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 HECHT announced the judgment of the Court and delivered the opinion for the Court with respect to Part I, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON joined, and with respect to Part III-B, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE GREEN joined, and an opinion with respect to Parts II, III-A, and III-C, in which JUSTICE O'NEILL, JUSTICE BRISTER, and JUSTICE MEDINA joined.

JUSTICE WAINWRIGHT filed an opinion concurring in part and dissenting in part, and concurring in the judgment, in which JUSTICE JOHNSON joined.

CHIEF JUSTICE JEFFERSON filed an opinion concurring in part and dissenting in part, in which JUSTICE GREEN joined.

JUSTICE WILLETT took no part in the decision of the case.

The State of Texas requires a private post-secondary school to meet prescribed standards before it may call itself a "seminary" or use words like "degree", "associate", "bachelor", "master", and "doctor" — or their equivalents — to recognize attainment in religious education and training. We must decide whether this requirement impermissibly intrudes upon religious freedom protected

by the United States and Texas Constitutions. We hold it does and therefore reverse the judgment of the court of appeals[1] and remand the case to the trial court for further proceedings.

I

A

The State of Texas goes to great lengths to ban "diploma mills" — what *Webster's Dictionary* defines as "institution[s] of higher education operating without supervision of a state or professional agency and granting diplomas which are either fraudulent or because of the lack of proper standards worthless".[2] The Higher Education Coordinating Act of 1965, codified as chapter 61 of the Texas Education Code,[3] states that "the policy and purpose of the State of Texas [are] to prevent deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees [and] to regulate the use of academic terminology in naming or otherwise designating educational institutions, the advertising, solicitation or representation by educational institutions or their agents, and the maintenance and preservation of essential academic records."[4]

To achieve this purpose, subchapter G of the Act denies a "private post-secondary educational institution"[5] use of certain terminology common to graduate education unless it has a

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[1] 114 S.W.3d 617 (Tex. App.—Austin 2003).

[2] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 638 (1981).

[3] TEX. EDUC. CODE §§ 61.001-.9732.

[4] *Id*. § 61.301.

[5] *Id*. § 61.302(2) ("'Private postsecondary educational institution' or 'institution' means an educational institution which: (A) is not an institution of higher education as defined by Section 61.003 [generally, a public school]; (B) is incorporated under the laws of this state, maintains a place of business in this state, has a representative present in this state, or solicits business in this state; and (C) furnishes or offers to furnish courses of instruction in person, by electronic media, or by correspondence leading to a degree or providing credits alleged to be applicable to a degree."); *id*. § 61.003(8) ("'Institution of higher education' means any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section."). An exception for certain non-profit schools, *id*. § 61.313(d), and a "grandfather" exception, *id*. § 61.313(e)-(g), are not relevant here.

certificate of authority from the Texas Higher Education Coordinating Board.[6] Section 61.313 restricts what an institution can call itself. As originally enacted in 1975, it restricted use of only the terms "college" and "university",[7] but its reach was broadened in 1997 and now states in part:

> (a) Unless the institution has been issued a certificate of authority under this subchapter, a person may not:
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> (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
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> (2) describe an institution using a term listed in Subdivision (1) or a term having a similar meaning.[8]

Section 61.304 restricts the designations of educational attainment an institution may use. In 1998, when the events in this case occurred, section 61.304 stated:

> A person may not grant or award a degree on behalf of a private postsecondary educational institution unless the institution has been issued a certificate of authority to grant the degree by the board in accordance with the provisions of this subchapter. A person may not represent that credits earned or granted by that person or institution are applicable for credit toward a degree to be granted by some other person or institution except under conditions and in a manner specified and approved by the board. The board is empowered to specify and regulate the manner, condition, and language used by an institution or person or

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[6] *Id*. § 61.021(a) ("The Texas Higher Education Coordinating Board is an agency of the state. . . ."); *id*. § 61.002(a) ("[The Board] provide[s] leadership and coordination for the Texas higher education system, institutions, and governing boards, to the end that the State of Texas may achieve excellence for college education of its youth through the efficient and effective utilization and concentration of all available resources and the elimination of costly duplication in program offerings, faculties, and physical plants."); *id*. § 61.022(a) ("The board shall consist of nine members appointed by the governor so as to provide representation from all areas of the state . . . . Members of the board serve staggered six-year terms.").

[7] Act of May 27, 1975, 64th Leg., R.S., ch. 587, § 1, 1975 Tex. Gen. Laws 1867, 1870 ("No person may use the term 'college' or 'university' in the official name or title of a private institution of higher education established after the effective date of this subchapter and subject to its provisions unless the institution has been issued a certificate of authority to grant a degree or degrees.").

[8] TEX. EDUC. CODE § 61.313(a). *See also id*. § 61.313(c) ("A person may not 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 an educational or training establishment.") and (d) ("This section does not apply to an institution of higher education or a private institution of higher education as defined by Section 61.003."); *id*. §§ 61.003 (8), (15)("Private or independent institution of higher education" is one, *inter alia,* organized as non-profits, tax-exempt under Tex. Const. art. VIII § 2 and federal statute, and accredited by certain entities), § 61.302(9) ("'Educational or training establishment' means an enterprise offering a course of instruction, education, or training that the establishment does not represent to be applicable to a degree.").

> agents thereof in making known that the person or institution holds a certificate of authority and the interpretation of the significance of such certificate.[9]

Current section 61.302(1) defines "degree" expansively:

> "Degree" means 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 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.[10]

As section 61.301 explains:

> 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.[11]

To obtain a certificate of authority,[12] an institution must satisfy the Coordinating Board that it meets standards the Board has adopted.[13] There are 21 at present.[14] In 1998, the standards were

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[9] Act of May 25, 1993, 73rd Leg., R.S., ch. 516, § 7, 1993 Tex. Gen. Laws 1949, 1950, formerly TEX. EDUC. CODE § 61.304. A 2005 amendment added "or offer to grant or award a degree" to the first sentence, assigned these three sentences, respectively, to subsections (a) through (c), and added new subparagraphs (d)-(f). Act of May 25, 2005, 79th Leg., R.S., ch. 1039, § 3, 2005 Tex. Gen. Laws 3499, 3500.

[10] TEX. EDUC. CODE § 61.302(1); *see also* 19 TEX. ADMIN. CODE § 7.3(7) (2007) ("Degree — Any title or designation, mark, abbreviation, appellation, or series of letters or words, including 'associate', 'bachelor's', 'master's', 'doctor's' and their equivalents and foreign cognates, which signify, purport to signify, or are generally taken to signify satisfactory completion of the requirements of all or part of a program of study which is generally regarded and accepted as an academic degree-level program by accrediting agencies recognized by the Board.").

[11] TEX. EDUC. CODE § 61.301.

[12] 19 TEX. ADMIN. CODE § 7.3(4) (2007) ("Certificate of authority — The Board's approval of institutions of higher education, (other than exempt institutions) with operations in the state of Texas, to confer degrees or courses applicable to degrees, or to solicit students for enrollment in institutions that confer degrees or courses applicable to degrees.").

[13] TEX. EDUC. CODE § 61.306(a) ("The board may issue a certificate of authority to grant a degree or degrees and to enroll students for courses which may be applicable toward a degree if it finds that the applicant meets the standards established by the board for certification.").

[14] 19 TEX. ADMIN. CODE § 7.7(1)-(21) (2007).

substantively similar but numbered 24.[15] According to the Board, its standards "represent generally accepted administrative and academic practices and principles of accredited institutions of higher education in Texas" and "are generally set forth by regional and specialized accrediting bodies".[16] The standards are lengthy, detailed, rigorous, and comprehensive, covering every aspect of an institution's operation. Some are quite explicit, like these:

- "Each faculty member teaching in an academic associate or baccalaureate level degree program shall have at least a master's degree from an institution accredited by a recognized agency or a regional accrediting agency with at least 18 graduate semester credit hours in the discipline being taught. Furthermore, at least 25% of course work in an academic associate or baccalaureate level major shall be taught by faculty members holding doctorates, or other terminal degrees, in the discipline being taught from institutions accredited by a recognized agency or a regional accrediting agency. . . . Graduate level degree programs shall be taught by faculty holding doctorates, or other terminal degrees, in the discipline being taught from institutions accredited by a recognized agency or a regional accrediting agency."[17]

- "Each associate or baccalaureate degree program shall contain a general education component consisting of at least 25% of the total hours offered for the program. This component shall be drawn from each of the following areas: Humanities and Fine Arts, Social and Behavioral Sciences, and Natural Sciences and Mathematics."[18]

Other standards leave much to the Coordinating Board's discretion to determine compliance:

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[15] 19 TEX. ADMIN. CODE § 5.214(a)(1)-(24) (1998), *adopted* 22 Tex. Reg. 11353, 11355-11357, (Nov. 21, 1997).

[16] 19 TEX. ADMIN. CODE § 7.7 (2007); 19 TEX. ADMIN. CODE § 5.214(a) (1998) (referring to standards "generally set forth by the Commission on Colleges, Southern Association of Colleges and Schools and by specialized accrediting bodies and several academic and professional societies . . . .").

[17] 19 TEX. ADMIN. CODE § 5.214(a)(5) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(9)(A), (B) & (E) (2007). In 2005, a caveat was added to these requirements for persons with exceptional experience. *Id.* § 7.7(9)(F) ("With the approval of a majority of the institution's governing board, an individual with exceptional experience in the field of appointment, which may include direct and relevant work experience, professional licensure and certification, honors and awards, continuous documented excellence in teaching, or other demonstrated competencies and achievements, may serve as a faculty member without the degree credentials specified above. Such appointments shall be limited and the justification for appointment fully documented. The Coordinating Board shall evaluate the qualifications of the full complement of faculty providing instruction at the institution to determine that such appointments are justified and make up a small percentage of the faculty as a whole."), *adopted* 30 Tex. Reg. 2663 (May 6, 2005). In 2006, an additional requirement was added. *Id.* § 7.7(2)(B) ("The chief academic officer shall hold an earned doctorate awarded by an institution accredited by an agency recognized by the Board or from a foreign institution demonstrated to be equivalent to an accredited institution, and shall demonstrate sound aptitude for and experience with curriculum development and assessment; accreditation standards and processes as well as all relevant state regulations; leadership and development of faculty, including the promotion of scholarship, research, service, academic freedom and responsibility, and tenure (where applicable); and the promotion of student success."), *adopted* 31 Tex. Reg. 6327 (Aug. 11, 2006).

