

ORAL ARGUMENT – 01/05/05
03-0995
HEB MINISTRIES V. TEXAS HIGHER EDUCATION
COORDINATING BOARD

SHACKELFORD: The state fined Tyndale Seminary \$173,000 for issuing diplomas in theology and calling itself a seminary without first receiving state approval of its board, its curriculum and its professors. That is unconstitutional.

There are two major problems with what the state is doing. First, the state may not regulate religion or purely religious teaching and training. Period. No excuses. That violates both religion clauses. Second, and completely separate, is free speech. Under free speech even if the government were now allowed to license and regulate purely religious teaching and training, the government still must provide extensive legislative findings and evidence to prove that a least restrictive means was not available. Yet in this case requiring seminaries for instance to disclose that the nature of their degree is religious, or requiring seminaries to say they are non-accredited, is a least restrictive means. Much less restrictive than the state taking control of all seminaries through regulation.

WAINWRIGHT: The state argues that Smith governs this case and that the standard that there need to be a compelling interest need not be satisfied here. J. Scalia goes on in length about taxes, about a number of examples in which the state does regulate religious conduct or practices as opposed to the least and has done so legitimately. What's your answer to that argument?

SHACKELFORD: First, the Smith argument only is aimed at one claim: the free exercise claim. It has nothing to do with either an establishment clause or free speech. But second, Smith itself states right on the face of the opinion, that Smith does not apply when the free exercise conduct also involves speech or as they say communicative activity. And then they cite as their example for that the Cantwell case. The very case we rely upon for the free exercise clause claim.

So the first point of that is that that argument only focuses on the free exercise claim. And the second point is, the Smith decision itself completely says that Cantwell has speech claims when the religion is speech. That neutrality type argument doesn't work.

WAINWRIGHT: The so called hybrid exception.

SHACKELFORD: Right. And additionally, you have others. I know Prof. Laycott covered this extensively in the brief. And that is that even if a law were neutral, at the beginning of Smith there is some statements about the fact that the government can never involve itself even through a neutral law into the internal activities of a church. For instance, there is a number of cases dealing with like sex discrimination. And you can't tell a church - you Baptist have to hire women pastors. Because that is considered a violation of church autonomy even if it were a neutral rule. That is only

referencing the free exercise clause claim. And the state is seeking a power in this case that it doesn't have, a power that we should never grant. The power to ultimately control the training of the clergy.

HECHT: But really they just don't want you to use a handful of words.

SHACKELFORD: We wish that were true. But that's not accurate. I understand that's their major argument. There are two major problems with the argument they make with regard to terminology and the use of terms. One, it's really an irrelevant argument. It does not matter what excuse the state tries to use. The state may not regulate purely religious teaching and training. Period. No matter what excuse they try to use or word to try to get them into the process of regulating that.

HECHT: Couldn't they say you can't call yourself a law school?

SHACKELFORD: Absolutely.

HECHT: Why isn't that the same regulation as saying you can't call yourself a seminary?

SHACKELFORD: Can the state regulate for instance the awarding of secular degrees? And if a religious institution came along and said we don't want to follow your rules regarding how to give secular degrees. Yes. But they can't tell seminaries what is substandard in theological degrees. They can't tell seminaries these are subpart religious training facilities for the ministry, and these are groups that we say are not.

HECHT: You agree that if you came in with this curriculum and said we want to call ourselves a law school, the state could say no.

SHACKELFORD: Absolutely.

HECHT: So the war is over the word seminary?

SHACKELFORD: That's a small part of it, but that is definitely a part of the fines. The other thing is, the fines that were issued against the seminary. You look to the statute. The statute doesn't say you can't use a couple of magic words. The statute says you can't use the word degree or their equivalence. In fact if you look at the statute, it actually says you can't use the word that is an equivalent of an equivalent. It uses the word equivalence twice on top of each other. And that is why in this case, for instance, Tyndale never used the word degree. There is nothing in the record that ever says that. The state in their brief a couple of times putting quotation marks degree or degree level, and then they have a number of cites in the record. When you go to those cites you will find that quotation is not in there. Tyndale never used the word degree.

