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

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN, concurring in part and dissenting in part.

The Board imposed a civil penalty against Tyndale for illegally issuing thirty-four degrees. Tyndale chose not to appeal that administrative penalty or the Board's findings. Instead, HEB Ministries and two unrelated entities—Southern Bible Institute and Hispanic Bible Institute—launched a facial constitutional attack on portions of the Education Code. Specifically, HEB Ministries and its co-plaintiffs sought a declaration that sections 61.302(1) and 61.304 of the Education Code violated rights guaranteed by the Due Process, Free Speech, Establishment, and Free Exercise clauses of both the United States and Texas constitutions. Both the trial court and the court of appeals concluded that the statute regulating the issuance of degrees did not violate HEB

Ministries' constitutional rights. Today, however, a majority of the Court—for differing reasons—concludes otherwise. Because the statute does not unconstitutionally impinge on HEB Ministries' freedom of speech or rights guaranteed by the Establishment Clause and the Free Exercise Clause, I respectfully dissent. I agree with the Court that section 61.313's restriction on the use of the name "seminary" by schools offering only religious programs of study violates the Free Exercise Clause, and I concur in that portion of the Court's judgment.[1]

I
Establishment Clause

I agree with JUSTICE WAINWRIGHT that this case is more appropriately analyzed under the Free Exercise Clause than the Establishment Clause. The Establishment Clause forbids any "law respecting an establishment of religion." U.S. CONST. amend. I. In *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 695 (Tex. 1984), we held that an establishment clause challenge to a statute permitting state licensing and regulation of child-care facilities, as applied to church-operated facilities, was "misplaced." We observed:

> The Establishment Clause cases address the issue of whether some form of government *aid*, either direct or indirect, to a religious institution violates the Establishment Clause.
>
> Unlike the traditional Establishment Clause cases, this case involves government *regulation* of a child-care institution which is part of the church ministry. This distinction is important for two reasons. First, to accept [the church's] argument and invalidate the licensing and regulatory scheme because of "excessive entanglements" would create a dilemma in applying the three-pronged Establishment

[1] I join most of part III-B of the Court's opinion, but I do not agree with its proposition that "[e]ither way, the statute in its application to schools offering only religious instruction targets religious practices, discriminating between those that comply with state standards from those that do not, and is not merely a neutral regulation of post-secondary education."

> Clause test; the second prong would be at odds with the third. Requiring nonreligious childcare facilities to comply with the state licensing and regulatory scheme while exempting religious facilities would result in unequal state treatment of the two classes of institutions. This unequal treatment could, arguably, be impermissible under the second-prong of the Establishment Clause test because the primary effect would be to advance religion.
>
> Second, state licensing and regulation is a type of entanglement that differs from the entanglement discussed in the traditional Establishment Clause cases. In those cases, the State must examine and determine what programs are religious and what programs are secular to ensure that government aid reaches only the nonreligious ones. In our case, the state regulatory scheme prohibits inquiry into the religious content of the homes' curriculum. The purpose of these regulations is to assure that all child-care facilities, secular and nonsecular, meet certain minimum standards in areas such as financial solvency, staff-child ratio, nutrition and medical care.

People's Baptist Church, 683 S.W.2d at 695 (citations omitted). We concluded that the licensing requirement did not offend the Establishment Clause and noted that "[a] more appropriate and direct means of questioning the constitutionality of this government regulation is through . . . the Free Exercise Clause." *Id*. at 695.

Such is the case here. As in *People's Baptist*, requiring nonreligious higher-education institutes to comply with the accreditation scheme while exempting religious institutions would result in unequal treatment of the two, an impermissible advancement of religion under the second prong of the *Lemon* test. *Id*.; *cf. Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)(noting that "an accommodation [for religious observance] must be measured so that it does not override other significant interests"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 396-97 (1990) (noting the irony that exempting religious activities from tax, as plaintiffs requested, would require the state to engage in the arguably impermissible task of determining which expenditures

were religious and which were secular). Moreover, this case involves state regulation, not aid. The regulatory oversight at issue here is designed to ensure that all educational institutions—religious and secular alike—comport with minimum educational standards for issuing degrees. Subchapter G governs a secular matter: the creation of a system that recognizes certain types of post-secondary educational achievement. Accreditation signals not the approval of the school's message, but a certification that the institution meets a variety of educational standards, and any institution—religious or otherwise—may apply for authorization to issue degrees. Accordingly, as in *People's Baptist*, a "more appropriate and direct means of challenging the constitutionality" of this regulation is through the Free Exercise Clause. *People's Baptist*, 683 S.W.2d at 695.

