IN THE SUPREME COURT OF TEXAS

NO. 03-0995

HEB MINISTRIES, INC., SOUTHERN BIBLE INSTITUTE, AND HISPANIC BIBLE INSTITUTE, PETITIONERS,

v.

TEXAS HIGHER EDUCATION COORDINATING BOARD AND COMMISSIONER RAYMUND PAREDES, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued January 5, 2005

JUSTICE WAINWRIGHT, joined by JUSTICE JOHNSON, concurring in part and dissenting in part, and concurring in the judgment.

Today the Court reaffirms the sacred principle that Americans have a fundamental right to their religious beliefs. The United States Constitution prohibits the government from interfering with this liberty, as the state has no authority to regulate religious beliefs. I concur in the Court's result on all issues decided, some for different reasons, except one. I agree that the government cannot dictate whether private religious institutions may call themselves "seminaries" as the term admits primarily a religious connotation. Because the training of clerics and teaching of religious doctrines at religious institutions is inherent to religious beliefs, the State also cannot license clerics

or regulate their training. I also agree that the government may not preclude religious institutions from employing virtually any useful terminology to describe the postsecondary educational achievements of their students, but I would hold, contrary to the plurality, that the State, within constitutional limits, may require private educational institutions to comply with minimum educational criteria before they may confer postsecondary degrees on their students. A holding that the Legislature is barred by the U.S. Constitution from setting minimum standards for the issuance of college and graduate degrees by religious institutions, establishes a constitutional right for one type of institution to issue postsecondary degrees regardless of compliance with public standards. This holding precludes the Legislature from considering permissible alternatives, such as allowing religious institutions to issue college degrees with appropriate disclosures on their graduation documents indicating that their degrees are not from state-certified programs (if, for example, they do not include required minimum study in mathematics, science, humanites, written communication, basic computer instruction, or other subjects). This would permanently tie the hands of the Legislature, precluding it from considering constitutionally permissible alternatives so that it may concurrently protect religious freedom while ensuring that all private postsecondary degrees from Texas institutions represent meaningful educational achievement. The Religion Clauses of the First Amendment of the Constitution do not compel this result. The plurality's logic goes astray in melding the act of issuing a postsecondary graduation document with the absolute right to religious beliefs, and fails to recognize that the Legislature's ensuring that all postsecondary degrees are meaningful designations is not an improper targeting of Tyndale's religious beliefs. The government may not under the Constitution dictate which religious institutions call themselves seminaries, whom

they may hire to teach and what curriculum they may teach, but calling a graduation document a bachelor's degree, instead of a bachelor's certificate, is not an issue of religious beliefs, notwithstanding Tyndale's attempt to conflate the two. I also concur with the plurality, for different reasons, that religious institutions have the right to accurately label their graduation documents, as the Free Speech Clause of the Constitution precludes the State from broadly barring private postsecondary institutions from using virtually all terminology that reasonably describes the educational attainment of their students.

I

Background

Petitioner HEB Ministries, Inc.[1] is a non-profit Texas corporation and orthodox Christian church that operates, as one of its ministries, the Tyndale Theological Seminary and Bible Institute.[2] Tyndale provides undergraduate and graduate level education to students in ecclesiastical subjects such as theology, apologetics, and Christian studies, and also provides general-education courses such as English grammar, composition, and ancient world history. The Texas Higher Education Coordinating Board fined Tyndale for using terms protected by the Education Code in its name and for issuing some graduation documents to its 1998 graduates which, while not using the protected term "degree," are advertised by Tyndale as equivalent to a degree or as satisfying part of a state-certified postsecondary degree program.

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[1] HEB Ministries is unrelated to the H.E. Butt Grocery Company, which is also commonly referred to as "HEB."

[2] Because their interests are aligned, I use the terms "HEB" and "Tyndale" interchangeably.

The Board fined Tyndale $3,000 for using the term "seminary" in violation of section 61.313(a)(1) of the Education Code.[3] For "doctrinal reasons" and fear of jeopardizing its "ecclesiastical rights," Tyndale did not seek a temporary certificate of authority from the Board, nor longer-term accreditation from a state-approved accrediting agency.[4] Tyndale now argues that the twenty-one state-mandated standards required for accreditation or a certificate of authority are impermissibly intrusive. *See* 19 TEX. ADMIN. CODE § 7.7. For example, Tyndale claims that the regulation regarding faculty qualifications would prohibit Reverend Billy Graham, Mother Teresa, the Apostles, and a Jewish carpenter born in a manger from teaching at the institution.

The Board also fined Tyndale $170,000 for purportedly issuing "degrees"—as statutorily defined—in violation of section 61.304 of the Education Code. Section 61.304 prohibits private postsecondary institutions from granting "degrees" without first obtaining a certificate of authority from the Board or becoming accredited by a state-approved accrediting agency. TEX. EDUC. CODE § 61.304; *see also id.* § 61.303(a) (exempting accredited institutions). "Degree" is broadly defined as

> any title or designation, mark, abbreviation, appellation, or series of letters or words, including associate, bachelor's, master's, doctor's, and their equivalents, which signifies, purports to, or is generally taken to signify satisfactory completion of the

[3] Section 61.313(a)(1) prohibits a private postsecondary educational institution from using the term "seminary" in its official name unless the entity first obtains a certificate of authority from the Board or becomes accredited by a state-approved accrediting agency. TEX. EDUC. CODE § 61.313(a)(1); *see also id.* § 61.303(a) (exempting accredited institutions).

[4] The court of appeals stated that "Tyndale has steadfastly refused to participate in any of the alternative processes available under the statutory oversight plan." 114 S.W.3d at 630. Tyndale has, however, along with seven other unaccredited religious schools, endeavored to create its own accrediting agency, which the State does not recognize at this time.

> requirements of all or part of a program of study leading to an associate, bachelor's, master's, or doctor's degree or its equivalent.

Id. § 61.302(1). None of the documents awarded by Tyndale at its 1998 graduation were actually titled "degree," but the Board alleges that Tyndale used terminology on the documents and in brochure descriptions that bring the documents within the broad definition of "degree" in section 61.302(1). Though not evident from the statutory language, the Board now concedes that issuing "diplomas" or "certificates," without the protected words or brochure descriptions, is not a violation of section 61.304.