[18] 19 TEX. ADMIN. CODE § 5.214(a)(8) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(13)(A)-(B) (2007).

- "The character, education, and experience in higher education of governing board members, administrators, supervisors, counselors, agents, and other institutional officers shall be such as may reasonably ensure that the students will receive education consistent with the objectives of the course or program of study."[19]

- "There shall be sufficient distinction among the roles and personnel of the governing board of the institution, the administration, and faculty to ensure their appropriate separation and independence."[20]

- "The character, education, and experience in higher education of the faculty shall be such as may reasonably ensure that the students will receive an education consistent with the objectives of the course or program of study."[21]

- "There shall be a sufficient number of full-time teaching faculty resident and accessible to ensure continuity and stability of the education program, adequate educational association between students and faculty and among the faculty members, and adequate opportunity for proper preparation for instruction and professional growth by faculty members."[22]

- "The quality, content, and sequence of each course, curriculum, or program of instruction, training, or study shall be appropriate to the purpose of the institution and shall be such that the institution may reasonably and adequately achieve the stated objectives of the course or program."[23]

- "The institution shall have adequate space, equipment, [and] instructional materials to provide education of good quality."[24]

- "The institution shall have adequate financial resources and financial stability to provide education of good quality and to be able to fulfill its commitments to students."[25]

- "The institution shall adopt and distribute to all members of the faculty a statement of academic freedom assuring freedom in teaching, research, and publication."[26]

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[19] 19 TEX. ADMIN. CODE § 5.214(a)(1) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(2) (2007).

[20] 19 TEX. ADMIN CODE § 5.214(a)(3) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(4) (2007).

[21] 19 TEX. ADMIN CODE § 5.214(a)(5) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(9) (2007).

[22] 19 TEX. ADMIN CODE § 5.214(a)(6) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(10) (2007).

[23] 19 TEX. ADMIN CODE § 5.214(a)(7) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(12)(A) (2007).

[24] 19 TEX. ADMIN CODE § 5.214(a)(11) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(16) (2007).

[25] 19 TEX. ADMIN CODE § 5.214(a)(12) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(5) (2007).

[26] 19 TEX. ADMIN. CODE § 5.214(a)(14) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(11) (2007).

A certificate of authority is valid for two years,[27] and an institution must apply for renewal 180 days before the certificate expires.[28] A certificate can be renewed for only eight years, by which time the institution must obtain full accreditation.[29]

An institution is exempt from subchapter G if it is fully accredited by a "recognized accrediting agency" designated by the Coordinating Board.[30] In 1998, the Board had designated only three accrediting agencies, two of which were specifically oriented toward religious institutions.[31] Since then, four others have been added, none with a religious focus.[32] Although no recognized accrediting agency's standards are included in the record, for Board recognition, an accrediting agency's standards "must be at least as comprehensive and rigorous as [the Board's standards for a certificate of authority] and be as rigorously applied."[33] An exempt institution may, and according

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[27] TEX. EDUC. CODE § 61.306(b) ("A certificate of authority to grant a degree or degrees is valid for a period of two years from the date of issuance.").

[28] *Id*. § 61.308(a) ("A private postsecondary educational institution which desires to renew its certificate of authority shall apply to the board at least 180 days prior to the expiration of the current certificate.")

[29] 19 TEX. ADMIN. CODE § 5.215(d)(3) (1998) ("An institution may be granted consecutive certificates of authority for no longer than eight years. Absent sufficient cause, at the end of the eight years, the institution must have been accredited by a recognized accrediting agency."); *accord* 19 TEX. ADMIN. CODE § 7.6(c)(3) (2007).

[30] TEX. EDUC. CODE § 61.303(a) ("The provisions of this subchapter do not in any way apply to an institution which is fully accredited by a recognized accrediting agency."); *id*. § 61.302(8) ("'Recognized accrediting agency' means an association or organization so designated by rule of the board for the purposes of this subchapter.").

[31] 19 TEX. ADMIN. CODE § 5.211 (1998), *adopted* 22 Tex. Reg. 11353 (Nov. 21, 1997) ("Recognized accrediting agency — The Commission on Colleges, Southern Association of Colleges and Schools; the American Association of Bible Colleges; or the Association of Theological Schools in the United States and Canada.").

[32] 19 TEX. ADMIN. CODE § 7.4(a)(1) (2007) ("For purposes of the exemption, the Board currently recognizes the following accrediting agencies: the Commission on Higher Education, Middle States Association of Colleges and Schools; the Commission on Institutions of Higher Education, New England Association of Schools and Colleges; the Commission on Institutions of Higher Education, North Central Association of Colleges and Schools; the Northwest Commission on Colleges and Universities, the Commission on Colleges, Southern Association of Colleges and Schools; the Accrediting Commission for Community and Junior Colleges and Accrediting Commission for Senior Colleges and Universities, Western Association of Schools and Colleges; the Association of Biblical Higher Education (undergraduate only); and the Association of Theological Schools in the United States and Canada.").

[33] 19 TEX. ADMIN. CODE § 5.213(i)(2) (1998); *accord* TEX. ADMIN. CODE § 7.5(f)(2) (2007).

to the Board *should*, obtain a certificate of authorization,[34] which is not to be confused with a certificate of authority.[35]

In sum, with a few exceptions, none material to this case, subchapter G of the Act requires that a private post-secondary institution either have Board-approved accreditation or satisfy Board-adopted standards before it can describe itself and its students' attainments with words commonly used for those purposes by such institutions. A violation is a Class A misdemeanor,[36] may be investigated and enjoined by the Attorney General,[37] is punishable by a civil penalty of $1,000 per day[38] and an administrative penalty of $1,000-5,000 per offense[39] imposed by the Commissioner of

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[34] TEX. EDUC. CODE § 61.303(c) ("An exempt institution or person may be issued a certificate of authorization to grant degrees."); 19 TEX. ADMIN. CODE § 7.4(d) (2007) ("A new institution may not presume exempt status and offer to award degrees or courses leading to degrees until it has applied for and been granted a certificate of authorization by the Commissioner."); *id*. § 7.3(5) ("Certificate of authorization — The Board's acknowledgment that an institution is qualified for an exemption from the regulations herein.").

[35] 28 Tex. Reg. 4131 (May 23, 2003) (explaining that the regulations were being amended to "add definitions of 'certificate of authority' and of 'certificate of authorization' to explain the different types of certificates available to institutions").

[36] TEX. EDUC. CODE § 61.304(d) ("A person commits an offense if the person: (1) grants or awards a degree or offers to grant or award a degree in violation of this section . . . ."); *id*. § 61.304(e) ("An offense under Subsection (d) is a Class A misdemeanor."); *id* § 61.313(h) ("A person commits an offense if the person: (1) uses a term in violation of this section . . . ."); *id*. § 61.313(i) ("An offense under Subsection (h) is a Class A misdemeanor."); TEX. PENAL CODE § 12.21 ("An individual adjudged guilty of a Class A misdemeanor shall be punished by: (1) a fine not to exceed $4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.").

[37] TEX. EDUC. CODE § 61.318(a) ("The commissioner may report information concerning a possible violation of this subchapter to the attorney general. The attorney general shall make the necessary investigations and shall bring suit to enjoin any violation of this subchapter.").

[38] *Id.* § 61.319(a) ("A person who violates this subchapter or a rule adopted under this subchapter is liable for a civil penalty in addition to any injunctive relief or any other remedy. A civil penalty may not exceed $1,000 a day for each violation.").

[39] *Id.* § 61.316(a) ("If a person violates a provision of this subchapter, the commissioner may assess an administrative penalty against the person as provided by this section. . . ."); *id*. § 61.316(b) ("Any person who confers or offers to confer a degree on behalf of a private postsecondary educational institution subject to the provisions of this subchapter which has not been issued a certificate of authority to grant degrees or who represents that credits earned or granted by that person or institution are applicable for credit toward a degree to be granted by another person or institution except under conditions and in a manner specified and approved by the board shall be assessed an administrative penalty of not less than $1,000 or more than $5,000. Each degree conferred without authority constitutes a separate offense."); *id*. § 61.316(c) ("Any person who establishes a private postsecondary educational institution that is not exempt from this subchapter and uses a term protected under this subchapter in the official name of the institution without first having been issued a certificate of authority for the institution under this subchapter or any person who establishes an educational or training establishment and uses a term protected under this subchapter in the official name or title of the establishment shall be assessed an administrative penalty of not less than $1,000 or more than $3,000.").

Higher Education, the Board's executive officer,[40] and is a false, misleading, or deceptive act or practice actionable under the Texas Deceptive Trade Practices-Consumer Protection Act.[41]

B

The parties have stipulated to all the facts.

Petitioner HEB Ministries, Inc., a church in Fort Worth,[42] operates a school, Tyndale Theological Seminary and Bible Institute, which was founded in the early 1990s to offer a biblical education in preparation for ministry in churches and missions. By 1999, its campus consisted of a library, four or five classrooms, administrative offices, a small bookstore, and a computer department, and its enrollment was 300-350 students, with over three-fourths in correspondence courses. Tyndale is a "private postsecondary educational institution" as defined by subchapter G.