Even if the Establishment Clause were implicated, however, the statutory scheme here passes muster.

> Under *Lemon*, a government practice is constitutional if: (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not excessively entangle the government with religion.

Williams v. Lara, 52 S.W.3d 171, 189 (Tex. 2001). The plurality concedes that the accrediting statute has a secular purpose and that its primary effect neither advances nor inhibits religion. Instead, the plurality concludes that it is "beyond serious dispute that the statute clearly and excessively entangles the government in matters of religious instruction." ___ S.W.3d at ___.

In *Agostini v. Felton*, the Supreme Court noted that Lemon's "excessive entanglement" prong was more properly analyzed as a subset of the second prong: whether the regulation's primary effect advanced or inhibited religion. *Agostini*, 521 U.S. 203, 232-33 (1997). The Court also noted that "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion," and that

because "[i]nteraction between church and state is inevitable, . . .[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Id*. at 233.

At least one state court has explored the contours of this inevitable interaction between church and state in a context similar to ours. As the plurality notes (and respectfully disagrees with), the Tennessee Supreme Court upheld broad state regulation of a religious school that issued only religious degrees. *State v. Clarksville School of Theology*, 636 S.W.2d 706, 711 (Tenn. 1982). The court's reasoning is instructive:

> [The Tennessee statute] places neither a direct nor indirect burden upon the free exercise of religion by the defendants nor threatens an entanglement between the affairs of church and state. . . . [T]he Act does not regulate the beliefs, practices or teachings of any institution; it merely sets forth minimum standards which must be met in order for an institution to be authorized to issue degrees. Moreover, the evidence shows that the granting of degrees is a purely secular activity. It is only this activity that brings the School under the regulation of the Act.
> . . .
> The School can choose to not comply with the Act and yet may continue to train ministers as it chooses; such non-compliance with the Act will simply prohibit the School from granting degrees.

Id. at 709; *see also N.J. State Bd. of Higher Educ. v. Bd. of Dirs. of Shelton College*, 448 A.2d 988, 997-998 (N.J. 1982) (rejecting Establishment Clause challenge to a statute regulating post-secondary education, as there was no excessive entanglement between church and state).

Similarly, the regulations here, while comprehensive, are entirely voluntary and do not purport to interfere with the parochial mission of any school. *See, e.g., Roemer v. Md. Public Works Bd.*, 426 U.S. 736, 764 (1976) (plurality op.) (determining that contacts between state and colleges for purposes of administering aid program "are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditations by the State").

The plurality contends that "[t]here is no special provision for religious instruction, and not only is the Board given no discretion to treat such education differently than secular education, it has given no indication that it would be willing to do so if it could." ___ S.W.3d at ___. But the statute, as well as the Coordinating Board's accompanying regulations, expressly permit religious institutions to be certified without meeting the standard qualifications for accreditation. Section 61.308(e) provides:

> If, after a good-faith effort, an institution cannot achieve accreditation within the period of time prescribed by the board, the institution may appeal for extension of eligibility for certification because of having been denied accreditation *due to policies of the institution based on religious beliefs* or other good and sufficient cause as defined by the board. *The board shall consider the application of any accreditation standard that prohibited accreditation of the institution on the basis of religious policies practiced by the institution as a prima facie justification for extending the eligibility for certification if all other standards of the board are satisfied.*

TEX. EDUC. CODE § 61.308(e) (emphasis added).[2] During the relevant time, the pertinent regulations provided:

> If the board determines that an institution has been unable to achieve accreditation by a recognized agency *on the basis of religious policies practiced by the institution*,

[2] In a footnote, the plurality cites section 61.308(e) and notes the court of appeals' holding that this provision rendered the statutory scheme "unobtrusive." ___ S.W.3d at ___. The plurality brushes this section aside because "[t]he Coordinating Board has not made that argument in its briefs in this Court, and has not cited section 61.308(e), although it did cite a corresponding regulation . . . and pointed out in oral argument that because HEB Ministries has never been evaluated by the State, there has never been an opportunity for 'any court . . . to see if there is indeed a conflict between any of [the State's] requirements and [HEB Ministries'] religious beliefs or practice.'" The plurality also notes that "[t]he Board stops short of saying that it would have – or even could have – offered any special allowances for religious institutions." Regardless of the Coordinating Board's contentions or citations, we may no more ignore this exemption for religious institutions than we may disregard unmentioned, but controlling, precedent.