In response to the Board's fines, Tyndale filed this lawsuit seeking a declaratory judgment that applicable sections of the Texas Education Code are unconstitutional under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment of the United States Constitution, and under the Freedom of Worship Clause in Article I, section 6 of the Texas Constitution. Both Tyndale and the Board filed motions for summary judgment. In its ruling on these motions, the trial court upheld the fines assessed against Tyndale for granting "degrees," under section 61.304, but vacated the fine for Tyndale's use of the term "seminary," under section 61.313(a)(1), holding that the State's regulation of that term violated the First Amendment of the United States Constitution and Article I, sections 6, 8, and 20 of the Texas Constitution.

The court of appeals reversed the trial court's judgment allowing unregulated use of the term "seminary" and rejected Tyndale's Free Exercise, Establishment Clause, and Free Speech challenges. 114 S.W.3d 617, 633-36. The court of appeals affirmed the trial court's judgment with respect to

the granting of degrees, holding that section 61.304 does not violate the Establishment Clause, the Free Exercise Clause, or Tyndale's right to free speech. *Id*. at 628-29, 631-32.

II

Constitutional Prohibition Against State Regulation of Religious Convictions

The Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] U.S. CONST. amend. I. They apply to the states through the doctrine of incorporation in the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause erects an unqualified prohibition against government interference with beliefs. *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 695 (Tex. 1984). The Clause also protects certain conduct motivated by religious beliefs. *United States v. Lee*, 455 U.S. 252 (1982). Under the Establishment Clause, the state may not prefer religion to irreligion or one religion to others, nor may the government exhibit hostility towards religion. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947); *see also Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994); *Lee v. Weisman*, 505 U.S. 577, 609-16 (1992) (Souter, J., concurring). These constitutional principles guide the evaluation of the state regulations at issue.

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[5] The Texas Constitution is more explicit in its protection of the freedom to worship. "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences." TEX. CONST. art. I, § 6. The issues are briefed under the U.S. Constitution with reference to analogous provisions in the Texas Constitution. The plurality concludes that the Texas Constitution is "coextensive" on the issues raised. As neither party addresses in substance the application of the Texas Constitution to these issues and neither asserts any difference in the jurisprudence between the two constitutions, I would "limit our analysis to the First Amendment and simply assume that its concerns are congruent with those of [the Texas Constitution]." *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 150 (Tex. 2004).

A. The Free Exercise Clause

The United States Constitution protects the free exercise of religion from undue state infringement. U.S. CONST. amend I, cl. 2, amend XIV, § 1; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *see also* TEX. CONST. art. I, §§ 6, 29.[6] The Free Exercise Clause of the First Amendment protects religious freedom by ensuring that the freedom to hold religious beliefs and opinions is absolute. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). This was reiterated in *Employment Division v. Smith*, where the Supreme Court held that "the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" 494 U.S. 872, 877, 879 (1990) (quoting *Sherbert v. Verner*, 374 U.S. at 402 (1963)). The first issue is whether the statutes at issue regulate religious beliefs.[7]

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[6] The Free Worship Clause of the Texas Constitution provides in its entirety:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

TEX. CONST. art. I, § 6.

[7] The Establishment Clause cases consider whether some form of government aid, either direct or indirect, improperly entangles the government in religion. *Walz v. Tax Comm'n*, 397 U.S. 664, 670-75 (1970); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). In this case, HEB does not challenge government aid or support of religion or religious symbols but complains of state regulation of its activities. The Supreme Court decided in *Lukumi* that because the dispute raised a question of the freedom to worship in the face of governmental regulation, rather than governmental efforts to benefit or favor religion, the Free Exercise Clause was dispositive. 508 U.S. at 532; *see also People's Baptist*, 683 S.W.2d at 695.

1. State Regulation of the Term "Seminary"

Section 61.313(a) of the Texas Education Code requires that all private postsecondary educational institutions in Texas must submit to state regulation in order to call themselves seminaries. Specifically, section 61.313(a) provides:

> Unless the institution has been issued a certificate of authority under this subchapter, a person may not: (1) use the term "college," "university," "seminary," "school of medicine," "medical school," "health science center," "school of law," "law school," or "law center" in the official name or title of a nonexempt private postsecondary educational institution; or (2) describe an institution using a term listed in Subdivision (1) or a term having a similar meaning.

TEX. EDUC. CODE § 61.313(a). To comply with this section of the Education Code, Tyndale must submit to twenty-one state-established standards. *See id*.; 19 TEX. ADMIN. CODE § 7.7. Tyndale complains that such state regulation violates its rights under the Free Exercise Clause.

The State contends that its regulation of the term "seminary" is neutral and generally applicable, and thus permissible under *Smith*. I disagree. The State does not have the authority to determine whether a private postsecondary educational institution that professes a sincere faith may call itself a "seminary." *See Smith*, 494 U.S. at 888; *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). Requiring religious organizations to submit to state regulation in order to call themselves seminaries is at odds with the Free Exercise Clause of the First Amendment of the United States Constitution.

The Board argued in its briefing that the term "seminary" is not an "exclusively religious" one, and the court of appeals apparently agreed. 114 S.W.3d at 633. The Board contended, citing *Church v. Bullock*, 109 S.W. 115, 117 (Tex. 1908), that a seminary is a "place of education" and

only departs from this secular meaning when the adjectives "theological" or "religious" are placed in front of it to take on the meaning of "a place specifically for the preparation of men for the ministry, or at least, for the teaching of religious doctrines." In postsubmission briefing, the Board acknowledged that "seminary" is a religious term but asserts that the term also conveys a secular meaning.

Statutory interpretation begins with the plain and common meaning of the statute's words. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). As enacted in 1975, section 61.313(a) only included the terms "college" and "university." Act of May 28, 1975, 64th Leg., R.S., ch. 587, § 1, 1975 Tex. Gen. Laws 1867, 1870. The Legislature added the term "seminary" in 1997, along with the terms "school of medicine," "medical school," "health science center," "school of law," "law school," and "law center." Act of May 9, 1997, 75th Leg., R.S., ch. 232, § 1, 1997 Tex. Gen. Laws 1147, 1149. If "seminary" has a predominantly secular meaning, as the Board contends, there is no reason for the Legislature to add it to the list of protected terms, as the addition would only repeat the statute's reference to other secular educational institutions. We presume that each word in the statute has meaning and that the Legislature added seminary to the statute to include within the scope of the statute entities that were not covered by other terms. *See Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963). The inclusion of "seminary" added religious institutions to the scope of the statute.

In addition, this Court has pondered the meaning of this word before. This Court reasoned in *Bullock* that

> "[a] seminary is a place of education . . . specifically a school for the education of men for the priesthood or ministry." A seminary being a "place of education," the adjectives "theological or religious" necessarily give to it the meaning of a place

> specifically for the preparation of men for the ministry, or at least, for the teaching of religious doctrines. The words are commonly so used.