Tyndale's 1997-1998 course catalog stated:

> At TYNDALE our focus is upon you — the professional minister or motivated layman who wishes to make a difference for Christ in our world. You are the most important part of the TYNDALE equation. Our job is to meet your needs — to meet you half-way with quality Bible courses that help you in your ministry endeavor.

The catalog also contained a lengthy "Doctrinal Statement" setting out Tyndale's positions on issues of faith.[43] The catalog listed 172 courses, 162 of which were in religious subjects. Of the other ten, three were in general education — "Basic English Grammar & Composition", "Read, Research &

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[40] *Id*. § 61.028(a) ("The board shall appoint a commissioner of higher education, who shall select and supervise the board's staff and perform other duties delegated to him by the board. The commissioner shall serve at the pleasure of the board."); 19 TEX. ADMIN. CODE § 7.16(a) (2007) ("If a person or institution violates a provision of this subchapter, the Commissioner may assess an administrative penalty against the person or institution as provided in this section."); 19 TEX. ADMIN. CODE § 5.221(a) (1998) ("If a person violates a provision of this subchapter, the commissioner may assess an administrative penalty against the person as provided by law.").

[41] TEX. EDUC. CODE § 61.320(a) ("A person who violates this subchapter commits a false, misleading, or deceptive act or practice within the meaning of Section 17.46, Business & Commerce Code.").

[42] "HEB" refers to the Hurst-Euless-Bedford area between Fort Worth and Dallas.

[43] These were captioned "The Scriptures", "The Godhead", "Angels, Fallen and Unfallen", "Man, Created and Fallen", "God's Eternal Purpose", "The First Advent of Christ", "Salvation Only Through Christ", "The Extent of Salvation", "Eternal Security", "The Holy Spirit", "The Great Commission", "The Blessed Hope", "The Tribulation", "The Second Coming of Christ", "The Eternal State", "Current Issues", and "Women and Ministry".

Study Basics", and "Ancient World History" — and seven were in typing, word processing, and use of the Internet, offered by the "Department of Theological and Biblical Research". The catalog offered 20 "diplomas", all in religious subjects.[44]

Tyndale's catalog offered no "diploma" in any secular subject and no "degree" of any kind, but it characterized programs of study required for a diploma as equivalent to programs of study required for a degree at the same level. For example, the catalog referred to its "Diploma Of Theological Studies" program as a "bachelor equivalent program" and "bachelor equivalent course of studies", and the "Master of Arts Level Diploma" in "Counseling" as a "Masters Level Program".[45]

The course catalog did not state that Tyndale's diplomas were the equivalent of college degrees, but neither did it state that they were not; it was silent on the subject. The catalog stated that Tyndale and Louisiana Baptist Theological Seminary were "going forward with parallel programs [in prophetic studies] and exchange of credits between the two institutions", but did not otherwise say that Tyndale academic credits could be applied toward earning degrees.

In 1998, Tyndale had never been accredited by an agency recognized by the Coordinating Board and had never obtained a certificate of authority from the Board. Tyndale never sought accreditation or a certificate of authority for what it describes as "doctrinal reasons". In its 1997-1998 course catalog, Tyndale described its position on accreditation as follows:

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[44] These were: "Certificate of Biblical Studies"; "Diploma of Basic Biblical Studies"; "Associate Level Diploma of Biblical Studies"; "Diploma of Advanced Biblical Studies"; "Diploma of Theological Studies"; "Diploma of Christian Studies"; "Graduate Diploma" in "Systematic Theology" and in "Ministry and Christian Counseling"; "Master of Arts Level Diploma" in "General Biblical Studies", in "Counseling", in "Apologetics", in "Languages", and in "Missions"; "Doctor of Ministries Level Diploma" in "General Biblical Studies" and in "Counseling"; "Master of Ministries Level Diploma"; "Master of Systematic Theology Level Diploma"; "Doctor of Theology Level Diploma"; "Doctor of Theology Level Diploma in Prophetic Studies"; and "Ph.D. Level Diploma in Prophetic Studies". The counseling programs were expressly religious and not secular, and the language programs were for biblical study.

[45] This would violate current regulations. 19 TEX. ADMIN. CODE § 7.14(a)(2) ("A person or institution may not . . . represent that credits earned or granted are collegiate in nature, including describing them as 'college-level,' or at the level of any protected academic term . . . ."), *adopted* 31 Tex. Reg. 1023 (Feb. 17, 2006).

Many seminaries are on shifting sands. They feel they must impress the world or the culture with their intellectualism. Thus, some schools are spending large sums of money on appearance and are no longer focusing on the substance — strong theology, solid Bible courses, practical language exegesis, etc.

What validates TYNDALE? TYNDALE believes it is affirmed by its Board of Advisors, Board of Governors, the students attending and, the world-class Guest Faculty who give our students the best of academics and the greatest training in the spiritual message of the Scriptures. But again, many schools seek RECOGNITION and AFFIRMATION from the state, from secular associations or professional groups that really have no business meddling in biblical matters.

The approach of many seminaries and Bible schools is obsolete and antiquated. They are still trying to be, as they call it, "traditional" schools. But mainly, they simply try to keep up with the Joneses. They attempt to look and act like secular universities. But in reality, a school like TYNDALE, and other schools with our convictions, are the ones that are traditional, not the other way around.

For example, in the 1960s, most Christian schools were not accredited, nor did the best want to be. They were satisfied with serving the Lord by being complete and whole within their framework and calling. As well, a student could get the best education at these institutions and know he had not been compromised with the culture. But in the 1970s, a push was on for state approval and accreditation. "We want state and federal government approval. We want the world to like us?" [sic] Did any of this have anything to do with the quality or teaching message of those schools? It did not! When one of the big seminaries became accredited in the 1970s, almost all of the older faculty and all of the graduates testify that the school went down hill — not in a certain secular quality manner, but in its message and commitment to truth and the Gospel.

One of the largest Christian Universities in America has said, "We will not become accredited!" That school today is highly respected and other schools want their graduates. Accreditation or lack of it has not had anything to do with the school's quality or mission.

At commencement exercises on June 26, 1998, Tyndale recognized graduates with 34 awards, listed in the program with titles as follows:

- "Certificate of Biblical Studies (Cert. BS)" — two;
- "Diploma of Basic Biblical Studies (Dip. BBS)" — three;
- "Associate of Biblical Studies (ABS)" — one;
- "Diploma of Advanced Biblical Studies (Dip. ABS)" — one;
- "Bachelor Level Diploma in Biblical Studies (BBS)" — two;
- "Bachelor Level Diploma in Theological Studies (Dip. Th.S.)" — six;
- "Diploma of Christian Studies (DCS)" — two;
- "Master of Arts (MA)" — nine;
- "Master of Theology (Th.M.) — two;
- "Doctor of Ministries (D.Min)" — one;

- "Doctor of Theology (Th.D)" — two;
- "Doctor of Philosophy (Ph.D)" — three.

The record contains a copy of only one of the award certificates. It read:

Tyndale Theological Seminary
Fort Worth, Texas
To Whom it may concern
[recipient's name]
Has completed satisfactorily the course of
Theological studies offered by
the faculty of this institution and is entitled
to the following diploma: The aequus
Master of Arts Level Diploma
And the same is hereby conferred by the authority of the board
and faculty as recommended by the president.
June 26, 1998

In conferring these awards, Tyndale did not use the word "degree". Nevertheless, the Commissioner of Higher Education sent Tyndale a letter dated July 22, 1998, which stated:

> As you know, the Texas Education Code, Chapter 61, Subchapter G, requires an institution to have a certificate of authority to grant degrees, credits applicable to degrees, or to use specific academic terminology. I have determined that Tyndale Theological Seminary & Biblical Institute is violating this statute. Under Section 61.316, the Commissioner must assess penalties for violations. Those penalties may range from $1,000 to $3,000 for use of a protected term in the institution's name and from $1,000 to $5,000 for awarding or offering to award degrees. Each degree awarded or offered constitutes a separate offense.
>
> From the evidence we possess, I conclude the following:
>
> - Tyndale meets the definition of a private postsecondary institution in Texas as found in § 61.302(2);
> - Tyndale was informed that the law requires it must hold a certificate of authority from the Coordinating Board to grant degrees, grant credits applicable to degrees, or use protected terminology in a letter from the Coordinating Board dated September 16, 1991;
> - On or about June 26, 1998, Tyndale awarded six undergraduate certificates (consisting of courses alleged to be applicable to degrees), one associate degree, eight bachelor's degrees, two diplomas of Christian Studies (accepted as a baccalaureate equivalent for admission to your master's programs), eleven master's degrees, and six doctoral degrees for a total of 34 degrees; and
> - Tyndale is using the protected term "seminary" in its name.

> Therefore, I am assessing an administrative penalty of $173,000, consisting of 34 violations of granting a degree without authority at $5,000 each and one violation of using a protected term at $3,000.
>
> You have twenty (20) days from the date of receipt of this letter to either pay the penalty or appeal the decision. . . .
>
> Also, you must immediately cease your actions in violation of state law. You must contact us within twenty days of the receipt of this letter with your plans to correct your actions. At minimum those plans must include the following: you must (1) cease using the term "seminary," or any other protected term, in the name of your institution; (2) cease awarding or offering to award degrees; (3) cease offering credit towards degrees; (4) inform your graduates, students, and potential students by letter that you have no degree granting authority; and (5) offer by letter full refunds to all graduates and students. The content of the letter informing your students of your status and the offer of refunds must be submitted to the Coordinating Board for approval prior to its distribution. Failure to contact us with your plans to correct your actions will result in our referring this matter to the Office of the Attorney General for injunctive and any other relief allowed by law.