> the board will consider the institution eligible to apply for a certificate of authority, provided that all other standards are met at the level of accreditation and that *such religious institutions shall be eligible to grant degrees of a religious nature only*.

19 TEX. ADMIN. CODE § 5.215(d)(4) (2003).[3] That Tyndale has "steadfastly refused," 114 S.W.3d at 630, to participate in any of these alternate processes does not make them any less available, and we should not invalidate the statutes "merely because they may be amenable to an unconstitutional application." *Shelton College*, 448 A.2d at 490; *see also Roemer*, 426 U.S. at 761 (noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional [actions]").

The plurality concludes that the State's regulations on degree-granting violate the Establishment Clause because allowing some religious institutions (those that meet accreditation requirements) to grant degrees while forbidding others to do so "clearly effectuate[s] a state preference for one model of religious education over others, a preference that the Establishment Clause does not permit." ___ S.W.3d at ___. The plurality asserts that "[i]t is hard to imagine a more active involvement in religious training than by determining whether it meets the

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[3] The current regulations contain a similar provision:

> The Board shall consider the application of any accreditation standard that prohibits accreditation of an institution solely on the basis of religious policies practiced by the institution as sufficient justification for extending the institution's eligibility for certification to grant degrees of a religious nature only, if the institution:
>
> (A) has applied for and pursued accreditation in good faith;
>
> (B) meets all other standards at the level of accreditation; and
>
> (C) satisfies all other requirements of the Board.

19 TEX. ADMIN. CODE § 7.6 (c) (5) (2007).

comprehensive standards set by the Coordinating Board, and *equally hard to imagine a more direct state sponsorship of religious education than by indicating in every institution's name and on every academic award whether the State approves the programs of study*." *Id.* at ___ (emphasis added). If this is indeed the case, the logical implication is that the State cannot accredit *any* religious colleges or universities that offer degrees in *any* religious discipline,[4] as such accreditation would also appear to run afoul of the Establishment Clause as an impermissible preference under the plurality's analysis. Nor, it seems to me, could the State regulate or license religious institutions operating in other spheres, *e.g.*, church-affiliated broadcasting stations. Further, the plurality's analysis would seem to apply to invalidate state regulation of marriage or adoption, if that regulation was inconsistent with the tenets of a particular religion. The state can regulate in these areas, as I believe it can regulate the issuance of degrees, because allowing religious institutions to participate in secular regulatory schemes simply does not violate the Establishment Clause.

The Supreme Court rejected a similar argument in *Bob Jones University v. United States*, a case in which Bob Jones University contended, among other arguments, that denying it a tax exemption violated the Establishment Clause by preferring religions whose tenets did not require racial discrimination over those that believed racial intermixing was forbidden. *Bob Jones*, 461 U.S. 574, 604 n.30 (1983). The Court held that:

> [i]t is well settled that neither a state nor the Federal Government may pass laws which prefer one religion over another, but it is equally true that a regulation does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions. The IRS policy at issue here is founded on

[4] As Respondents assert, "[i]f these statutes are held to violate the Establishment Clause, a blanket exemption would be required for all religious institutions."

> a neutral, secular basis, and does not violate the Establishment Clause. In addition, . . . the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief.

Id. at 604-05 (citations and internal quotations omitted). I agree with that analysis and would hold that subchapter G, similarly, is founded on a neutral, secular basis and does not violate the Establishment Clause.

II
Free Exercise Clause

I also agree with JUSTICE WAINWRIGHT that subchapter G does not violate the Free Exercise clause. Indeed, the plurality's extended analysis is inappropriate because HEB Ministries does not maintain that the conduct in which it is prohibited from engaging (the issuance of degrees and similar documents) is religiously motivated. As the Supreme Court explained in *United States v. Lee*, the "preliminary inquiry in determining the existence of a constitutionally required exemption" from a neutral law of general application under the Free Exercise Clause is whether compliance with the law "violates [the challengers'] religious beliefs" and thus "interferes with their free exercise rights." *United States v. Lee*, 455 U.S. 252, 256-257 (1982). The cases cited by the plurality affirm this rule. In *Employment Division v. Smith*, the law at issue forbade the religiously motivated use of peyote;[5] *in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[6] the law prohibited the ritual sacrifice of animals demanded by the Santeria religion; even in *Shelton*, the New Jersey Supreme Court case,

[5] 494 U.S. 872(1990).