109 S.W. at 117 (quoting 25 Am. & Eng. Ency. Law, 286). In that case, this Court did not hold that it was only when combined with the words "religious" or "theological" that the word "seminary" took on the meaning proposed by HEB Ministries in this case. *See id*. "Seminary" has a primarily religious connotation, and when combined with the word "theological," as in Tyndale Theological Seminary, it has an exclusively religious meaning.

The court of appeals relied, in part, on the definition of "seminary" given in Black's Law Dictionary: "[a]n educational institution, such as a college, academy, or other school." BLACK'S LAW DICTIONARY 1392 (8th ed. 2004). Webster's dictionary, however, defines the same term as "an institution for the training of candidates for the priesthood, ministry, or rabbinate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2064 (1961). Even the Board acknowledges that Tyndale's avowed purpose is to train ministers to work in churches. In the context and usage of the statute, the word "seminary" included in the State's statutory scheme refers to institutions that provide religious education, instruction, and training.

The United States Court of Appeals for the Fifth Circuit has held that, in some circumstances, a seminary qualifies as a "church" for purposes of the ministerial exception. *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981). In *Southwestern Baptist*, the court observed that the defendant seminary was an "integral part of a church, essential to the paramount function of training ministers who will continue the faith." *Id*. The court also held that the seminary's faculty qualified as "ministers" for purposes of the exception because the faculty

members were "intermediaries between the [Southern Baptist] Convention and the future ministers of many local Baptist Churches." *Id.* While seminarian policies and philosophies will differ among institutions, *see, e.g.*, *EEOC v. Miss. Coll.*, 626 F.2d 477, 479 (5th Cir. 1990), *Southwestern Baptist* is instructive because it recognizes that seminaries often function similarly to churches or other organized congregations. The Board acknowledges that Tyndale's purpose is to train ministers to work in churches. Furthermore, their faculty members may well be akin to church clergy in addition to providing general educational instruction on secular subjects.

I conclude, as does the Court, that the word "seminary" admits a primarily religious meaning, and now consider whether, consistent with the Free Exercise Clause, the State may dictate which institutions may call themselves seminaries.

The Supreme Court has espoused "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (declaring unconstitutional a state law that granted ownership of church property to the American branch of the Russian Orthodox Church). This "spirit of freedom" is reflected in many of the Court's decisions regarding state interference in the internal affairs of churches and religious organizations. *See, e.g.*, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

In 1929, the Supreme Court refused to decide whether an individual was qualified to be a chaplain in the Roman Catholic Church. *Gonzalez*, 280 U.S. at 17. "Because the appointment is a

canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Id*.

In *Catholic Bishop of Chicago*, the Supreme Court considered whether church-operated schools were subject to the jurisdiction of the National Labor Relations Board (NLRB). 440 U.S. at 491. Although the Court ultimately concluded that Congress did not intend to include church-operated schools within the purview of the National Labor Relations Act, the Court admonished that such an exercise of jurisdiction would raise "serious First Amendment questions" because the NLRB's actions would "go beyond resolving factual issues." *Id*. at 502, 504. They would

> necessarily involve inquiry into the good-faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id.

To decide which institutions are seminaries and which are not, the Board necessarily would have to make judgments concerning which convictions, doctrines, and faiths are religious in nature and which are not. Because Tyndale is HEB Ministries' training institution for ministries, the Board would have to consider whether the school is fulfilling its religious mission to the ministry and if its teachings are sufficiently "theological" in nature to be a seminary. For the government to determine whether sincerely professed religious beliefs are actually secular is an endeavor "fraught with the sort of entanglement that the Constitution forbids." *Hernandez*, 490 U.S. at 697. This it cannot do. *See Catholic Bishop of Chicago*, 440 U.S. at 502. Once a person professes a sincere religious conviction

or faith, the person's right to her faith is protected by the Constitution and not subject to governmental determinations that they are not religious in nature. *See id*. The Board can no more prohibit a church from calling its school a seminary than it can prohibit a religious congregation from calling itself a church. HEB Ministries' beliefs are protected by the Constitution from government regulation.

Because the term "seminary" admits of a primarily religious meaning, the State has no authority to prohibit Tyndale from using the term in its title, and may not constitutionally require private postsecondary institutions to submit to state regulation in order to do so. Accordingly, section 61.313(a) of the Texas Education Code is unconstitutional to the extent that it regulates this use of the term "seminary."

The Court's result is the same, but its reasoning is a bit different. It adds a distinction between religious institutions that teach a primarily religious curriculum and those which teach a secular curriculum. That distinction is unnecessary. In my view, a religious institution may teach the curriculum it desires, religious, secular, or mixed, and call itself a "seminary" without first submitting to state regulation.

B. State Regulation of Issuance of Degrees by a Religious Institution

Religious beliefs are immune from government regulation. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Conduct motivated by religious beliefs also enjoys important constitutional protection. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993). However, the Supreme Court has held that religiously motivated conduct is not always immune from state regulation. For example, states may ban the taking of controlled narcotics as a

religious practice. *Employment Div. v. Smith*, 484 U.S. 872, 890 (1990). Government prohibition of the religious practice of polygamy is not contrary to the constitutional right to religious freedom. *Reynolds v. United States*, 98 U.S. 145, 164-66 (1879). The Amish are required, as are other employees, to pay social security taxes even though their faith precludes their participation in government support programs. *United States v. Lee*, 455 U.S. 252, 258-61 (1982); *see Cantwell*, 310 U.S. at 303-04. And church-affiliated day care facilities generally are not exempt from compliance with regulations to protect the health and safety of the children in their care. *State v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692, 696-97 (Tex. 1984). To implicate religious Free Exercise Clause protections, the conduct at issue must be motivated by religious beliefs, which underlies the debate over whether placing "Ph.D." at the top of graduation parchment is religiously motivated conduct. *See Lukumi*, 508 U.S. at 532.