C

Tyndale did not appeal the Board's decision.[46] Instead, HEB Ministries sued the Coordinating Board, the Commissioner, and the Attorney General for a declaratory judgment that sections 61.304[47] and 61.313(a), as applied to a school like Tyndale, violate the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution as well as article I, section 6 of the Texas Constitution.[48] HEB Ministries also sought attorney fees. The Coordinating Board and the Commissioner counterclaimed for collection of the previously assessed $173,000 administrative penalty, an injunction prohibiting HEB Ministries from engaging in the conduct for which it had been sanctioned, and attorney fees.

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[46] *See* TEX. EDUC. CODE § 61.316(f) ("An institution may appeal an administrative penalty in the manner provided by Chapter 2001, Government Code.").

[47] What was then section 61.304 is now section 61.304(a)-(c). *Supra* note 9.

[48] The petition also alleged that the statutes violate article I, section 29 of the Texas Constitution ("To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."), and that section 61.304 of the Texas Education Code violates due process guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 19 of the Texas Constitution. None of these claims is material to this appeal.

At some point, two other institutions intervened as plaintiffs. One, Southern Bible Institute, describes itself as "a post-secondary religious educational institution in Dallas, Texas . . . founded for the purpose of preparing disadvantaged African-American men for the gospel ministry." The other, Hispanic Bible Institute, states that it is "a post-secondary religious educational institution in San Antonio, Texas", and that "[t]he educational offerings of this ministry are theology, church and pastoral ministry, and general studies." The record contains no other information about the intervenors.

Both sides moved for summary judgment. In their motion, the plaintiffs (including the intervenors) argued, in addition to the allegations in HEB Ministries' petition, that sections 61.304 and 61.313 also violate the First Amendment's Free Speech Clause[49] and article I, section 8 of the Texas Constitution.[50] The defendants did not object to this additional claim and addressed it in their response. The trial court held that section 61.313's regulation of the word "seminary" violates the First Amendment and article I, sections 6 and 8 of the Texas Constitution. In all other respects, the trial court granted summary judgment for the defendants. It ordered HEB Ministries to pay the State $170,000, the penalty assessed for granting 34 degrees, and ordered the plaintiffs to pay $34,781 in attorney fees. The court also enjoined HEB Ministries from awarding degrees, as defined in Subchapter G, or representing that Tyndale's educational credits would be applied toward a degree at another institution, until it obtained a certificate of authority from the Coordinating Board.

The court of appeals held that neither 61.304 nor 61.313 violates the First Amendment or article I, sections 6 and 8 of the Texas Constitution. Thus, it reinstated the $3,000 administrative penalty against HEB Ministries for Tyndale's use of "seminary", and upheld the $170,000

[49] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[50] 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 . . . .").

administrative penalty for granting degrees. The court remanded the case for entry of a permanent injunction consistent with its opinion.[51]

We granted the plaintiffs' petition for review.[52] Petitioners, to whom we shall refer collectively as "HEB Ministries", contend that the Establishment and Free Exercise Clauses of the First Amendment and corresponding state constitutional provisions preclude the State from requiring a post-secondary school with a religious mission to meet specified standards for its operation and curriculum before it can call itself a "seminary" or use words like "associate", "bachelor's", "master's", and "doctor's" to mark student attainment in religious education and training. HEB Ministries does not challenge the State's authority to impose such standards on secular institutions and on religious institutions offering a secular education. Nor does HEB Ministries contend that the State cannot regulate use of the word "degree". It contends only that the State cannot deny the use of such higher education terminology to religious schools that do not meet its standards. Respondents, the Coordinating Board and the Commissioner (collectively "the Coordinating Board"),[53] insist that sections 61.304 and 61.313(a) are constitutionally sound because they are part of a neutral law that is secular in purpose and generally applicable to all institutions of higher education, and that only incidentally impacts institutions offering religious instruction. The Coordinating Board argues that use of the statutorily restricted words is unimportant to the religious mission of a school like Tyndale when there are other words it can use to describe itself and its students' attainment.

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[51] 114 S.W.3d 617 (Tex. App.—Austin 2003).

[52] 48 Tex. Sup. Ct. J. 146 (Dec. 3, 2004).

[53] The Attorney General represents respondents but is no longer a party to the case.

HEB Ministries also contends that sections 61.304 and 61.313(a) violate the Free Speech Clause of the First Amendment and corresponding state constitutional provisions. The separate opinions find it necessary to reach this issue, but we do not.

II

The Establishment Clause prohibits any "law respecting an establishment of religion".[54] Correspondingly, article I, section 6 of the Texas Constitution states that "no preference shall ever be given by law to any religious society".[55] We have referred to this provision and article I, section 7 as "Texas' equivalent of the Establishment Clause."[56] The parties do not argue that there is any difference in the application of these federal and state constitutional provisions to this case, and we will assume for present purposes that they are coextensive.[57]

Fundamentally, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[58] Since the government cannot determine what a church should be, it cannot determine the qualifications a cleric should have

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[54] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); *Cantwell v. Conn.,* 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

[55] TEX. CONST. art. I, § 6 ("[N]o 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.").

[56] *Williams v. Lara*, 52 S.W.3d 171, 186 (Tex. 2001).

[57] *In re Commitment of Fisher*, 164 S.W.3d 637, 645 (Tex. 2005) ("Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the United States Constitution and assume that its concerns are congruent with those of the Texas Constitution."); *see also Tilton v. Marshall*, 925 S.W.2d 672, 677 n.6 (Tex. 1996) ("Because Tilton has not argued persuasively for a different application of the provisions of the First Amendment and Article I, Section 6 as they pertain to the free exercise of religion, we assume without deciding that the state and federal free exercise guarantees are coextensive with respect to his particular claims.").

[58] *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *accord Williams*, 52 S.W.3d at 186.

or whether a particular person has them.[59] Likewise, the government cannot set standards for religious education or training.[60] As the United States Supreme Court said long ago in *Watson v. Jones*:

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned.[61]

That said, the Supreme Court has also written:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. . . .
>
> Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity.[62]

The Coordinating Board asserts that subchapter G meets this requirement of neutrality. Though the statute regulates religious education, it does so, the Board argues, only incidentally in pursuit of its secular objective of regulating all post-secondary educational institutions generally, irrespective of whether their programs are secular or religious. In the sense that subchapter G applies to institutions across the board, we agree that it is neutral; that is, it does not single out religious programs for special treatment. But the fact that subchapter G burdens all private post-secondary

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[59] *See Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) ("[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them."); *see also Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (reversing a judgment reinstating a deposed bishop).

[60] *See Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) ("Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government.").

[61] 80 U.S. (13 Wall.) 679, 728-729 (1872).

[62] *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 745-747 (1976) (plurality opinion) (footnote omitted).

institutions does not lessen its significant, peculiar impact on religious institutions offering religious courses of study. Subchapter G requires a clear, public, instantly identifiable differentiation between a religious education that meets the Coordinating Board's standards and one that does not: only an institution that meets those standards may call itself a seminary and its graduates associates, bachelors, masters, doctors, and the like. But setting standards for a religious education is a religious exercise for which the State lacks not only authority but competence,[63] and those deficits are not erased simply because the State concurrently undertakes to do what it *is* able to do — set standards for secular educational programs. The State cannot avoid the constitutional impediments to setting substantive standards for religious education by making the standards applicable to all educational institutions, secular and religious.[64]

Subchapter G expresses a preference for one manner of religious education over another. The religious school that chooses to educate in the manner of secular schools may use education terminology with the State's approval. Other religious schools cannot. The Coordinating Board's standards we have set out above, adopted as authorized by subchapter G, require "academic freedom" and faculty "independence" inconsistent with a doctrinal statement like Tyndale's that is at the core of its mission. Those standards set minimum faculty qualifications and require that one-fourth of the hours required for graduation from a baccalaureate program be in *each* of three groups: the humanities and fine arts, the social and behavioral sciences, and the natural sciences and mathematics. The standards also give the Board wide discretion to determine the adequacy of an institution's operations and curriculum. An accrediting agency's standards must be at least as comprehensive and rigorous for the agency to receive recognition by the Board. Such standards, prescribing as they do a detailed model for any institution offering post-secondary education, can

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[63] *See Lemon*, 403 U.S. at 625 ("[G]overnment is to be entirely excluded from religious instruction").

[64] *See Roemer*, 426 U.S. at 747 ("The State must confine itself to secular objectives . . . .") (plurality opinion).

hardly be said to impact religious institutions offering religious instruction incidentally. Subchapter G does not target religious institutions, but it directly and substantively impacts them by impeding their ability to describe themselves or their students' religious educational attainment.

HEB Ministries does not argue that the Coordinating Board's standards offend constitutional protections when applied to secular educational programs, even if provided by religious institutions, and we need not consider that issue. HEB Ministries argues only that it is constitutionally impermissible for the State to require an indication of its preference for one manner of religious education over another. HEB Ministries' course offerings are almost exclusively in religious subjects — 162 out of 172 — and the ten general education courses available are offered only to supplement religious training. HEB Ministries offers no secular program of study. Its academic awards are all in religious studies, and the only certificate in our record clearly denotes this by stating that it is given for satisfactory completion of a "course of Theological studies". It is one thing for the State to require that English majors in a baccalaureate program take science or math courses, that they be taught by professors with master's degrees from accredited institutions, and that professors have the freedom to teach that the works sometimes attributed to Shakespeare were really written by Edward de Vere, Christopher Marlowe, Francis Bacon, or Queen Elizabeth I. It is quite another for the State to require that a religious institution's baccalaureate-level education in religion include psychology courses, or that preaching or evangelism or missions be taught only by professors with master's degrees instead of practitioners from the field, or that a school's faculty have the freedom to teach that the Bible was not divinely inspired, contrary to the school's tenets of faith. As the United States Supreme Court has observed,

> training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit.[65]

[65] *Locke v. Davey*, 540 U.S. 712, 721 (2004).