Tyndale was fined for instance for using terms like a diploma in Christian

studies. The reason Tyndale was fined for issuing these diplomas and certificates that they issued, were that the state considered those to be an equivalent of what the state wants to regulate. And I can really say it no better than the state's own brief on page 11. They say that any terminology that carries the same expectation of high academic achievement is covered. So seminaries can use no words to communicate that a serious course in theological study was completed. Why? Because that's an equivalent. And that's why Tyndale was fined \$173,000.

Rather than do what almost every other state in the country does, which is for instance, requiring that seminaries disclose that their degree is in a religious discipline. In this case the state is trying to license a religious function, the training of the pastor, that it could not even participate in itself.

O'NEILL: If the word seminary were out of the statute or if it were found - they've argued it has a secular meaning, but if it were out of the statute would there be a problem with the degree piece?

SHACKELFORD: There would. Exactly like in this case. When you are issuing in this case for instance, diplomas in religious disciplines, the state can't be in charge of telling you what is a substandard theological degree. What is a substandard degree in missions?

O'NEILL: Is this what was actually issued?

SHACKELFORD: That is an example of one of the exact diplomas for which Tyndale was fined. Now we added to the bottom of this a disclaimer in that some states require a disclaimer. One of the requirements the state has under speech, under religion, or all of them is it has to show that the way it's regulating speech in religion is the least restrictive way to do so. And if their purpose is truthful communication this makes clear that this group is not accredited by the state.

Now what this also does is, again, this would have been fine in 30 some odd states in the country, because what most states do is they say you simply have to disclose that the degree or the diploma is in a religious discipline. So if you were to look at this you would see theological on the top. You would see seminary. You look in the middle it says Theological again. You would see it's a diploma in Christian studies. The average person understands what a degree in theology is.

O'NEILL: What if you have someone who puts PhD by their name and what they are referring to really is diploma. How do you disclaim something like that on a resume for example?

SHACKELFORD: Obviously you can never stop people from putting things that are not true in their communication. Resume fraud goes on all over the place. But fraud is fraud and it can be prosecuted and it's actionable.

But what you can do is the state has every right to require truthful

communication. The state has every right for instance for again what most states do, which is to say that if you issue a degree in theology or in whatever else, that you have to make clear that that is in a religious subject matter. It's in a religious discipline. Because there is no public expectation that the state is regulating religious training in theology. In fact it's their burden under the clear SC case law, they are the ones who have to show - they offered no evidence to show that secular employers are confused between when somebody shows up and they have a secular degree. They say I have a degree in biology, or I have a degree in structural engineering. I have a degree in accounting.

BRISTER: But if John Doe applies to be my briefing attorney and just says on the resume he has a college degree from Tyndale Theological Seminary, then that's fraud by John Doe but not by Tyndale?

SHACKELFORD: Yes. The use of the word college, the state does have a right to regulate and they do. And again, the only evidence in the record here, which is not our burden, it's their burden, they provided none, the only evidence in the record if you look at right around page 430 of the record, is a secular employer who said I know the difference between when somebody shows up to me with a secular degree looking for a job, and somebody who says I have a degree in theology from a seminary. Every secular employer knows that. So there is really zero interest in the state in trying to control for us what they think is substandard theological teaching and training and what is not. And certainly if you ask yourself what is the least restrictive means? Let me give you a couple of quotes as far as the burden. Playboy. One of the things we pointed out in this case is can't the churches and seminaries re represent in this case at least get the same constitutional deference as is giving commercial purveyors of pornography? In Playboy for instance the requirement is when a plausible least restrictive alternative is available "it is the governments obligation to prove that the alternative will be in effective to achieve its goals."