The Supreme Court has developed different levels of scrutiny to apply to state regulations that burden religious conduct. Laws that target religious practices are subject to the most rigorous constitutional scrutiny under religion clause jurisprudence. *Id*. at 533. Such state burdens must be narrowly tailored to satisfy a compelling governmental interest. *Id.*; *Smith*, 494 U.S. at 878-79. Laws that substantially burden a person's exercise of religion, even without expressly targeting religious practices for regulation, are likewise subject to strict scrutiny. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) ("The Appeals Commission does not seriously contend that its

denial of benefits can withstand strict scrutiny; rather it urges that we hold that its justification should be determined under the less rigorous standard . . . . We reject the argument again today."). State action that does not target religion or substantially burden religious conduct but only incidentally burdens religious practices may pass constitutional muster if it is otherwise valid and does not impact religion disparately, i.e., the laws are neutral and generally applicable. *Smith*, 494 U.S. at 878 ("[I]f prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). The Supreme Court rejected the argument that neutral and generally applicable laws that incidentally burden religious practices are subject to strict scrutiny and suggested that a reasonable relationship test determines whether they are constitutional. *See id*. at 885-86 & n.3.

The Supreme Court established these standards in several cases over the years. Although the opinions have been the subject of an active discussion in legal publications, the Supreme Court's pronouncements are binding until changed. *See* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633 (2004); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25 (2000); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989). In the seminal case of *Sherbert v. Verner*, the Supreme Court

held that a substantial burden on the exercise of religious beliefs is subject to strict scrutiny. 374 U.S. 398, 402-03 (1963). A member of the Seventh-day Adventist Church quit employment that required her to work on her Saturday sabbath, and was subsequently denied unemployment benefits for declining without "good cause" to accept other employment that also required work on Saturday. *Id*. at 406. The Court framed the issue as "whether some compelling state interest enforced in the eligibility provisions of the . . . statute justifies the substantial infringement of the appellant's First Amendment right." *Id*. Finding no compelling governmental interest at issue, the Court held that the denial of unemployment benefits violated the plaintiff's free-exercise rights. *Id*. at 406-07; *see Thomas*, 450 U.S. at 718.

In 1990, the Supreme Court addressed an incidental rather than substantial infringement on religious conduct. Explicitly addressing for the first time religious conduct restricted by a state criminal law of general applicability, the Supreme Court in *Smith* applied a lower standard to the constitutional challenge in that case than it did in *Sherbert*. 494 U.S. at 885-86. Two members of the Native American Church brought a free exercise challenge to an Oregon law criminalizing the "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner." *Id*. at 874 (referring to ORE. REV. STAT. § 475.992(4) (1987)). The plaintiffs were discharged from their jobs for ingesting peyote, a "controlled substance" under Oregon law, for sacramental purposes during a Native American Church ceremony. *Id*. They claimed the Oregon law was unconstitutional as applied to them because it interfered with their exercise of religion. *Id*.

The Court reaffirmed that "first and foremost" the Free Exercise Clause means "the right to believe and profess whatever religious doctrine one desires," and precludes "all 'governmental regulation of religious *beliefs* as such.'" *Id*. at 877 (quoting *Sherbert*, 374 U.S. at 402). Distinguishing the regulation of religious beliefs from the regulation of conduct, the Court observed that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id*. at 878-79. The right of free exercise "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879 (quoting *Lee*, 455 U.S. at 263 n.3). To require strict scrutiny of the criminal statute in the case "would produce . . . a private right to ignore generally applicable laws . . . [which] is a constitutional anomaly." *Id*. at 886. The Court held that neither the text of the Constitution nor Court precedent require that states allow use of a controlled substance as a religious practice. *Id*. at 887-88.

The Court expressly declined to extend the strict scrutiny balancing test of *Sherbert* to govern "the analysis of generally applicable prohibitions of socially harmful conduct." *Id*. at 889-90. Thus, the state need not establish a compelling interest to institute incidental burdens on a person's religious practices, so long as it does so through a neutral and generally-applicable criminal law that does not otherwise violate the Constitution. *Id*.[8]

[8] Distinguishing its prior holdings in Free Exercise Clause cases, the Supreme Court stated that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Smith*, 484 U.S. at 881 (citing, among others, *Cantwell*, 310 U.S. at 304-07; *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and *Wisconsin v.*

The Court affirmed the holding in *Smith* three years later in *Lukumi*, 508 U.S. 520. *Lukumi* involved a set of city ordinances that prohibited the religious sacrifice of animals by the Santeria religion and imposed criminal sanctions for their violation. *Id*. at 525-28. The Court reaffirmed "the general proposition that a law that is neutral and of general applicability" and only *incidentally* burdens religious practices need not be narrowly tailored to advance a compelling government interest. *Id*. at 531-32. The city ordinances at issue were held unconstitutional, however, because they were neither neutral nor generally applicable but targeted the religious practices of the Santeria religion. *Id*. at 541, 545-46.

In *Lukumi*, the Court observed that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id*. at 533. Although passing facial review, the laws in question were not neutral because Santeria worship was the "object" or "target" of the city's ordinances. *Id*. at 534-40. The Court determined that the "design" of the laws accomplished "a religious gerrymander, an impermissible attempt to target petitioners and their religious practices." *Id*. at 535 (citation omitted).

Addressing the "general applicability" requirement, the *Lukumi* Court observed that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief" and that this principle "is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id*. at 543. Although the Court did not define the standard for general applicability, the Court held that "these ordinances fall well below the minimum

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Yoder, 406 U.S. 205 (1972)). The Court determined that *Smith* did not present a "hybrid rights" case, and therefore did not elaborate on the exception.

standard necessary to protect First Amendment rights." *Id*. In arriving at this conclusion, the Court observed that the ordinances were vastly underinclusive and included many secular exemptions. *Id*. at 543-46. Failing both the neutrality and general applicability prongs, the *Lukumi* Court applied "the most rigorous of scrutiny" to the City of Hialeah's ordinances and held them unconstitutional because they were "designed to persecute or oppress a religion." *Id*. at 547.

The parties disagree which level of scrutiny should apply to section 61.304 of the Education Code. HEB Ministries contends that because the State's regulatory scheme provides for secular exemptions, but not religious ones, it is not neutral and, accordingly, the statutory scheme must be analyzed under strict scrutiny. *See Lukumi*, 508 U.S. at 537, 543-46; *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999). Specifically, HEB Ministries points to section 61.303 of the Education Code, which exempts some institutions from being required to have a Board-issued certificate of authority if they have been accredited by a state approved accrediting agency. HEB also cites section 61.313, which exempts some educational institutions from the prohibition on protected terms if they used the terms "college" or "university" in their title prior to September 1, 1975. TEX. EDUC. CODE §§ 61.303, 61.313. HEB Ministries further contends strict scrutiny applies because this is a hybrid rights case involving multiple constitutional claims, including claims based on the Free Speech Clause, Free Exercise Clause, and Establishment Clause. *See Smith*, 494 U.S. at 881.