[6] 508 U.S. 520 (1993)

the plaintiff college alleged that state accreditation was inconsistent with the Bible's command that it reject state licensure.[7]

By contrast here, HEB Ministries is not claiming that accreditation violates any religious principles. HEB Ministries does not contend that its religious tenets require its graduates to hold documents the general public would likely confuse with degrees granted by accredited colleges. HEB Ministries does not allege that there is any religious significance to "degree," "bachelor's," or similar terms. Moreover, the State has not prohibited Tyndale from describing accurately its graduates' achievements. To give but one example, subchapter G would not prohibit a religious institution from issuing a document certifying that "John Doe has completed an advanced course of study in X and is qualified to minister in Y church."

Even assuming that a prohibition on the issuance of degrees (or similarly worded documents) violated HEB Ministries' religious beliefs, its Free Exercise claims would fail because the Coordinating Board would maintain the right to ensure educational standards. As Justice Scalia, writing for the Court, noted in *Employment Division v. Smith*, the Supreme Court 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." *Smith*, 494 U.S. 872, 878-79 (1990).[8] The only exceptions to this rule "have involved not the Free Exercise Clause alone, but the Free Exercise

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[7] *Shelton College*, 448 A.2d at 993.

[8] Here, as JUSTICE WAINWRIGHT notes, there is no doubt that the State is free to regulate postsecondary education, and thus may regulate the issuance of degrees (and degree-like documents) even by those who are religiously impelled to issue them.

Clause in conjunction with other constitutional protections," such as the protection of freedom of speech. *Id*. at 881.

Thus, in order to arrive at the conclusion that subchapter G violates the Free Exercise Clause, the plurality engages in a strained reading of the record and the case law—characterizing the statute as restricting "the communication of religious beliefs" such that the State must have a compelling interest and must tailor its accreditation scheme narrowly. The plurality would implement this heightened scrutiny when "the law *affects* communication." ___ S.W.3d at ___ (emphasis added). But the *Smith* Court used the word "regulate" in discussing this line of cases,[9] and a careful examination of precedent reveals a much higher level of state involvement necessary to implicate the freedom of speech analysis. The examples of "hybrid" freedom of speech and Free Exercise decisions cited in *Smith* involved a discretionary licensing system for religious solicitation, requiring the State to determine whether a given cause was religious[10] and a flat tax on solicitation as applied to dissemination of religious ideas.[11]

The regulations that were struck down under a "hybrid" analysis directly limited religious communication. In contrast, Tyndale and similar institutions are free under subchapter G to say and teach whatever they wish without government involvement—they are merely barred from issuing

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[9] *Smith*, 494 U.S. at 882("There being no contention that Oregon's drug law represents an attempt to regulate . . . the communication of religious beliefs . . .").

[10] *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940).

[11] *Murdock v. Pennsylvania*, 319 U.S. 105 (1943);); *Follett v. McCormick*, 321 U.S. 573 (1944); *see also Swaggart*, 493 U.S. at 387 (discussing *Murdock* and *Follett* and observing that "[s]ignificantly, we noted in both cases that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct.").

a degree misrepresenting the nature of the education they choose to provide. Despite assertions to the contrary,[12] subchapter G cannot fairly be construed as so pervasively, or even substantially, affecting communications as to trigger strict scrutiny, and, thus, even if HEB Ministries' conduct were religiously motivated, subchapter G would not violate the Free Exercise Clause.

III
Free Speech

I disagree with JUSTICE WAINWRIGHT's contention, however, that the State may only regulate "degrees" and not associated terminology like the terms "associate," "bachelor's," "master's," and "doctorate."[13] JUSTICE WAINWRIGHT would hold that the State may regulate a single word—degree—and that all other regulations violate the United States Constitution. This distinction overlooks the significance of the terminology used to connote educational achievement. Words like "bachelor's," "master's", and "doctorate" have acquired meanings that permit them to stand on their own, even absent the noun—"degree"—they are generally understood to modify. When these

[12] The plurality attempts to substantiate its characterization by the following reasoning: "[S]ection 61.304 strongly encourages compliance with state educational standards, which in turn affect the content and operation of religious educational programs, and in that sense . . . affects 'the communication of religious beliefs' . . ." ___ S.W.3d at ___ (citations omitted). As discussed above, the Supreme Court requires a much more direct regulatory relationship to trigger the higher level of scrutiny applied by the plurality. In any case, if forbidding religious schools from falsely representing themselves as meeting the State's neutral, otherwise valid educational standards has a negative impact on those schools' enrollment (and thus on their ability to communicate with students), this would seem merely to be evidence of a preference among potential students for a different type of education, or, at least, for a graduation document that can be passed off as evidence of one. Even a church cannot boost attendance by advertising a raffle and misrepresenting the prize.