JEFFERSON: Under the free exercise clause, do you have the burden to show that the legislature's true object in enacting this statute was one of targeting religious conduct?

SHACKELFORD: We don't have to prove that. First, the Smith case itself says that the neutral principles type approach that is laid out in Smith does not apply if the religious conduct is speech. In that case you go to what had been the test forever, then the question is does for instance in this case the state telling seminaries who may teach the seminary, what they may teach, where they may teach, how they may teach, and to whom they may teach. Does that interfere with the free exercise of religion? Once you say yes, the burden shifts.

JEFFERSON: If you were completely outside of this statute, you didn't use the word seminary and you didn't confer degrees, would the state have any ability to regulate the religious training at the school? In other words, as J. Hecht was mentioning a few moments ago, isn't this just about the nature of the title and the description of the diploma that's conferred?

SHACKELFORD: It's not because 1) there is no language. Again, the statute is very clear. Any language that communicates an equivalent. Any language that communicates as they say in their

brief the same expectation of high academic achievement is not allowed. So there are no safe harbor words for seminaries to use. And that's one of the problems with over breath in that there are no words available, no words that a church knows it can use and not risk \$173,000 fine.

WAINWRIGHT: Is Tyndale concerned about the number of diploma mills that are out there that are not legitimate, that are sending out pieces of paper that say diploma on them that are attempting to assert the same statute of the same constitutional protections?

SHACKELFORD: Sure.

WAINWRIGHT: Is there a way from your approach for the state to regulate that?

SHACKELFORD: Yes. We don't in anyway seek to affect the issuance of degrees in secular disciplines. And that's why the remedy that we ask for in this case is very narrow. We don't ask for words in the statute to be changed. We don't ask for this court to go in and tell the legislature to change this and that. What we ask for is very narrow and very simple. And that's simply to reverse the \$173,000 fine against the church, and to declare the statute unconstitutional only as applied to seminaries in their issuance of theological degrees and diplomas. That would leave the statute completely in tact as to every other area in which the state really does have a right to regulate.

WAINWRIGHT: So then diploma mills that are not legitimate that claim to be theological can still issue numbers of diplomas illegitimately under what you are asking for?

SHACKELFORD: You're going to have - the state cannot get into the business of telling anyone, any of us what is good theological training. If they do they have the problems that they do in this case, which is saying that you have to have a masters degree to teach. So Billy Graham can't teach evangelism because he doesn't have a masters degree. They are stepping into an area that they have no authority in. But what they can do is what most states do. They can require truthful communication. So if they wanted to say that everybody has to say how many hours of training they received, instead of somebody you know for instance printing up a diploma in their basement. They can do that. They can require truthful communication that the degree is in a religious discipline, which makes clear to the general public that this is not a secular degree. So there are a lot of things they can do if they want truthful communication and they want to make sure that there is no deception.

WAINWRIGHT: But under your position, the illegitimate diploma mills that are claiming to be theological would be a necessary evil? The state could not stop them under your _____?

SHACKELFORD: Yes. Just like this court in Tilton said that for instance is there maybe harm from a religious preacher, or whatever, saying send me money and I will pray for you and you will be healed? People might be harmed by that. But our founders, the founders both of the US constitution and this state have determined that that is a harm that would be greatly exacerbated if we allow the government to get into these kinds of religious matters.

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RESPONDENT

WARR: The statutes at issue in this case do not regulate religion. They regulate education.

O'NEILL: You say that seminary has a secular meaning as it's used in the statute. And you refer to other areas where there is an adjective used in front of it to indicate it's intended to have a religious meaning elsewhere. But we also have the code of construction act that says we have to interpret terms according to their commonly understood meaning. If we were to find that the commonly understood meaning of seminary is religious in nature, would you agree then that this would infringe on the religion clauses of the constitution?

WARR: No. I, in fact would agree that the commonly understood definition of seminary is a place of learning with a religious affiliation.