The Coordinating Board acknowledges that the State cannot control religious education and training and insists that subchapter G does not do so. Compliance is voluntary. Any institution is free to choose to operate without a certificate of authority from the Coordinating Board or accreditation from a recognized agency as long as it does not use restricted terminology. But subchapter G cannot avoid the Establishment Clause merely because it allows institutions a degree of choice.[66] The issue is whether it operates to prefer one kind of religious instruction over another. By restricting the terminology a religious institution can use, the State signals its approval or disapproval of the institution's operation and curriculum as vividly as if it hung the state seal on the institution's front door. A "seminary" teaches religion the way the State of Texas approves. A program or award in religious studies described as being at an associate, bachelor's, master's, or doctor's level, or anything equivalent, has the State's approval. All others do not.

As Tyndale explained in its course catalog, views vary on how post-secondary religious instruction should be provided. For some, the secular education model is preferred, with programs structured like those of any liberal arts school, and accreditation, though expensive, is affordable. For others, religious instruction is more insular, steeped in the doctrine and experience of a specific faith, and limited resources practically preclude obtaining accreditation.[67] The Coordinating Board admits that subchapter G takes sides in this debate, but insists that subchapter G does so only incidentally as part of its overall regulation of private post-secondary education. We disagree that

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[66] *Williams v. Lara*, 52 S.W.3d 171, 191-192 (Tex. 2001) (rejecting the argument that a county's religious education program for jail inmates posed no Establishment Clause problems because participation was voluntary, citing, *inter alia*, *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (rejecting the same argument regarding a state prayer program for public school students)).

[67] *See* Brief of Amicus Curiae Southwestern Baptist Theological Seminary at 1-2 ("Southwestern finds, however, that the rigors of these accreditation processes take considerable time and personnel away from its educational programs and mission. Southwestern understands that educational institutions that are small, financially struggling, or that serve the needs of a religious order falling outside what might be considered to be the mainstream of popular faiths or ideologies may not posses either the individual or financial resources to participate in the accreditation process. Southwestern recognizes that the religious teaching of these institutions may be substantially 'chilled' if the State of Texas is permitted to set and enforce accreditation standards against these institutions, prevent the institutions from calling themselves 'seminaries', or keep these institutions from conferring religious certifications upon their students.").

the State's expression of a preference for how religion should be taught can fairly be characterized as incidental. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[68] The Texas Constitution expressly prohibits such a preference. By limiting the educational terminology a religious institution may use without the approval of the Coordinating Board, subchapter G prefers one course of religious instruction over another.

The Coordinating Board argues that subchapter G's standards are no different than sanitation standards a state might set for churches butchering meat to religious specifications. A state in such circumstances need not interfere with religious beliefs and practices to ensure that food is minimally safe for human consumption, and it cannot interfere in religious requirements when health is no longer an issue. Thus, government standards for determining that food is not only safe but kosher — a religious requirement only partly concerned with health — would involve an impermissible state preference among religious views.[69] As one court has written, a law that allows a state agency to determine whether food is kosher impermissibly "take[s] sides in a religious matter," even if the purpose of the law is to prevent fraud in the marketing of food.[70] Subchapter G helps prevent harm to students by requiring that educational institutions be financially responsible[71] and candid about their operations.[72] But the State's legitimate concern for student safety does not authorize it to take sides in the religious debate over how religion should be taught by setting substantive standards for

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[68] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[69] *See Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Ran-Dav's County Kosher, Inc. v. N.J.*, 608 A.2d 1353 (N.J. 1992); *but see National Foods, Inc. v. Rubin,* 727 F. Supp. 104, 109 (S.D.N.Y. 1989) (upholding a prosecution of a defendant for violating a law governing kosher food where the state alleged that the defendant acted in bad faith); *Sossing Sys., Inc. v. Miami Beach*, 262 So. 2d 28, 29-30 (Fla. Dist. App. Ct. 1972).

[70] *Commack*, 294 F.3d at 425.

[71] 19 TEX. ADMIN. CODE § 5.214 (12)-(13) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(5)-(6) (2007).

[72] 19 TEX. ADMIN. CODE § 5.214 (16), (24) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(18) (2007).

religious educational curriculum and process. We have upheld regulations protecting the health, safety, and well-being of students in daycare facilities.[73] Subchapter G is much different.

We think sections 61.304 and 61.313(a) clearly effectuate a state preference for one model of religious education over others, a preference that the Establishment Clause simply does not permit. We are mindful, however, that

> [t]he Supreme Court has rejected any absolute approach in applying the Establishment Clause. At times it has relied on the principles enunciated in *Lemon v. Kurtzman*[74] . . . to guide it through this "extraordinarily sensitive area of constitutional law." 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.[75]

In our view, the statutory provisions at issue do not pass this test.

There is nothing to suggest that either the Legislature in enacting subchapter G or the Coordinating Board in enforcing it intended any purpose other than the secular one of maintaining high standards for post-secondary education to protect legitimate institutions and their graduates and prevent public deception by "diploma mills", even though the distinct impact on religious instruction is apparent. Nor can we say that *the* principal or primary effect of subchapter G is to advance or inhibit religion, although as we have explained at length, a substantial effect of the statute is to indicate the State's preference for post-secondary religious instruction that meets the Board's standards. But it is fair to say that *a* principal or primary effect is to advance religious education the State approves and inhibit what it does not. We think it beyond serious dispute that the statute clearly and excessively entangles the government in matters of religious instruction. The Board's standards, and those of recognized accrediting agencies, cannot be applied without a thorough, detailed, and repeated examination of an institution's operations and curriculum. Without such an

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[73] *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 695 (Tex. 1984).

[74] 403 U.S. 602 (1971).

[75] *Williams v. Lara*, 52 S.W.3d 171, 189 (Tex. 2001) (footnote and citations omitted).

examination, the Board could not determine, as it says it must, whether, for example, "[t]he character, education, and experience in higher education of the faculty shall be such as may reasonably ensure that the students will receive an education consistent with the objectives of the course or program of study."[76] This is but one of more than a score of standards the institution must meet to obtain approval and access to restricted terminology. And it must demonstrate its compliance every two years until it obtains full accreditation from a recognized agency, which, as we have noted, is considered by the Coordinating Board to be at least as rigorous an exercise as compliance with the Board's standards.

It is true, as the Coordinating Board argues, that an institution may choose not to burden itself with state standards, but that option does not disentangle the State from religious matters. The choice, which every institution must make, determines whether the institution may use restricted terminology, indicating that its programs have state approval. It is this expression of approval or lack of approval of religious instruction that entangles the State in religion.

Several Justices of the Supreme Court have criticized the *Lemon* test,[77] and while we are not at liberty to take criticism for rejection, from our vantage point, the Court seems over time to have become "particularly attuned to whether the challenged government practice purposefully or effectively 'endorses' religion, an inquiry courts generally consider a component of the *Lemon* test's first and second parts."[78] As we have explained, subchapter G clearly expresses the State's

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[76] 19 TEX. ADMIN CODE § 5.214(a)(5) (1998); *accord* 19 TEX. ADMIN. CODE § 7.7(9) (2007).

[77] *See*, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319-320 (2000) (Rehnquist, C.J., dissenting) (describing *Lemon*'s "checkered career"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-399 (1993) (Scalia, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and dissenting in part); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346-349 (1987) (O'Connor, J., concurring); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring).

[78] *Williams v. Lara*, 52 S.W.3d 171, 190 (Tex. 2001) (citing *Allegheny*, 492 U.S. at 592); *accord Lynch v. Donnelly*, 465 U.S. 668, 688-694 (1984) (O'Connor, J., concurring); *Books v. City of Elkhart*, 235 F.3d 292, 304-305 (7th Cir. 2000); *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 (6th Cir. 2000); *Granzeier v. Middleton*, 173 F.3d 568, 572-573 (6th Cir. 1999); *Cammack v. Waihee*, 932 F.2d 765, 773-780 (9th Cir. 1991).

endorsement of particular religious education by allowing institutions that meet its standards to use restricted terminology. A "seminary" is a state-endorsed school, and a "bachelor's" diploma a state-endorsed award. The State's imprimatur is unmistakable.

We are aware of only one other court that has considered whether state regulation of post-secondary religious education conflicts with the Establishment Clause. In *New Jersey State Board of Higher Education v. Shelton College*, the New Jersey Supreme Court upheld that state's regulation against an Establishment Clause challenge.[79] But the school in that case, Shelton College, offered secular as well as religious programs, including elementary education, secondary education, English, history, business management, music education, and natural science.[80] And the court's reasoning illustrates the significant differences between the level of regulation involved in that case and this one:

> The Establishment Clause permits minor, unobtrusive state supervision of religiously oriented schools. Only excessive entanglement is proscribed. None of the education statutes or regulations here in question mandates "active involvement of the sovereign in religious activity." None authorizes state regulation of the *content* of an educational program. Nor does the regulatory scheme on its face require "comprehensive, discriminating and continuing state surveillance." Although the regulations in this area appear to be burdensome, especially as applied to a college of approximately 30 students, they explicitly call for flexibility in their administration so as to accommodate various institutions with diverse educational goals. Because Shelton College declined even to complete the licensing process, the allegation of excessive entanglement rests on speculation about the manner in which these statutes and regulations might be applied. Although one could imagine an unconstitutional application of this regulatory scheme, we are confident that the Board of Higher Education will pursue the least restrictive means to achieve the State's overriding concerns. Of course, should the Board exercise its discretion in a manner that unnecessarily intrudes into Shelton's religious affairs, the college would then be free to challenge the constitutionality of such action. At this juncture, however, we need not invalidate these statutes merely because they may be amenable to an unconstitutional application.[81]

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[79] 448 A.2d 988 (N.J. 1982).

[80] *Id*. at 990.

[81] *Id*. at 997-998 (footnote and citations omitted).