[13] The Board assessed a $5,000 penalty for each of the thirty-four violations. Twenty-six of the thirty-four violations involved associate, bachelor, master, and doctoral degrees.

absolute adjectives[14] are used as marks of educational attainment, they represent the conferment of "degrees" and permit, as here, an unaccredited institution's graduates to overstate their credentials.

Additionally, JUSTICE WAINWRIGHT's concurrence goes beyond the protections HEB Ministries itself sought. HEB Ministries has conceded that diplomas in secular disciplines are subject to state regulation. It asserts only that diplomas awarded in religious disciplines are exempt. But if the statute violated the First Amendment's free speech guarantee, any post-secondary institution—whether religiously affiliated or not—would be permitted to award "the equivalent" of doctorates, master's, bachelor's, and associate degrees, in any academic discipline. Imagine a "doctor of engineering," who received his degree from an unaccredited school, hired by the State to inspect and repair bridges. *Cf. Westbrook v. Penley*, No. 04-0838, ___ S.W.3d ___, ___ (Tex. 2007) (holding that tort liability would impinge upon matters of church governance, in violation of the First Amendment, but noting that neither the respondent's nor the public's health or safety were at issue).

Such a holding would strip the Board of authority to regulate "diploma mills," the very evil the Legislature sought to control through the regulatory scheme set forth in the Education Code. *See* TEX. EDUC. CODE § 61.301. As the Legislature noted in enacting the statute:

> 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; it is also the purpose of this subchapter to regulate the use of academic terminology in naming or otherwise designating educational institutions, the advertising, solicitation or representation by educational institutions or their

[14] An absolute adjective is one "having its noun understood, not expressed, as *poor* in *The poor are always with us*." RANDOM HOUSE UNABRIDGED DICTIONARY 7 (2d ed. 1993). One need not say "disease" to further describe a person afflicted with "Alzheimer's."

> agents, and the maintenance and preservation of essential academic records. 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.

JUSTICE WAINWRIGHT correctly recognizes that the speech at issue is commercial speech. As such, it occupies one of the lowest rungs on the First Amendment hierarchy, enjoying only a "'limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Bd. of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). Commercial speech does "no more than propose a commercial transaction" and may be freely regulated. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Supreme Court outlined its method of analyzing the lawfulness of restrictions on commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

In this case, JUSTICE WAINWRIGHT cites but misapplies the *Central Hudson* test by excising its first prong. Because HEB Ministries' speech is misleading commercial speech, it is not protected by the First Amendment. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). As the *Central Hudson* Court noted, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. *The government may ban forms of communication more likely to deceive the public than to inform it . . . .*" *Central Hudson*, 447 U.S. at 563 (emphasis added). Thus, "the government may freely regulate commercial speech that . . . is misleading," *Florida Bar* v. *Went For It*, 515 U.S. 618, 623-24 (1995) (citations omitted), and the remaining *Central Hudson* factors apply only if the speech is not misleading.

The record in this case leaves little doubt that HEB Ministries' speech was misleading. The program from Tyndale's June 1998 Commencement Exercises lists various headings, such as "Doctor of Philosophy," "Doctor of Theology," "Doctor of Ministries," "Master of Theology," "Master of Arts," "Bachelor Level Diploma of Theological Studies," and "Associate of Biblical Studies." Beneath each heading are the names of students who had completed those courses of study. The course catalog nowhere states that Tyndale does not offer degrees, and the catalog in fact conveys the opposite impression. It features department heads and faculty members who identify themselves as "doctors," even though they have only diplomas from Tyndale, an institution without a certificate of authority issued by the Coordinating Board. Faculty members use the familiar abbreviations for degrees, such as "Ph.D." and "Th.D." even though they do not have actual degrees. In its advertising materials, Tyndale boasted that its "[g]raduates are . . . receiving professional pay

increases with Tyndale diplomas, a sign of recognition and acknowledgement." Moreover, the Board found that Tyndale awarded degrees, and HEB Ministries did not appeal that determination.