O'NEILL: If you agree that it has a religious meaning, then clearly the state...

HECHT: That's not quite what the brief says.

WARR: The brief makes those arguments, but I think the most important thing - obviously seminary is not exclusively religious. I think that is our point.

O'NEILL: The state clearly could not license clergy.

WARR: No.

O'NEILL: Then how can they educate clergy or control the education of clergy?

WARR: The state is not seeking to control the education of clergy.

O'NEILL: These 21 standards would seem to monitor and control a certain element of that.

WARR: If the HEB and other religious schools want to use the protected terms, want to issue degrees - bachelors, masters, Ph.D., and they want to use the word seminary. Yes. They must comply with either the state standards or they must seek accreditation.

O'NEILL: This language and any equivalent term, it's difficult for me to see that diploma is not an equivalent term to degree.

WARR: No. Diploma is not equivalent. And I think it's important to the court to understand HEB was fined not for issuing a diploma of Christian studies, but because in its catalog

it represented that diploma to be the equivalent of undergraduate degree. It was a prerequisite for their masters program. The word certificate or the word diploma alone is allowed under the statute.

O'NEILL: The term is a similar term or and their equivalent, that's subject to a lot of ambiguity isn't it?

BRISTER: What could they issue?

WARR: They could issue a certificate of Christian studies as long as they don't, in the context of explaining in their catalog, represent it as the equivalent of an undergraduate degree.

BRISTER: So they can do precisely what they - the only thing - but you punished them for each diploma they issued, not for each brochure they sent out, not for each of their catalogs that described it as an equivalent.

WARR: That's right.

BRISTER: If each one of these was the fine, you had to be punishing them for that right?

WARR: It was that, but it was because they were representing it as the equivalent.

BRISTER: Not in there.

WARR: Not in the degree itself. But its representations to its students, and those students could have gone on and represented truthfully to employees that I have an undergraduate level diploma. I have a bachelors level diploma which is what they said that those were.

HECHT: But it's in theology right?

WARR: It could have also conferred Ph.D. in philosophy and masters of arts. But yes they also had theology degrees.

GREEN: What interest does the state have in regulating the clergy?

WARR: We are not regulating the clergy. We are regulating education. We are not saying who can be a minister or how ministers must be trained. If HEB doesn't use these words, they are not regulated at all. I think it's important to understand that once someone has a degree, even if it is in theology, that degree is currency in the educational marketplace and the job marketplace. That person is not restricted to going and becoming a clergy person.

GREEN: But isn't that burden on the employer to do diligence to determine what the value of that degree is?

WARR: It could be. But the legislature was within its constitutional ability to decide that that was not sufficient. And we showed in our briefs that that's a very heavy burden to put upon employers. Even the federal government cannot seem to regulate its hiring of people who have these fraudulent degrees.

O'NEILL: Is Texas the only state with this kind of scheme? Is it true as opposing counsel said that most other states deal with it by disclaimers?

WARR: No. Some states do. There's a wide variety of regulation among the states. Some states don't regulate at all. Some states have more strict regulations than Texas has.

O'NEILL: To the extent they regulate, do all other states that do regulate require a disclaimer as opposed to our scheme?

WARR: No. There are states that have similar and do not rely only upon...

BRISTER: Which other states ban the use of seminary?

WARR: I don't know about seminary. I know that other states do restrict the use of...

BRISTER: It was their term first. Right?

WARR: It could have been.

BRISTER: The state didn't come up with the term seminary.

WARR: But seminary has a long history as a place of rigorous learning. And I think...

BRISTER: Well pastor does too. But we wouldn't say that somebody can't use the term pastor because this guy doesn't seem like what most of us think a pastor should be.

WARR: No. The state could not regulate that.

BRISTER: So how can you regulate seminary if because we don't think this is what most Americans would think seminary if this particular sect does?

