mr. Gillen, for that argument. Now, any rebuttal from Mr. Rothschild?

MR. ROTHSCHILD: No rebuttal, Your Honor.

THE COURT: All right. As we conclude this matter then, I'd like to make just several comments. And we will not, as we said, close the record formally for several weeks, but at least this concludes the taking of testimony in the case.

I think it's appropriate to say that over the course of this extended trial, the Court has had, we have all had, the assistance of a number of individuals, and it's appropriate to say thanks to those individuals, our good court security officers, the Office of the United States Marshal, our clerk's office here in the United States District Court for the Middle District of Pennsylvania, our very able court reporters, and all of them, my staff, Liz and Adele, for their good work, and all who have worked on the logistical end of this trial.

This is -- if it's not the largest trial

that's been heard in the Middle District of Pennsylvania, it equates with the largest trial, certainly in recent memory. And it was no easy undertaking. I had a part in it, but there were so many who attempted to and successfully did make it a much easier enterprise.

To the parties in this case and to the assembled spectators, many of whom came day after day, let me say this. It was suggested to me at the outset of this case that I should admonish the spectators that they needed to maintain a certain decorum in the case and during the time that they sat as either parties or spectators, and I declined that advice, and I did that because I generally live by the belief that people will behave themselves unless I see otherwise.

And I must note that at no time during this trial, this very long trial, did I have to admonish anyone in the courtroom. I am struck by the solemnity, the dignity, the appropriateness that all of you had, and I'm talking about parties and spectators. And I appreciate that deeply. It was befitting a court of law where important issues are being discussed, and I thank you again for that.

To the press, let me say that I recognize that it is not easy to do what you do and to cover an

extended trial. We attempted to make certain accommodations to facilitate that. I hope that they were useful to you, and I appreciate your living within those accommodations and constraints for the duration of this extended trial and again for your professionalism in doing so.

And last but not least, let me say a word to counsel. I will say to all of you that watching you during this trial, every single one of you, made me aware of why I became a lawyer and why I became a judge. Your advocacy was so impressive to me, but more than that, your ability to interact and to act collegiately, cordially towards each other in the spirit of cooperation with yourselves, between yourselves or among yourselves and the Court.

When I practiced law, it frequently occurred to me that clients and observers would sometimes mistake that spirit of cooperation for a lack of zealousness and advocacy. I assure everyone that it is not that at all. Good advocates, good lawyers, can fight in the most zealous and the most dedicated manner in a courtroom but then shake hands and cooperate and leave in the highest -- keeping in mind the highest ideals of the profession.

Going back to the days of William

Shakespeare and beyond that, people have maligned lawyers and judges, and they'll continue to do so, sometimes with justification, but unfairly so in many cases. Those of you who have sat through this trial, parties and spectators, have seen, by each and every one of the lawyers, some of the best presentations, some of the finest lawyering that you will ever have the privilege to see.

And so let me take the opportunity to return the compliments that you've given to the Court and to everyone else, and let me do that times two, because, frankly, it was a pleasure to have each and every one of you and your support staffs before me in this case.

Fundamentally, it was my distinct and rare privilege and honor to sit through this extended trial. I know that this case is important to the parties. I'm extremely cognizant of that. This case has not ended for me and hard work lies ahead.

And as I said in my dialogue with counsel, I will endeavor to render a decision as promptly as I can, applying the law to the facts as I find them. I assure you of that, and I assure you that I will do my duty in doing so.

Counsel, do you have anything further before we adjourn these proceedings? From the plaintiffs?

MR. ROTHSCHILD: No, Your Honor. Thank you.

THE COURT: From the defendants?

MR. GILLEN: Your Honor, I have one question, and that's this: By my reckoning, this is the 40th day since the trial began and tonight will be the 40th night, and I would like to know if you did that on purpose.

THE COURT: Mr. Gillen, that is an interesting coincidence, but it was not by design.

(Laughter and applause.)

With that, I declare the trial portion of this extended case adjourned.

(Whereupon, the proceedings were concluded at 3:28 p.m.)

CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings and that this copy is a correct transcript of the same.

Dated in Harrisburg, Pennsylvania, this 11th day of November, 2005.

/s/ Lori A. Shuey

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