Because misleading commercial speech may be freely regulated, HEB Ministries' free speech claim must fail, and the Court need not reach the remaining *Central Hudson* factors. But even if the speech were not misleading, the statute easily satisfies the other *Central Hudson* requirements. As the Court recognizes (and HEB Ministries does not dispute), the State's interest here is substantial. "Diploma mills" are an ongoing problem, made more prevalent by the advent of the Internet. *See, e.g.*, Roger J. Cramer, Managing Director, U.S. General Accounting Office, Testimony before the U.S. Senate Committee on Governmental Affairs, Diploma Mills: Federal Employees Have Obtained Degrees from Diploma Mills and Other Unaccredited Schools, Some at Government Expense 7 (May 11, 2004), http://gao.gov/new.items/d04771t.pdf (May 11, 2004) (all Internet materials as visited August 29, 2007, and available in clerk of court's case file)(noting that some senior-level federal employees, including management-level employees responsible for emergency operations at the National Nuclear Security Administration, had obtained degrees from diploma mills and other unaccredited schools); Pa. Sues College That Gave Cat an MBA, Dec. 7, 2004, http://www.foxnews.com/story/0,2933,140727,00.html (describing alleged Texas diploma mill that, in exchange for $299, awarded an MBA to a cat in Pennsylvania); Press Release, Texas Office of Attorney General, Attorney General Abbott Gets Judgment Against Brothers Who Operated Fraudulent Dallas Diploma Mill (Mar. 17, 2005), http://www.oag.state.tx.us/oagnews/release.php?id=841 (describing judgment obtained against

Trinity Southern University, which awarded bachelor's master's, and doctorate degrees based only on students' testimony about life experiences).

Because the State's interest is substantial, *Central Hudson*'s other factors come into play: whether the regulation directly advances the State's interest, and whether the regulatory technique is "in proportion to that interest." *Cent. Hudson*, 447 U.S. at 564. As the Supreme Court has noted, however, the Constitution does not require the narrowest possible restriction:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Bd of Trs. v. Fox, 492 U.S. 469, 480 (1989) (citations omitted).

Here, the statute represents a reasonable means of accomplishing the Legislature's ends. JUSTICE WAINWRIGHT concludes that a disclaimer would "better inform the public" about Tyndale students' educational accomplishments than would compliance with the statute; thus, he concludes that "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." ___ S.W.3d at ___. But merely because the State has not chosen the narrowest means to achieve its objective does not mean the statute is unconstitutional. As *Fox* recognized, the State need only demonstrate a reasonable fit between the Legislature's ends and the means chosen to accomplish those ends. *Fox*, 492 U.S. at 480. The Education Code satisfies those

requirements. The statutory requirements here do not diminish commercial speech but merely ensure its accuracy. *See Friedman v. Rogers*, 440 U.S. 1, 16 (1979) (noting that "[r]ather than stifling commercial speech, [the statute at issue] ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past"). While a disclaimer may also fulfill that goal, the absence of such a requirement does not render the statute unconstitutional.

JUSTICE WAINWRIGHT warns that the statute coopts "virtually every term that could reasonably provide a useful description of educational achievement at a postsecondary educational institution." ___ S.W.3d at ___. I disagree. The statute prohibits use of only those terms that "signif[y], purport to, or [are] generally taken to signify satisfactory completion of the requirements of . . . a program of study leading to an associate, bachelor's, master's, or doctor's degree or its equivalent." TEX. EDUC. CODE § 61.302(1). Thus, as the State correctly contends, Tyndale may issue diplomas or certificates without running afoul of the statute, as long as it does not claim that they are equivalent to associate, bachelor's, master's, or doctor's degrees.

JUSTICE WAINWRIGHT would permit partial state regulation of a single word—"degree"—while allowing an institution to represent that its diplomas are indistinguishable from valid degrees. A graduate of one of these unaccredited institutions may now proudly display a framed diploma that says: "ABC Institute has conferred on John Doe the designation *Doctor of Medicine* which is equivalent to a doctoral degree." JUSTICE WAINWRIGHT's proposed holding would strip the Board of its ability to regulate institutions of higher learning. Diploma mills would stand on equal footing with accredited institutions, and consumers would have no assurance that their

professor, engineer, counselor, or chemist graduated from an institution that satisfied the Legislature's minimum requirements for accreditation.

IV
Conclusion

Because the statute permissibly regulates commercial speech, and because it presents no Establishment Clause or Free Exercise Clause violation, I respectfully dissent from the part of the Court's judgment that concludes otherwise. I would reverse the court of appeals' judgment relating to the use of the term seminary and would render judgment for the petitioners on that issue. I would affirm the remainder of the judgment.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: August 31, 2007