The State contends that section 61.304 is neutral and generally applicable, and therefore under *Smith*, this Court must not apply the *Sherbert* strict scrutiny analysis. According to the State, the laws at issue apply to all private postsecondary educational institutions—religious and secular

alike—that grant postsecondary academic degrees. The State also contends there is no evidence that the object of the statutory scheme was to infringe upon or restrict practices because of their religious motivation or to suppress religious beliefs.

As explained in *Lukumi*, the beginning point is the statute's text, for the minimum requirement of neutrality is that a law not discriminate on its face. *Lukumi*, 508 U.S. at 533. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. *Id*. A facial reference to religion in a statute does not necessarily render it presumptively unconstitutional, *see Locke v. Davey*, 540 U.S. 712, 725 (2004), nor is facial neutrality alone determinative. *Lukumi*, 508 U.S. at 533-34. The Free Exercise Clause, like the Establishment Clause, "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971), and covert suppression of particular religious beliefs. *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring); *see Lukumi*, 508 U.S. at 534.

According to Tyndale, section 61.304 is unconstitutional because it forces Tyndale to submit to the State's regulations in order to award college degrees to describe the educational attainment of its students. *See Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Section 61.304 precludes private postsecondary institutions from awarding degrees unless the Board has issued the institution a certificate of authority, and to obtain such a certificate requires

submission to the twenty-one standards governing curriculum, faculty, and school governance. TEX. EDUC. CODE § 61.304.

The Legislature explained its purposes for enacting these requirements for private postsecondary education institutions. "It is the policy and purpose of the State of Texas to prevent deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees . . . ." *Id.* § 61.301. The Legislature also explained:

> Because degrees and equivalent indicators of educational attainment are used by employers in judging the training of prospective employees, by public and private professional groups in determining qualifications for admission to and continuance of practice, and by the general public in assessing the competence of persons engaged in a wide range of activities necessary to the general welfare, regulation by law of the evidences of college and university educational attainment is in the public interest. To the same end the protection of legitimate institutions and of those holding degrees from them is also in the public interest.

Id.

This Court recognized recently, quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), that "education is perhaps the most important function of state and local governments." *Neely v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005). The United States Supreme Court held that Congress' stated purpose in enacting the Higher Education Act of assisting colleges in ensuring that large numbers of youth obtain educations is a "legitimate secular objective entirely appropriate for governmental action." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). The Supreme Court further explained that "[t]here is no doubt as to the power of a State, having high responsibility for education for its citizens, to impose reasonable regulations for the control" of education. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *see also Lemon v.*

Kurtzman, 403 U.S. 602 (1971); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). And the New Jersey Supreme Court held that the privilege of granting degrees, evidential of academic achievement, is "very intimately related to the public welfare, and is unquestionably subject to regulation by the State." *Shelton Coll. v. State Bd. of Educ.*, 226 A.2d 612, 618 (N.J. 1967) (quoting ELLIOTT, THE COLLEGES AND THE COURTS 200 (1936)). The purpose of ensuring the quality of postsecondary education provided by institutions in this State and protecting the integrity of college degrees issued therefrom is plainly within the State's substantial interest in education.

The Legislature's objective is to ensure that the granting of a degree is a meaningful act grounded in established curricular and instructional standards and that persons who rely on a postsecondary degree, lawfully issued by a Texas institution, may accurately presume a level of competence and qualification. *See* TEX. EDUC. CODE § 61.301. The Legislature enforces this objective in education, an area in which it has a substantial and legitimate interest. *See Yoder*, 406 U.S. at 213; *Neely*, 176 S.W.3d at 753. Moreover, all postsecondary institutions, whether secular or religious, private or public, must submit to the State's standards to grant college or graduate degrees. *See* TEX. EDUC. CODE §§ 61.0512, 61.304; 19 TEX. ADMIN. CODE § 7.7(13) (requiring certain degree programs at private postsecondary institutions to include "Humanities and Fine Arts, Social and Behavioral Sciences, and Natural Sciences and Mathematics" as well as "courses to develop skills in written and oral communication"). An institution may operate outside those standards if it chooses to use nomenclature on its graduation documents other than college or graduate degrees (e.g., bachelor's level certificate), but to issue degrees it must comply with public standards. There is no disparate treatment of any category of institutions.

The law here is neutral and generally applicable and prohibits the unauthorized issuance of college and graduate degrees, currently enforced by both civil and criminal penalties. The Supreme Court held in *Smith* that individuals must comply with valid laws prohibiting conduct that the State is free to regulate. 494 U.S. at 878-79. In this case, I do not believe the Constitution bans states from promulgating generally applicable standards that must be met before postsecondary institutions may confer degrees on its students.[9]

The Office of the Attorney General for the State of Texas has opined on this very issue: whether rights under the Free Exercise Clause permit a religious organization to operate a degree-awarding university without compliance with state standards. Op. Tex. Att'y Gen. No. JC-0200 (2000). Attorney General John Cornyn concluded that "the application to religious educational institutions of state laws regulating the awarding of degrees does not violate the law restricting governmental burdens on the free exercise of religion. *Id.*[10]

The only other state supreme court to address this issue also reached the same outcome. The Tennessee Supreme Court held that the Tennessee Postsecondary Education Authorization Act's prohibition on the issuance of degrees by postsecondary institutions, unless they complied with state

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[9] The Southern Baptist Convention's theological seminary agrees that pursuant to its constitutional interest in education, the State may "forbid institutions from using the words 'bachelor's degree,' 'master's degree,' etc., unless certain defined program requirements are satisfied." Brief for Southwestern Baptist Theological Seminary as Amicus Curiae at 14.

[10] The Attorney General's opinion considered the Supreme Court's free exercise jurisprudence. A Texas statute required application of the strict scrutiny test for substantial government burdens on religious practices. TEX. CIV. PRAC. & REM. CODE § 110.001 et seq. This mimicked the standard required by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). Although I do not think the result here would change if the statute applied, the statute is inapplicable as its effective date was after the accrual of the cause of action in this case. *See* TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.

standards, did not violate the Free Exercise Clause of the First Amendment. *McLemore v. Clarksville Sch. of Theology*, 636 S.W.2d 706 (Tenn. 1982). It held that the granting of degrees is "unquestionably subject to regulation by the State" and is not a religious activity. 636 S.W.2d at 709; *see Shelton Coll. v. State Bd. of Educ.*, 226 A.2d 612 (N.J. 1967) (rejecting a claim that the First Amendment right of free speech prohibited the state from regulating the power to confer a bachelor's degree).

