

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

TAMMY KITZMILLER, et. al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 04-cv-2688
)	(Honorable Judge Jones)
DOVER AREA SCHOOL DISTRICT and)	
DOVER AREA SCHOOL DISTRICT)	
BOARD OF DIRECTORS,)	
)	
Defendants.)	

BRIEF *AMICI CURIAE* OF THE
JEWISH SOCIAL POLICY ACTION NETWORK,
THE JEWISH COUNCIL FOR PUBLIC AFFAIRS AND
THE JEWISH ALLIANCE FOR LAW AND SOCIAL ACTION
IN SUPPORT OF PLAINTIFFS

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IN SUPPORT OF PLAINTIFFS**

The Jewish Social Policy Action Network (JSPAN), the Jewish Council for Public Affairs (JCPA), and the Jewish Alliance for Law and Social Action (JALSA), respectfully submit this brief as *amici curiae* in support of the Plaintiffs.

INTEREST OF THE *AMICI CURIAE*

JSPAN is an organization of American Jews, who seek, *inter alia*, to protect the constitutional liberties and civil rights of all Americans.

JSPAN believes that the First Amendment's religion clauses are the bedrock of American freedom, and that without the separation of church and state neither

religious freedom nor any other basic freedoms can endure. While we share that belief with most Americans, the 1500 year Jewish experience of living as Jews in Christendom and in Islamic societies accounts for the uncommon depth and unanimity with which that belief is held by American Jews.

Religious minorities in America would regard themselves, in the words of Justice O'Connor, as "outsiders, not full members of the political community," *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985), *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 625 (1989), were it not for the separation principle first enunciated by the founding fathers and then reemphasized in many Supreme Court rulings from the mid-20th century, *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), until today, *McCreary County, Kentucky v. ACLU*, 545 U.S. ___, 125 S.Ct. 2722 (2005). That American Jews today are full members of the political community, indeed are the freest Jewish community in our two millennia Diaspora history, is the result of this nation's adherence to the constitutional principle of separation of church and state.

JSPAN's interest in this matter is in preventing any erosion of that principle. The Dover School District's attempt to encourage biology students to believe in "intelligent design" is, in our view, a dangerous step in that direction.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 13 national and 125 local Jewish federations and community relations councils,

was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state is an essential bulwark for religious freedom in the United States. The JCPA opposes both initiatives to remove the study of evolution from public school science curricula and the promotion of the teaching of creationism.

The Jewish Alliance for Law and Social Action (JALSA) is a progressive voice within the Jewish community, working on issues of social and economic justice, civil rights, and constitutional liberties. JALSA seeks to end discrimination based on race, ethnicity, gender, sexual orientation, and religion through passage of legislation, court cases, and social action. Members of JALSA have contributed extensively to *amici* briefs in state and federal courts on freedom of religious worship and religious establishment cases, including cases on religious accommodation, prayer in schools, and government entanglement cases.

ARGUMENT

The *amici* fully agree with the substantive arguments in plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment,¹ for we hold it beyond question that "intelligent design" is but a loosely veiled form of "scientific creationism" which the Supreme Court has already prohibited from being taught in public schools. *Edwards v. Aguillard*, 482 U.S. 578 (1987). That holding is controlling here. We respond in this *amici* brief only to defendants' assertion that what is involved here is but a "modest curriculum change" (Tr. of 9/26/05 (morning), pp. 22, 24 and 27) or a "modest but significant change" in the biology curriculum. (Tr. of 9/26/05 (morning), p. 28).

When compared to the crude efforts in Tennessee, Arkansas and Louisiana to forbid the teaching of evolution in public schools altogether or to require equal time for the teaching of "creation science," the Dover School District's change

¹ To plaintiffs' excellent argument in that regard we would only add that the theory of intelligent design has been a staple of religious argument for centuries. *See, e.g.*, Hume, D., *Dialogues Concerning Natural Religion*, Part VIII (1779); Paley, W., *Natural Theology: or Evidences of the Existence and Attributes of the Deity collected from Appearances of Nature* (1802); Brown, A., *Footprints of God* (Findlay, Ohio: Fundamental Truth Publishers, 1943); Clark, R., *The Universe – Plan or Accident?* (Philadelphia: Muhlenberg Press, 1961).