Subchapter G's certification process is certainly not minor or unobtrusive; it is, the Coordinating Board insists, "comprehensive and rigorous".[82] The statute prohibits an institution from using common terminology if the sovereign is not actively involved in the institution's religious education. State examination extends to content and presentation. There 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.[83] We need not speculate what process Tyndale would have been required to follow to obtain certification; the demands of the Board's standards are perfectly clear. These are not the circumstances described in *Shelton College*, and had they been, we think from what the court said there, it would have reached the same result we do in the present case.

"The purpose of the Establishment Clause is to protect against state 'sponsorship . . . and active involvement' in religious activity."[84] Here, the religious activity is offering religious instruction and recognizing attainment with certificates clearly reflecting that such instruction is religious. We do not address what restrictions may be imposed on religious institutions that offer a secular education or award diplomas or other certificates for courses of study not clearly

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[82] 19 TEX. ADMIN. CODE § 5.213(i)(2) (1998); *accord* TEX. ADMIN. CODE § 7.5(f)(2) (2007).

[83] As the court of appeals noted, 114 S.W.3d at 623, 628, subchapter G authorizes the Coordinating Board to extend an institution's eligibility for certification if it has been denied accreditation based on its religious policies. TEX. EDUC. CODE § 61.308(e) ("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 rule of 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."). The court of appeals thought that this provision made subchapter G's supervision of religious schools "unobtrusive". 114 S.W.3d at 628. The 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, 19 TEX. ADMIN. CODE § 7.6(c)(5) (2007), 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 Board stops short of saying that it would have – or even could have – offered any special allowances for religious institutions.

[84] *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 694-695 (Tex. 1984) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

denominated as religious. It is hard to imagine a more active involvement in religious training than by determining whether it meets the 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. We therefore hold that sections 61.304 and 61.313(a) violate the Establishment Clause and article I, section 6 of the Texas Constitution as applied to a religious institution's programs of religious instruction.

III

A

The First Amendment also forbids any "law . . . prohibiting the free exercise" of religion.[85] Likewise, article I, section 6 of the Texas Constitution states:

> 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 . . . .[86]

We have treated the state and federal Free Exercise guarantees as coextensive absent parties' argument to the contrary,[87] and we do so again here. We are well aware of scholarly commentary

[85] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise of [religion] . . . ."); *Cantwell v. Conn.,* 310 U.S. 296, 303 (1940).

[86] TEX. CONST. art. I, § 6.

[87] *Tilton v. Marshall*, 925 S.W.2d 672, 677 n.6 (Tex. 1996) ("Because Tilton has not argued persuasively for a different application of the provisions of the First Amendment and Article I, Section 6 as they pertain to the free exercise of religion, we assume without deciding that the state and federal free exercise guarantees are coextensive with respect to his particular claims.").

criticizing the United States Supreme Court's recent Free Exercise decisions,[88] but we do not find it necessary to discuss those issues in this case.

HEB Ministries contends, as we have said, that subchapter G violates its Free Exercise rights by requiring that it either comply with state standards, and thereby compromise its religious training mission, or forego the use of restricted terms, including "seminary" and common program-level designations for its diplomas. The Coordinating Board asserts that subchapter G does not violate the Free Exercise Clause because it is a neutral law of general applicability, or if not, then because the State has a compelling interest in regulating post-secondary schools. The Board stresses that compliance with subchapter G is voluntary and that other terms are available to schools that do not comply.

This dispute centers on whether and how to apply the United States Supreme Court's decision in *Employment Division v. Smith*.[89] In *Smith*, two Native American Church members who used peyote for sacramental purposes were fired and then denied unemployment benefits because their conduct violated state drug laws.[90] They complained that the criminal law thus infringed on their Free Exercise rights. The Supreme Court disagreed, noting that it had "consistently held that 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)."[91] The only exceptions, it stated, had

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[88] *See*, *e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259 (1993); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Mark G. Yudof, *Religious Liberty in the Balance*, 47 SMU L. REV. 353 (1994).

[89] 494 U.S. 872 (1990).

[90] *Id*. at 874.

[91] *Id*. at 879 (internal quotation marks omitted).

> involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . . And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. . . .
>
> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity . . . . Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs [or] the communication of religious beliefs, . . . the rule to which we have adhered . . . plainly controls.[92]

The Court specifically noted that the case did not involve "the communication of religious beliefs" or "any communicative activity". The fact that the use of peyote was prohibited by a general criminal law was "critical".[93] In that situation, the state could not be held to showing a compelling interest to justify the law:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.[94]

Three years later, the Supreme Court expounded on *Smith*'s neutrality and general applicability requirements in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[95] There, a church of the Santeria religion challenged city ordinances passed to prohibit it from sacrificing animals as part of its religious ritual.[96] The requirement that a law be neutral toward religion, the Court said, is basic: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because

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[92] *Id*. at 881-882.

[93] *Id*. at 876.

[94] *Id*. at 885 (internal quotation marks omitted).

[95] 508 U.S. 520 (1993).

[96] *Id*. at 524-528.

it is undertaken for religious reasons."[97] Non-neutrality, the Court said, was indicated but not established by the ordinances' use of the words "sacrifice" and "ritual" because the words, though religious in origin, also have secular meanings.[98] But even if a law is neutral on its face, if its object "is to infringe upon or restrict practices because of their religious motivation, the law is not neutral".[99] The Court readily found that "suppression of the central element of the Santeria worship service was the object of the ordinances."[100] The requirement of general applicability, the Court explained, was based on "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."[101] The Court deemed that principle "essential to the protection of the rights guaranteed by the Free Exercise Clause."[102] Clearly, the Court found, the ordinances "pursue[d] the city's governmental interests only against conduct motivated by religious belief."[103] Having determined that the ordinances were neither neutral nor generally applicable, the Court concluded:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not watered down but really means what it says. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny

[97] *Id*. at 532.

[98] *Id*. at 534.

[99] *Id*. at 533.

[100] *Id*. at 534.

[101] *Id*. at 543.

[102] *Id*.

[103] *Id*. at 545.

only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.[104]

Concurring separately, Justice Scalia, who wrote for the Court in *Smith*, explained further:

> The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in [*Smith*] and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.[105]

Justice Souter also concurred separately, expressing his misgivings over *Smith*, decided before he arrived at the Supreme Court. "[T]he noncontroversial principle," he said, "expressed in *Smith* though established long before, [is] that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable."[106] But as he read *Smith*, he said, its significance "is not only in its statement that the Free Exercise Clause requires *no more than* 'neutrality' and 'general applicability,' but also in its adoption of a particular, narrow conception of free-exercise neutrality."[107] Justice Souter continued:

> our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a

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[104] *Lukumi*, 508 U.S. at 546 (internal quotation marks, brackets, ellipses, and citation omitted).

[105] *Id*. at 557 (Scalia, J., concurring) (citations omitted).

[106] *Id*. at 559-560 (Souter, J., concurring).

[107] *Id*. at 560 (emphasis added).

> right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.[108]

To illustrate his concern, Justice Souter suggested:

> A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[109]

"The prohibition law in place earlier this century," he noted, "did in fact exempt 'wine for sacramental purposes.'"[110] Free Exercise protections, he concluded, extend beyond what he took to be the rule in *Smith*:

> Rather, we have said, "[o]ur cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'"[111]

Neither the Court nor Justice Scalia responded to Justice Souter's concerns.

Lukumi was an easy case — the Court was unanimous on the result — because the clear genesis and purpose of the ordinances was to restrict the church's sacramental animal sacrifices. As the Court summarized the case, "the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the

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[108] *Id*. at 561-562 (citation and footnote omitted).

[109] *Id*. at 561 (footnote omitted); *cf*. *Smith*, 494 U.S. at 877 (stating that the sacramental use of wine could not be prohibited, but not discussing whether regulation of wine use in general would be required to except sacramental use: "But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.").

[110] *Lukumi*, 508 U.S. at 561 n.2.

[111] *Id*. at 565 (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 384-385 (1990), and *Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989)).

Nation's essential commitment to religious freedom."[112] Though *Smith* also involved a law restricting a church's sacramental practice, its purpose was to prevent drug abuse generally and its enactment was completely unrelated to the church's practice. As Justice Blackmun observed in *Lukumi*, the case would have been much harder if the church had been requesting "an exemption from a generally applicable anticruelty law."[113] That hypothetical and Justice Souter's illustrate the difficulties in applying the rule in *Smith.*

HEB Ministries and amici curiae[114] argue the rule does not apply in this case because subchapter G directly interferes with a religious group's education and training of its ministers, activities that are specifically protected by the First Amendment. In support of this argument, amici cite a Supreme Court decision prior to *Smith* that prohibited a court from deciding whether a bishop deposed by his church should be reinstated[115] and state and federal decisions prohibiting suits against churches for employment discrimination.[116] But these cases address government interference in selection of the clergy, not in education and training. Subchapter G only obliquely affects religious groups' selection of their clergy. It may influence students' choices in seeking a religious course of study, but it does not prohibit a group from calling a minister who does not hold a "degree" from a "seminary" or otherwise limit a group's freedom to select whomever it chooses. While subchapter G's impact on religious education is direct and undeniable, the authorities cited shed little light on whether it infringes on Free Exercise rights. Assuming that government regulation of clergy

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[112] *Id.* at 524.

[113] *Id*. at 580 (Blackmun, J., concurring in the judgment).

[114] Brief of Baptist Joint Committee on Public Affairs and Christian Legal Society as Amici Curiae in Support of Petitioners 37-38 (by Prof. Douglas Laycock and Eric Cernyar).

[115] *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

[116] *Callahan v. First Congregational Church*, 808 N.E.2d 301 (Mass. 2004); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 & n.* (4th Cir. 2000) (collecting cases); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343, 346-350 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-463 (D.C. Cir. 1996); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

selection is prohibited apart from *Smith*, which seems a safe assumption even though *Smith* is silent on the subject, we do not think subchapter G can be so characterized. And though, as we have noted above, the government cannot regulate religious education any more than clergy selection,[117] the argument here is that subchapter G's standards are not constitutionally infirm because they apply to graduate education generally. Thus, we decline the invitation to analyze the Free Exercise issues here apart from *Smith*, although we reiterate that *Smith* made a point of noting that it did not involve "the communication of religious beliefs" or "any communicative activity", which is at the heart of the present case.