To the extent an institution desires to enter into this sphere of legitimate state regulation—e.g., the granting of college, university, and graduate degrees by private postsecondary educational institutions—it must comply with state mandates that are not unnecessarily intrusive and are prompted by legitimate objectives. *See Smith*, 494 U.S. at 878-79; *Lee*, 455 U.S. 252, 261 (1982). A contrary conclusion would allow entities, regardless of their motives, to circumvent the statutory requirements under the guise of religious practices by issuing degrees supported by little or no meaningful educational attainment. This would undermine the legitimate objectives of precluding issuance of fraudulent degrees and ensuring that society could rely on the attainment of a college degree as evidence of meaningful postsecondary educational accomplishment.

Because in this case Tyndale is engaging in commercial conduct the State is free to regulate—the granting of educational "degrees," "associate degrees," "bachelor's degrees," "master's degrees," and "doctorate degrees,"—I conclude that section 61.304 of the Education Code does not offend the Free Exercise Clause of the United States Constitution. *See id.* at 878-79; *Lukumi*, 508 U.S. at 531-33.

The plurality concludes that Tyndale has a constitutional right to issue college and graduate degrees without compliance with the Legislature's standards. Of course, Tyndale does not frame its case in this fashion because the idea in this context that only one type of postsecondary institution, a seminary, has an unfettered constitutional right to put the title "college degree" at the top of its graduation documents, without regard to compliance with public standards, is a tenuous notion. Instead, Tyndale enmeshes its argument on this issue with the bedrock principle that the State cannot regulate the doctrinal beliefs and teachings of a church's school. Wrapped in this theological flag, Tyndale's arguments then focus on religious beliefs and bury the real issue of the appropriate words to title a graduation document beneath it. I disagree that the Constitution bars the Legislature from establishing generally applicable standards for the granting of postsecondary educational degrees. This question concerns conduct—whether Tyndale can put "college degree," with no disclaimer or explanation that it does not comply with public standards at the top of its graduation documents. No one, including the Board, disputes Tyndale's right to believe and teach whatever it chooses and hire whomever it desires to do so.

Of course, it sounds patently offensive to religious freedoms to assert that the State is barring Mother Teresa and Reverend Billy Graham from teaching at a seminary, and if correct, it would be. But doctrine and instruction are not tantamount to stamping a title on a piece of parchment handed out at graduation. Governments cannot regulate what a seminary teaches, who it hires to teach, or how its administration is structured. These matters are central to the seminary's beliefs and convictions, and the freedom to believe as one chooses is absolute. See *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Typing the letters "Ph.D." on a parchment is an act that is not inherent to

Tyndale's religious beliefs or engaged in for religious reasons, and should not be accorded constitutional protection under the religion clauses. *See Smith*, 494 U.S. at 877. The Legislature could decide to allow it, but the Constitution does not require it. The plurality strains to persuade that because the Board does not allow Tyndale to confer degrees without compliance with the statutes, that it is dictating the doctrine that may be taught at the seminary. I remain unconvinced.[11] Tyndale, however, is correct that it should be able to use meaningful designations on "official looking paper" to convey what it believes to be substantial educational achievement. (*See* infra, Section III). This does not require, as the plurality concludes, creation of a constitutional right of religious, but not non-religious, postsecondary institutions to issue college and graduate degrees. Although different from this case, the plurality's reasoning would grant a constitutional right to a religious group to confer a doctor of philosophy degree on a graduation parchment after providing an hour of instruction.

The Education Code's broad definition of the term "degree" precludes use of many words similar to "degree." Tyndale asserts that section 61.304 of the Education Code, by virtue of the definition of "degree" in 61.302(1), regulates virtually all useful terminology that it may use to convey the educational achievement of its students. Although I believe that the granting of degrees is conduct the Legislature may regulate, the State's attempt to regulate Tyndale's use of any language suggesting a similar or competing level of educational competency also must be valid under the Free Speech Clause of the First Amendment.

[11] The plurality's rationale is in tension with the Supreme Court's *Smith* and *Lukumi* decisions.

III

Free Speech

HEB Ministries contends that the State's regulatory scheme violates its rights to free speech under the First Amendment of the United States Constitution because the State has usurped virtually all terms it could reasonably use to describe the educational achievement of its students. *See* U.S. CONST. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech . . . ."); TEX. CONST. art. I, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."). The State, in contrast, asserts that the speech at issue is commercial speech and, pursuant to federal constitutional law, the State has a substantial interest in curtailing the proliferation of diploma mills and assuring that indicia of educational attainment are accurate, and that the challenged statutes directly advance that governmental interest. HEB contends that, even if the speech at issue is commercial, the State must still show that the speech restrictions are narrowly drawn to serve that substantial interest. Tyndale's contention is that the State's regulation of any title, word, appellation, and other terminology not only "equivalent" to degree but suggesting a course of study toward a postsecondary degree or "its equivalent" is an unconstitutionally broad prohibition on Tyndale's free-speech rights.

The court of appeals agreed with the State that its regulation of the terms "degree," "associate," "bachelor," "master," "doctor," and other "equivalents" in sections 61.304 and 61.302(1) targets commercial speech. 114 S.W.3d at 631-32. The Supreme Court's case law confirms that determination. Commercial speech is speech that seeks to propose a commercial

transaction or is expression that serves the economic interests of the speaker. *Bd. of Trs. v. Fox*, 492 U.S. 469, 473 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The First Amendment's protection of commercial speech is based on advertising's informational function, which equips persons to act in their own best interests. *Cent. Hudson*, 447 U.S. at 562-63. To help fulfill this goal, there is a "constitutional presumption favoring disclosure over concealment," because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108, 111 (1990); *see Ibanez v. Fla. Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). The First Amendment presumes that some accurate information is better than no information at all. *Cent. Hudson*, 447 U.S. at 562. On this basis, the Supreme Court held that use of the designations CPA (certified public accountant) and CFP (certified financial planner) are commercial speech. *Ibanez*, 512 U.S. at 143-44. The terms "Dr." and "Ph.D." have also been held to be commercial speech. *Strang v. Satz*, 884 F. Supp. 504, 507 (S.D. Fla. 1995). The title "M.D." has also been analyzed under the commercial speech doctrine. *State ex rel. State Bd. of Healing Arts v. Thomas*, 97 P.3d 512, 523-24 (Kan. Ct. App. 2004). The conferral of degrees is largely a commercial activity and a privilege granted to institutions by the states in which they operate. *See Nova Univ. v. Educ. Inst. Licensure Comm'n*, 483 A.2d 1172, 1181 (D.C. 1984) ("degree conferral is business conduct, a corporate privilege conferred by the state of incorporation," and accordingly, "[e]ducational institutions have no inherent or constitutional right to confer degrees"). Courts have treated the