Intelligent design is a persuasive argument supporting belief in a Creator and is used for that purpose in Jewish education, but not in derogation of the theory of evolution. *See, e.g.*, Gittelsohn, R.B., *Little Lower than the Angels* (New York: Union of American Hebrew Congregations and Central Conference of American Rabbis, 1955). Teaching children that religion and evolution are in direct conflict, however, necessarily results in undermining either their religious belief or their acceptance of one of the greatest scientific discoveries of the last two centuries and some of the basic principles of modern science.

could be deemed relatively “modest.” The record, however, contains far more than a suggestion that this “modest” change is intended by the Discovery Institute as but the first step in a strategic five-year plan to defeat “scientific materialism” by building on the work of defendants’ principal expert witness, Dr. Behe, and his predecessors – work which promises to reverse the “stifling dominance of the materialistic world view and to replace it with a science consonant with Christian and theistic convictions.” *See* Discovery Institute’s publication, “The Wedge Strategy,” Ex. 140 (Tr. of 10/18/05 (afternoon), pp. 107-110).

The Discovery Institute, to be sure, is not the Board of Directors of the Dover School District. But the Discovery Institute and the Thomas More Law Center (which describes itself as “the sword and shield for people of faith”) were the two organizations from which William Buckingham, the Board’s curriculum-committee chairman, sought legal advice about the science curriculum. And it was Bob Jones University (“dedicated to the teaching and propagation of fundamentalist Christian religious beliefs”) as well as local parochial (but not public) schools from which the Assistant Superintendent sought information about biology textbooks that might be used to teach creationism. It was Buckingham who called one of the resigning Board members an “atheist,” who said at a public Board meeting that “2000 years ago a man died on a cross – can’t someone take a stand for him?” and who raised \$850 at a church service toward the purchase price of the

60 copies of “Of Pandas and People” and passed it on to his fellow “Young Earth” creationist, the Board President. It was the Board President who told the resigning Board member that she was “going to hell,” and who passed on the \$850 to his father, who was purchasing the 60 books and donating them to the school library. (Tr. of 9/29/05 (afternoon), p. 32 and 10/31/05 (afternoon), pp. 32-36, 57, 74, and the Court’s examination of the Board President at 127-133).

Thus, what the Board has tried to do is far from *de minimis*. In any event, there has never been room in Establishment Clause jurisprudence for the concept of *de minimis non curat lex* in cases involving public elementary and secondary school education. *School Dist. of Abington Twnshp. v. Schempp*, 374 U.S. 203, 225 (1963) (“it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment”); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (“In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart”); *Wallace v. Jaffree*, 472 U.S. at 81 (O’Connor, J., concurring) (“This Court’s decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs”); *Edwards v. Aguillard*, 482 U.S. at 584-585

“The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure Therefore, in employing the three-pronged *Lemon [v. Kurtzman]*, 403 U.S. 602 (1971)] test, we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools”) (footnote and citations omitted). Were it otherwise, the Supreme Court would not have invalidated statutes requiring the reading of ten verses of the Bible, *Schempp, supra*, or voluntary non-denominational prayer, *Engel v. Vitale*, 370 U.S. 421 (1962), or a moment of silence, *Wallace v. Jaffree, supra*, at the beginning of each school day.