Accordingly, we turn to the matter of how *Smith* applies, first to section 61.313's limitation on the use of "seminary", and then to section 61.304's limitation on terms reflecting program-level educational attainment.

B

Undoubtedly, a statute regulating the use of words like "church", "mosque", and "synagogue" by groups that do not meet state standards would not be a neutral law of general applicability permissible under *Smith* because the words' meanings are exclusively religious,[118] and a law regulating their use would thus target religion. The Supreme Court said as much in *Lukumi* when it concluded that regulation of "sacrifice" and "ritual" was consistent with but not conclusive of facial discrimination because those words did not refer exclusively to religious practices,[119] implying that if they had, it would have reached the opposite conclusion.

The meaning of "seminary" is also not exclusively religious. Its origin is secular and only metaphorically related to education. Derived from the Latin *semen*, meaning "seed", "seminary"

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[117] *Supra* note 60 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)) and accompanying text.

[118] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 404, 1473, 2318 (1981)

[119] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

once meant a seedbed but later a school, where, figuratively speaking, seeds of knowledge are planted.[120] The sixteenth-century Council of Trent of the Roman Catholic Church gave seminaries a distinctly religious cast, compared to other educational institutions like colleges and universities which were also often religious schools, by adopting a "Method of establishing Seminaries for Clerics, and of educating the same therein".[121] But the Church's employment of the word did not co-opt its meaning. Eighteenth-century seminaries in the United States were understood to include both secular and religious schools.[122] And today, "seminary" is still defined as a school, not solely a religious school.[123]

Primarily, however, "seminary" is used to refer to a religious school. The Coordinating Board has not pointed us to a single secular seminary in Texas, or even in the United States, for that matter, either at present or in 1997 when the Legislature amended section 61.313 to include "seminary" with "college", "university", and other institutional names as restricted words. That is not to say there are none at all, but the fact that they are rare describes the context in which the 1997 amendment was proposed and adopted.

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[120] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2064 (1981); 14 THE OXFORD ENGLISH DICTIONARY 956 (2d ed. 1989).

[121] THE CANONS AND DECREES OF THE SACRED AND OECUMENICAL COUNCIL OF TRENT 187-192 (J. Waterworth ed. & trans., London, Dolman, 1848), *available at* http://history.hanover.edu/texts/trent.html.

[122] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 869 n.1 (1995) (Souter, J., dissenting) ("While some of these ['seminaries of learning' which would have been funded under a Virginia tax bill defeated in 1876] undoubtedly would have been religious in character, others would not have been, as a seminary was generally understood at the time to be 'any school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments.' N. Webster, An American Dictionary of the English Language (1st ed. 1828); see also 14 The Oxford English Dictionary 956 (2d ed. 1989). Not surprisingly, then, scholars have generally agreed that the bill would have provided funding for nonreligious schools. See, *e.g.*, Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 897 and n. 108 (1986) ('Any taxpayer could refuse to designate a church, with undesignated church taxes going to a fund for schools. . . . The bill used the phrase 'seminaries of learning,' which almost certainly meant schools generally and not just schools for the training of ministers')").

[123] *Supra* note 118; BLACK'S LAW DICTIONARY 1365 (7th ed. 1999) (defining "seminary" simply as "an educational institution, such as a college, academy, or other school").

So does a provision added to the Texas Constitution in 1876. Article I, section 7 prohibits appropriation of public funds for any "theological or religious seminary".[124] In 1908, we observed that "the adjectives 'theological or religious' *necessarily* give ["seminary"] the meaning of a place specifically for the preparation of men for the ministry, or at least, for the teaching of religious doctrines",[125] thereby suggesting that the word without the modifiers would not be clearly understood to mean a religious school. But two other aspects of the framers' phrasing are worth noting. They obviously recognized that "theological or religious" and "seminary" fit together, that it made sense to refer to seminaries as theological or religious because seminaries often were. And they appear to have thought it made more sense than referring to theological or religious colleges or universities, surely not because such institutions were nonexistent, but because the use of "seminary" alone fully achieved their purpose of banning "[a]ppropriations for sectarian purposes", as the caption stated. The framers' choice of words indicates their understanding that seminaries were distinctly, though not exclusively, religious schools.

That same understanding is reflected elsewhere in the Education Code. In 1989, the Legislature created a work-study program "to provide eligible, financially needy students with jobs, funded in part by the State of Texas".[126] Eligibility requirements are minimal,[127] but a person is specifically ineligible if he or she "(1) receives an athletic scholarship; or (2) is enrolled in a seminary or other program leading to ordination or licensure to preach for a religious sect or to be

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[124] TEX. CONST. art. I, § 7.

[125] *Church v. Bullock*, 109 S.W. 115, 117 (Tex. 1908) (emphasis added).

[126] TEX. EDUC. CODE § 56.072.

[127] *Id*. § 56.075(a) ("To be eligible for employment in the work-study program a person must: (1) be a Texas resident as defined by coordinating board rules; (2) be enrolled for at least one-half of a full course load and conform to an individual course of study in an eligible institution; (3) establish financial need in accordance with coordinating board procedures and rules; and (4) comply with other requirements adopted by the coordinating board under this subchapter.").

a member of a religious order."[128] These are narrow categories, obviously intended to exclude small groups of students. The Legislature did not exclude all seminary students from the program, but only those in a religious course of study, and among them, only the ones aspiring to religious service. The language thus suggests that not all seminary education is religious. But it also suggests that the one word "seminary" fully conveys the idea of religious education, leaving "other" to include any such programs in colleges, universities, and other institutions.

No legislative history explains the Legislature's intent in amending section 61.313 to add "seminary" to names institutions are restricted in using, but it must have recognized that the amendment would ensure regulation of the kind of religious study and clerical training for which seminaries primarily are known. Indeed, it is hard to imagine that the Legislature had anything less specific in mind, given that the other additions to the list were specific names for medical and law schools. Although the amendment may not have been aimed at religious practices quite as squarely as the ordinances in *Lukumi*, its target was certainly smaller than the general public health protected by the statute in *Smith*.

The Coordinating Board argues that the amendment did not alter the fact that section 61.313 is neutral in its purposes of setting high standards for post-secondary education and prohibiting "diploma mills". Even if all seminaries were religiously affiliated, the Board contends, a seminary education is respected in the secular world and should meet the standards the public expects for graduate education. Furthermore, the Board notes, religious subjects can be taught in secular programs. Sacred texts may be studied as literature, religious history without belief in divine direction, even creeds without a profession of faith, and the same standards should apply as for other programs. But these arguments exaggerate HEB Ministries' contention in this case. HEB Ministries does not contend that secular education, whether provided by seminaries or other institutions, even

[128] *Id*. § 56.075(b).

in religious subjects, is beyond state regulation; it contends only that the State cannot regulate the religious education and training of students as part of a religious mission.

The Coordinating Board insists that section 61.313 does not violate HEB Ministries' Free Exercise rights by restricting its use of a single word, "seminary", when others are available, like "Biblical Institute", "Academy", "Center", "School", "School of Religion", or "School of Theology". It is not clear that the Board's reading of the statute is correct. Section 61.313 restricts not only the use of a listed term but also "a term having a similar meaning".[129] If the meanings of "seminary", "school", and "school of religion" are not similar, then the meaning of "similar" is itself unclear. If the Board is wrong and section 61.313 restricts not only the use of "seminary" but any other word of related import, then the statute denies a religious school that does not meet state standards all access to names used by such schools. And if the Board is right, the statute nevertheless limits access to the name that, unlike all others available, distinctly describes religious schools. Either 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.

"[A] law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."[130] We have found only one other state that regulates use of the word "seminary" as subchapter G does.[131] The Coordinating Board tells us: "The State has a strong interest in ensuring that 'seminaries' are in fact genuine places of study and academic learning." With respect to religious courses of study, we think the State has no such interest at all and is in fact incapable of determining what is "genuine" religious study and learning

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[129] TEX. EDUC. CODE § 61.313(a).

[130] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

[131] 15 PA. CONS. STAT. § 1303; 24 PA. CONS. STAT. §§ 6501, 6507, 6508.

and what is not. The Board argues that to exclude seminaries from the State's regulation of post-secondary education would seriously undermine its effectiveness, but HEB Ministries does not argue for so broad an exclusion. It contends only that a school's religious programs need not meet state standards before it can call itself a seminary. None of the instances of diploma mills' fraud on the public cited by the Board involves such programs. In sum, the Board has failed to show that the State has any interest in restricting use of the word "seminary" by schools offering religious instruction, let alone an interest of the highest order.

Accordingly, we conclude 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 guarantees of the First Amendment and the Texas Constitution.

C

HEB Ministries does not challenge the State's authority to require that a private post-secondary educational institution meet prescribed standards before it can grant degrees, which is what section 61.304 does, but contends that section 61.302(1) defines "degree" so broadly that a non-compliant school is effectively left with no words to describe educational attainment. For religious study programs, HEB Ministries asserts, this pressure to comply with subchapter G's standards governing a school's operation and curriculum content violates the Free Exercise Clause.