display of terms such as "fellow," "associate fellow," "board certified," "certified," and "specialist" as commercial speech. *See Borgner v. Brooks*, 284 F.3d 1204, 1207, 1210 (11th Cir. 2002) (relying upon the Eleventh Circuit's treatment of the title "psychologist" in *Abramson v. Gonzalez*, 949 F.2d 1567, 1574-75 (11th Cir. 1992)); *Potts v. Hamilton*, 334 F. Supp. 2d 1206, 1209, 1213-15 (E.D. Cal. 2004); *Bingham v. Hamilton*, 100 F. Supp. 2d 1233, 1234-35, 1239 (E.D. Cal. 2000) (all three cases involve statutes prohibiting dentists, who specialize in implant dentistry and are certified by organizations not recognized by the state, from advertizing certain credentials).

Tyndale provides educational and ministerial training courses to its students and the students pay tuition and fees. Tyndale's conferral of titles on its graduating students and advertisement of information about degrees it awards to graduating students is commercial speech.

Restrictions on commercial speech are reviewed under the test established in *Central Hudson*, 447 U.S. 557. The Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id*. at 563. The State may ban commercial speech which concerns unlawful activity or is false, deceptive, and misleading. *Ibanez*, 512 U.S. at 142; *Cent. Hudson*, 447 U.S. at 566. Otherwise, commercial speech may not be restricted unless 1) the government has a substantial interest in restricting the speech, 2) the regulation directly advances the asserted governmental interest, and 3) the speech restrictions are narrowly drawn such that they are no more extensive than necessary to serve that interest. *Cent. Hudson*, 447 U.S. at 566. The Court clarified in *Fox*, 492 U.S. at 480, that the requirement of narrowly constructing the restriction does not compel the state to employ the restriction that is "absolutely the least severe that will achieve the desired end." The law requires that the restriction of commercial speech be in proportion

to the interest served. *Id*. The proponent of the restriction on commercial speech carries the burden of justifying it. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

The parties do not dispute that the speech at issue concerns lawful activity and the Board does not contend that the expression is false. The State contends only that it seeks to regulate Tyndale's potentially deceptive speech. As previously observed, the State's interest in ensuring the quality of postsecondary educational institutions that issue degrees in this state is substantial. And Tyndale does not contest that the State has a substantial interest in regulating private postsecondary education, or that the State may endeavor to assure that degrees accurately portray educational attainment and to prevent the operation of illegal diploma mills. I consider the other two prongs of the test for permissible regulation of commercial speech and determine whether sections 61.304 and 61.302(1) of the Education Code directly advance the State's interest, and whether narrower limitations could be crafted to ensure the potentially misleading information is presented in a nonmisleading manner.

Restricting an unaccredited institution's ability to award degrees directly advances the State's interest because

> degrees and equivalent indicators of educational attainment are used by employers in judging the training of prospective employees, by public and private professional groups in determining qualifications for admission to and continuance of practice, and by the general public in assessing the competence of persons engaged in a wide range of activities necessary to the general welfare.

TEX. EDUC. CODE § 61.301. The Legislature may also address conduct that attempts to accomplish indirectly that which is prohibited directly in the statute. Thus, for example, the State may preclude an institution that does not meet its standards from lawfully calling its graduation documents

master's degrees yet representing through other means that "certificates" it issues have complied with the State's educational standards for a master's degree.

Tyndale responds that the State's nearly complete usurpation of reasonable terms to describe postsecondary educational attainment is not tailored to directly serve the State's objectives. Unless certified by the Board, the statute bars a postsecondary institution's use of "*any* title or designation, mark, abbreviation, appellation, or series of letters or words, including associate, bachelor's, master's, doctor's, *and their equivalents*" to describe private postsecondary achievement which leads to a degree or partially fulfills a degree program "or its equivalent." *Id*. § 61.302(1) (emphasis added). The State responds that HEB could issue "certificates," "advanced certificates," "diplomas," or "higher diplomas" so long as it refrains from describing them as equivalent to an associate's, bachelor's, master's, or doctor's degree. The State also contends that the statutes are narrowly tailored because HEB Ministries is still free to advertize its qualifications, services, and missions, so long as it does not use the protected terms—degree, associate, bachelor's, master's, and doctor's—that suggest approval by the State and satisfaction of minimum educational standards that society has come to expect of these terms. The State also argues the statutes are narrowly tailored because Tyndale could not be fined for, and would not be prohibited from issuing, for example, a "diploma" or "certificate" because these terms by themselves do not signify, purport to signify, and are not generally taken to mean "a program of study leading to an associate, bachelor's, master's, or doctor's degree or its equivalent."[12] *See id*.

[12] Webster's Dictionary defines "equivalent as similar or alike in significance or import." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 769 (1961). The Oxford Dictionary defines "equivalent" as having equal or corresponding import or meaning. THE OXFORD ILLUSTRATED DICTIONARY 283 (2nd ed. 1975).

A plain reading of the statute conveys a much broader prohibition than the Board concedes. First, under the statute a "degree" includes the protected terms associate, bachelor's, master's, doctor's and degree. *Id*. Generally, the definition requires that for protected words or titles to trigger state regulation, they be described or perceived as leading to a degree at the associate, bachelor's, master's or doctorate level.

The Board asserts that an institution must be certified to use any of these protected terms by themselves because they suggest and are generally understood to indicate that a recipient completed part or all of a program leading to a degree. The statutory language indeed extends that broadly. Second, the statute also defines a "degree" to include any word, title, designation, series of letters, or similar terminology to the protected terms that suggest study toward a state-recognized degree. Further extending the scope of the statute, the Legislature barred use of "any title," "designation," "words," "mark," "series of letters," or "appellation" that conveys study leading to a degree, or any similar posteducational achievement. *Id*. The language of 61.302(1) encompasses virtually every term that could reasonably provide a useful description of educational achievement at a postsecondary educational institutional. The legislation bans unapproved programs from using any of the protected terms, any words, letters, or titles that are similar to the protected terms and any words that suggest a program leading to a college or graduate degree or any words that are similar to the titled programs. The language of section 61.302(1) supports the Board's fines for use of the word "diploma" and "certificate" and provides a basis for fining unaccredited institutions for using the phrases "bachelor's level diploma" and "comparable to an associate's degree." The statute impermissibly bars Tyndale from issuing a master's level certificate or an associate's level diploma,

terms which do not convey state certification of a degree, but do convey postsecondary education accomplishment. A majority of the Court decides that for religious instruction by religious schools, the regulation of educational terminology under the statute's broad definition of degree violates constitutional standards. ____ S.W.3d ____. (In Section III.C., the plurality states that "the use of any words remotely resembling ordinary education terms is risky").[13] The appellations that the public understands to indicate college and graduate level study would all be equivalent or similar to the protected terms and "their equivalents."