Nothing appears to be more “modest” than organized silence in the schools, but even this is constitutionally infirm if undertaken with a religious purpose. *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *app. dismissed as moot sub nom.*, *Karcher v. May*, 484 U.S. 72 (1987). Nor is making an announcement that there is a particular book in the school library that should be read so minimal as to escape Establishment Clause scrutiny, when the activity in question is religious. *Cf. Nartowicz v. Clayton County Sch. Dist.*, 736 F. 2d 646, 649 (11th Cir. 1984); *and see Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999) (“A teacher's reading of a disclaimer that not only disavows endorsement of educational materials but also juxtaposes that disavowal with an urging to

contemplate alternative religious concepts implies School Board approval of religious principles"), *reh'g en banc denied*, 201 F.3d 602 (5th Cir.), *cert. denied*, 530 U.S. ____, 120 S.Ct. 2706 (2000).

James Madison showed little patience for such *de minimis* concepts when he warned “that it is proper to take alarm at the first experiment on our liberties.” In his Memorial and Remonstrance² he argued that the very *introduction* by Patrick Henry of a bill proposing a minimal, three pence tax to provide for “teachers of the Christian religion,” had already “transformed ‘that Christian forbearance, love and charity’ which of late mutually prevailed, into animosities and jealousies which may not soon be appeased.” Were that bill actually to have been enacted, Madison wrote, such legislation “will destroy that moderation and harmony which the forbearance of our laws to meddle with religion has produced among its several sects.” Much the same must be said in this case.

The animosity that accompanied the process of making this allegedly “modest change” in Dover’s biology curriculum, the resulting resignations of two Board members, the “atheist” and “going to hell” comments by the curriculum-committee chair and the Board President, amply demonstrate why the public school, “designed to serve as perhaps the most powerful agency for promoting

² Memorial and Remonstrance Against Religious Assessments, 2 Writings of James Madison 183, 184 (G. Hunt ed. 1901). A copy of Madison’s Memorial is reprinted as an appendix to the opinion of Mr. Justice Rutledge in *Everson v. Bd. of Educ.*, *supra*.

cohesion among a heterogeneous democratic people ... must keep scrupulously free from entanglement in the strife of sects.” *McCullum*, 333 U.S. at 216-217. It was just such “religiously based divisiveness” that the Establishment Clause sought to avoid. *Van Orden v. Perry*, 545 U.S. ___, 125 S.Ct. 2854 (2005) (Breyer, J., concurring).

But the biology curriculum innovation must be nipped in the bud not only because of the strife it has already caused, but because of the much greater strife it is likely to cause in the future. When a public school prefers one religion over another, the societal divisiveness and communal strife likely to ensue can hardly be exaggerated. The controversy between the Intelligent Design community and the many sects which perceive no inconsistency whatever between evolution and religious faith will surely continue, but even that is not the whole of it.

As this Court knows, *Of Pandas and People* encourages belief in the sudden creation of animals and people by a “designer,” but takes no position on the Young Earth thesis, the six-day Genesis version of creation. Yet believers in the literal Genesis version are an important part of the Intelligent Design community. They surely will be heard from soon, and this controversy is certain to continue within Dover, Pennsylvania, and throughout the nation. Such is the special explosiveness of such a mixture of religion and public education.

CONCLUSION

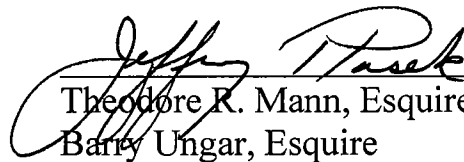
Referring to the religious freedom already evident in America before the Bill of Rights was ratified in 1791, even before the Constitution was ratified in 1787, Madison went on to state in his Memorial and Remonstrance:

If with the salutary effects of this system under our own eyes we begin to retract the bounds of religious freedom, we know no name that will too severely reproach our folly.

Justice O'Connor recently, with an eye on the carnage in contemporary societies where religion and government are not separated and with the benefit of 220 years of hindsight, expressed the same thought: "Why would we trade a system that has served us so well for one that has served others so poorly?" *McCreary County, Kentucky v. ACLU, supra*, 125 S.Ct. at 2746 (O'Connor, J., concurring).

Why indeed?

Respectfully submitted,


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