The first premise of HEB Ministries' constitutional complaint is correct. Section 61.302(1) casts a wide net, defining "degree" to include not only the designations "associate", "bachelor's", "master's", and doctor's", but "their equivalents", as well as "any title or designation, mark, abbreviation, appellation, or series of letters or words . . . which signifies, purports to [signify], or is generally taken to signify satisfactory completion of the requirements of all or part of a program of study leading to [a] . . . degree *or its equivalent*."[132] The last clause forms a linguistic Möbius

[132] TEX. EDUC. CODE § 61.302(1) (emphasis added).

strip: a degree is not only anything that could possibly signify a degree, but also the equivalent of anything that could possibly signify a degree, which includes the equivalent of . . . , and so on. The Coordinating Board suggests in its brief that the definition excludes four terms, "certificate", "advanced certificate", "diploma", and "higher diploma", but those exceptions are nowhere to be found in subchapter G or in the Board's regulations. The Board offers no explanation why they alone do not signify, do not purport to signify, and are not generally taken to signify a degree or its equivalents, and no explanation is apparent, especially in the context of this case. HEB Ministries was fined $30,000 for awarding two "certificates" and four "diplomas" in "Biblical Studies" because the Commissioner concluded that Tyndale alleged that completed courses could be applied toward a degree. HEB Ministries was fined another $10,000 for awarding two "diplomas" in "Christian Studies" because the Commissioner found that Tyndale would accept them for admission to more advanced study in what it called "master's" programs. Not one of these eight awards was called a "degree" or designated "associate", "bachelor's", "master's", or "doctor's" or otherwise seems to have signified a degree.

We realize we must construe statutes to avoid constitutional problems when we can,[133] but we cannot create exceptions where none appears to exist. It is hardly surprising, of course, that "degree" is defined broadly; the purpose of subchapter G is to ensure compliance, not to provide a safe haven for noncompliant schools. Even if the definition of "degree" admits exceptions, the use of any words remotely resembling ordinary educational terminology is risky. A violation of section 61.304 carries criminal, civil, and administrative liability.[134] If Subchapter G does not actually restrict all terminology ordinarily used to mark educational attainment, it effectively does so.

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[133] *E.g., In re Green*, 221 S.W.3d 645, 649 (Tex. 2007) (per curiam) ("We must of course avoid a construction of a statute that renders it unconstitutional. *See* TEX. GOV'T CODE § 311.021(1).").

[134] *Supra* notes 36-41.

The second premise of HEB Ministries' complaint is also correct: section 61.304's prohibition against granting degrees, defined to include all useful terminology, strongly encourages, to the point of coercion, compliance with standards set by the Coordinating Board. Again, this is hardly surprising. Subchapter G is designed to ensure that private post-secondary schools operating in Texas meet prescribed standards. If it were easier for a school not to comply, the statute's effectiveness would be impaired. The Board insists that compliance is voluntary, by which it means that it is possible for a school to refuse, but the consequences of refusal are severe.

We come, then, to the issue of whether this state regulation of the terminology used in recognizing student attainment, as applied to religious educational programs, violates the Free Exercise Clause. The Coordinating Board argues that because the regulation does not target religious programs, but applies to secular and religious programs alike, it is a neutral law of general applicability that, according to the rule in *Smith*, does not impact Free Exercise rights. This argument, we think, focuses too narrowly on the concepts of neutrality and general applicability, separate from the First Amendment's concerns they are meant to help analyze, and reduces them to a rule that a regulation is permitted as long as it is universal. Justice Souter's hypothetical involving Prohibition and the Eucharist illustrates the fallacy in such a rule.[135] A law is not neutral or generally applicable for purposes of applying the Free Exercise Clause merely because it affects everyone; it is important how religion is affected differently because it is religion. This concern is critical when the law affects communication, as the Supreme Court plainly implied in *Smith* by reemphasizing that the law there had no such effect.[136]

Standards for the content of educational instruction are not neutral with regard to religious studies merely because they also apply to secular studies, as the standards under subchapter G plainly

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[135] *Supra* notes 107-108 (citing *Lukumi*, 508 U.S. at 561) and accompanying text.

[136] *Supra* note 91 (citing *Employment Div. v. Smith*, 494 U.S. 872, 881-882 (1990)) and accompanying text.

show. Academic freedom, for example, which the Coordinating Board's standards require, has no more than a limited role, and perhaps no place at all, in a school whose mission is to advance the doctrinal tenets of a specific faith. Study in general subjects outside a student's major, a desirable requirement for a liberal arts education, may be considered a distraction or worse by someone preparing for the ministry or other religious service. These are but two examples. A secular educator's meat may be a religious educator's poison, and vice versa. Standards that improve the quality of secular education while impairing sectarian education discriminate against religion. The Coordinating Board argues that its standards benefit religious education, but that is a judgment call the First Amendment does not permit the State to make.[137] In any event, the Board argues, the intent is to benefit all educational programs. But while we can easily assume this to be true, we must also consider the effect of the standards on schools like Tyndale with a religious mission. The Board argues that section 61.304 regulates only the granting of degrees, something that is well within the State's authority, not how religious subjects are taught. But the statute's prohibition on granting degrees is so pervasive that its effect is necessarily coercive, as indeed it is intended to be.

In the sense that section 61.304 is directed to a problem, diploma abuse, that did not originate in or have any distinct association with any religious practice, the statute more closely resembles the drug law upheld in *Smith* than the animal sacrifice ordinances struck down in *Lukumi*. But section 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, the statute not only differs from the laws in both cases, it affects "the communication of religious beliefs" against which *Smith*

[137] *See Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

pointedly warned.[138] We therefore conclude that the Free Exercise Clause requires that it "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."[139]

"The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not 'water[ed] . . . down' but 'really means what it says.'"[140] The Legislature has identified the State's interests as "prevent[ing] deception of the public resulting from the conferring and use of fraudulent or substandard college and university degrees", "regulation by law of the evidences of college and university educational attainment", and "protection of legitimate institutions and of those holding degrees from them".[141] Amici curiae argue that these interests are hardly compelling when the public can easily protect itself with relatively simple inquiries into the credentials of an educational institution and its graduates. But the Coordinating Board insists that "[d]egree mills continue to be a serious worldwide problem."[142] The Board points to various articles and studies chronicling instances of harm caused by bogus academic credentials. The stipulated record on which this case was submitted in the trial court contains no evidence regarding the importance of the State's interests in subchapter G.

We do not doubt the importance of the State's interests, but we nevertheless conclude that section 61.304 is not narrowly tailored to pursue those interests and avoid unnecessary interference with religious studies. The Board has not identified any instance of diploma fraud involving religious programs, or any complaint that an award of a diploma in religious studies did not represent the expected academic achievement. Thus, it is not clear that the purpose of subchapter G would

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[138] *Supra* note 91 (citing *Smith*, 494 U.S. at 881-882) and accompanying text.

[139] *Lukumi*, 508 U.S. at 546 (internal quotation marks, brackets, ellipses, and citation omitted).

[140] *Id*. at 546 (quoting *Smith*, 494 U.S. at 888).

[141] TEX. EDUC. CODE § 61.301.

[142] Brief for Respondents 4.

be impaired in any way if religious programs were exempted altogether. At the very least, section 61.304's restrictions on all terminology relating to degrees need not be so pervasive for religious programs. The Board worries that any exception for religious schools might violate the Establishment Clause, but HEB Ministries does not argue that religious institutions offering secular education programs should be exempt from state standards. Amici argue that the State's interest would be fully served by requiring noncompliant institutions to disclose their lack of accreditation, even on academic award certificates. The Board does not argue that this, too, would raise First Amendment concerns but asserts only that it would be ineffective. It has not, however, provided support for its assertion.

The Board cites cases by the supreme courts of New Jersey and Tennessee upholding state regulation of graduate schools against challenges by religious institutions. In the New Jersey case, *Shelton College*, which we have already discussed, a religious school that offered both secular and religious instruction argued that state regulation of religious schools violated the First Amendment.[143] The court held that the Free Exercise Clause did not require a blanket exemption of religious schools from state regulation.[144] But as we have said, the regulation was not as pervasive as subchapter G, and Shelton College did not limit its argument to its religious programs. In *Tennessee ex rel. McLemore v. Clarksville School of Theology*, the Tennessee Supreme Court upheld broad state regulation of a theological school that trained only ministers, offered no secular courses, and granted only theological degrees.[145] We respectfully disagree with that court's decision.

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[143] *New Jersey State Bd. of Higher Educ. v. Shelton Coll.*, 448 A.2d 988, 989-991 (N.J. 1982).

[144] *Id*. at 989, 996-997.

[145] 636 S.W.2d 706, 707-708, 711 (Tenn. 1982).

Finally, in an opinion the Board does not cite, the Texas Attorney General addressed whether subchapter G would violate the Free Exercise Clause as applied to a "university" that offered only religious instruction.[146] Relying heavily on the *Shelton College* decision, and without expressing a view on whether the statute burdened Free Exercise rights, the opinion concluded that "a court would conclude that [subchapter G] and the regulations adopted thereunder by the Coordinating Board, as a general matter are the least restrictive means of achieving the state's interest in maintaining the integrity of the postsecondary degrees and protecting its citizens from fraud and misleading representations."[147] We respectfully disagree.[148]

Accordingly, we conclude that section 61.304's restriction on the words that a religious institution may use to refer to completion of religious programs of study is so broad that it violates the Free Exercise guarantees of the First Amendment and the Texas Constitution. The State may not deny a religious program of study clearly denominated as such the use of all words capable of describing educational achievement. As we have said, HEB Ministries does not complain of the statute's restriction on the use of the word "degree", and we do not consider whether it is permissible.

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[146] Op. Tex. Att'y Gen. No. JC-0200 (2000).

[147] *Id*.

[148] *See*, *e.g.*, *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 82 (Tex. 1997) ("While Attorney General's opinions are persuasive they are not controlling on the courts.").

The judgment of the court of appeals is reversed and the case is remanded to the trial court to vacate its injunction and award of penalties, to consider HEB Ministries' application for attorney fees,[149] and for further proceedings in accordance with this opinion.

Nathan L. Hecht
Justice

Opinion delivered: August 31, 2007

[149] *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (stating that "by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the [Declaratory Judgment Act] necessarily waives governmental immunity for such awards").