The Board's concession that Tyndale may use "certificate" or "diploma" on its graduation documents without state approval is not helpful. Under the statute, the words "diploma" and "certificate" certainly are "titles," "words," or "appellations" and they are similar to the protected term "degree." Thus, by its terms the statute bars any use of "diploma" and "certificate" that may indicate completion of all or part of a program leading to a degree. However, even if the Board's concession is correct under the language of the statute, the concession is not useful without being able to tie the terms "diploma" or "certificate" to some description of a recognized or similar level of postsecondary educational attainment, and the statute precludes making that connection. For example, Tyndale could likely issue a "diploma of theological studies" which would not convey its apparent belief that its program is comparable to college level course work because diplomas generally are issued at the high school educational level. *See* Brief for Independent Colleges and Universities of Texas, Inc. as Amicus Curiae at 12-13 (explaining that there is a public perception

[13] We disagree on which constitutional provisions are infringed. I would base the decision on commercial speech rights, and the plurality would decide this point under the Free Exercise Clause.

that a degree qualifies an individual to perform in their chosen field of study.)[14] If Tyndale issued a "diploma of bachelor's level studies", which would more accurately convey its contentions about its program, that title would violate the statute. The Board concedes the use of terms that would not allow Tyndale to accurately describe its belief about the level or quality of it programs. The Board's concession does not resolve the free speech problems Tyndale raises.

Section 61.302(1)'s prohibitions on First Amendment expression further preclude private postsecondary educational institutions from advertising comparisons with state-certified institutions. For example, the Board objects to Tyndale's description of its Diploma of Theological Studies as "stronger . . . than the typical Bachelors in Biblical Studies." Such a description suggests that Tyndale's program is better than state-certified Bachelor's Degree programs.[15] Fining private institutions for making legitimate comparisons that their programs are similar to or better than state-certified programs leading to a degree does not equip persons to act in their own interests. Instead, it punishes institutions for disclosure of truthful, relevant information that is likely to make a positive contribution to decision making. *See Peel*, 496 U.S. at 108; *Cent. Hudson*, 447 U.S. at 567-68. This restriction contradicts the First Amendment's purpose for commercial speech.

Moreover, the applicable portions of sections 61.304 and 61.302(1) operate as a ban on not only potentially misleading speech but also on truthful speech. Tyndale issued diplomas and certificates which may be as good as or better than some state-certified programs, and other private

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[14] The Independent Colleges and Universities of Texas, Inc. is a nonprofit association of the State's accredited private colleges and universities. It represents the majority of the State's private undergraduate institutions.

[15] If the description indicated that Tyndale's program in theological studies was certified by the State, the speech would be false and subject to legitimate regulation.

institutions, whether religious or nonreligious, would have the same complaint that legitimate comparisons are being improperly silenced. The regulation is more extensive than necessary to serve the State's legitimate interests. Under 61.302(1), Tyndale cannot use any terms that are similar to the protected terms, and it cannot describe its programs as similar to or better than state-approved programs leading to a degree. The statute cuts an impermissibly broad swath through protected commercial speech.

As previously stated, the standard for judging restrictions on commercial speech is that the restriction be in proportion to the interest served. *Fox*, 492 U.S. at 480. The availability of more limited alternatives that are less restrictive of speech is strong support for a conclusion that the regulation does not directly advance the desired goal. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). The Supreme Court's analysis indicates that courts should inquire whether the government could achieve its interests in a manner that does not restrict speech or is less restrictive of commercial speech. *Id*. The answer to this inquiry will help illuminate whether the regulation directly advances the governmental interest and is more extensive than necessary to serve that interest. *Id*. at 371, 373 (noting that "we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so" and that even with commercial speech, "regulating speech must be a last—not first—resort.").

Tyndale notes that narrower limitations could achieve the Legislature's desired objectives by requiring, for example, reasonable disclaimers or disclosures that certificates and diplomas Tyndale may issue are not approved by the State and that Tyndale itself is not accredited by the State. The Supreme Court has recognized "the possibility that some limited supplementation, by way of

warning or disclaimer or the like, might be required" rather than a ban on commercial speech. *Bates*, 433 U.S. at 384; *see, e.g.*, *Peel*, 496 U.S. at 110 (providing similar disclosure examples); *Cent. Hudson*, 447 U.S. at 570 (holding the state's interest could be addressed by including accurate descriptive information rather than banning the speech); *Strang*, 884 F. Supp. at 510 (holding the same with respect to statute that prohibited use of "Ph.D." or the title "doctor" unless obtained from an institution recognized by the state). Such measures may achieve the State's desired objective and be more likely to provide useful and accurate information to contribute to the public's decisionmaking than would banning all such information from the institution. *See Ibanez*, 512 U.S. at 142.[16] In the present context, reasonable disclaimers regarding the theological certificates and diplomas could serve to better inform the public of Tyndale's students' educational achievements than would a complete ban on their ability to accurately describe such achievements. The Education Code currently includes such a disclosure for the granting of honorary degrees. TEX. EDUC. CODE § 61.312. Thus, I conclude the State has not carried its burden of showing that its regulation of this commercial speech directly advances its interest because the regulation is more extensive than necessary to serve the Legislature's legitimate purposes. *See Cent. Hudson*, 447 U.S. at 570.

IV

Conclusion

Accordingly, I would reverse the court of appeals judgment and vacate the fines assessed by The Texas Higher Education Coordinating Board against HEB Ministries.

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[16] Some states have adopted this scheme and allow unaccredited religious institutions to grant degrees if certain disclosure requirements are met. *See, e.g.*, FLA. STAT. § 1005.06(f)(3); MD. CODE EDUC. § 11-202(c)(2).

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J. Dale Wainwright
Justice

OPINION DELIVERED: August 31, 2007