WARR: The legislature did. And the legislature made a judgment, the judgment that seminary along with college, university, medical school, law school needed to be protected. I think seminary, the legislature could have reasonably determined that seminary was a special word. I think when people hear that someone has graduated from seminary, they expect that that person has undergone a serious course of study that is equivalent to a university level of study.

O'NEILL: Serious as determined by whom?

WARR: Serious as determined by - as determined by the state. It is the equivalent. It assumes the equivalent of a university level education.

HECHT: But the argument is the first amendment does not give the state leeway to determine what's a serious seminary and what's an unserious seminary.

WARR: It gives the state leeway to determine what is a serious per secondary educational institution. And that is what a seminary is.

HECHT: In religious studies.

WARR: Even if it has a religious affiliation. A seminary is simply a special term that other terms just don't commit. If someone graduates from seminary it simply has a special weight, a weight that is greater than bible institute, or religious academy. It's a special word.

HECHT: But it's still religious. It doesn't strike you at all as contrary to the first amendment that the state could come in and say to be a Christian seminary you have to teach Islam, or you have to teach a course in the Koran, or you have to teach calculus. How can that be any of the state's business?

WARR: Because if schools don't want to teach those, and they would be well within their rights not to, they simply could not use the word seminary. Tyndale could take the word seminary out of its title and...

BRISTER: The same back to pastor. You could effectively ban the use of the word pastor by saying pastors have to have, because most people think of pastors as this, and so you've got to have a certain number of hours of counseling stuff, so you could end up - I mean we don't want people to be defrauded by going to people that aren't really pastors.

WARR: The state would have absolutely no interest in doing that.

BRISTER: What's the difference.

HECHT: It would solve the Tilton problem. You know if you hear this word, the state says you are safe. If you hear this word, you better hold onto your pocket book.

WARR: There's a very important difference between this and Tilton. In Tilton religious beliefs were implicated. Here, and I think this is the most important thing to remember...

OWEN: So you're saying seminaries are no longer institutions of religious beliefs. Some would agree with that. Is that the state's position?

WARR: I think they are institutions of religious learning. Of course there are lots of

religious beliefs that are taught in seminaries. But this regulation does not implicate religious beliefs. Tindal's religious beliefs. Tindal has never asserted, alleged or proven that the use of seminary or the use of the words degrees or anything else in the statute is required by their religion.

JEFFERSON: Do you agree with Mr. Shackelford that they have no obligation to prove that the legislature was motivated by some animus toward religion or by some intent to target religious conduct?

WARR: No. That's the only way they can prove their case. Under Smith they have to prove and under the City of Hialeah they have to prove that the legislature targeted religious conduct.

I would like to address J. Wainwright's question on Smith and _____. The Harvard(?) rights exception is a very thorny issue. It's not as simple as Mr. Shackelford has presented it. And it's certainly a matter of great debate in the lower courts. The SC has never addressed it. Where they are, simply a Harvard rights claim is sufficient. What the standard of proof should be. Luckily this court does not have to get into that thorny issue. The free exercise claim is compromised completely by the fact that there is no substantial burden on HEB's religious beliefs or practice. All they seem to be worried about is the affect upon the economic and commercial activity of running a school. They've never alleged that their religious belief or practice requires them to use these words.

WAINWRIGHT: They do assert, however, that with the 21 standards that the government's regulation is impacting the content of the curriculum and the type of person hired to teach the curriculum. So they are asserting that the government's regulations and some of these 21 points are pretty substantive. Some of those points do seem to at least affect curriculum.

WARR: They've asserted that, but their claim is only as applied claim, which is the way they've pled it all along. They have never applied for a certificate and have not had the opportunity to be evaluated by the state, and for any court to be able to see if there is indeed a conflict between any of those requirements and their religious beliefs or practice.

GREEN: Why isn't that disclaimer on a diploma sufficient to protect the state's interest?

WARR: The availability of least restrictive alternatives first of all does not impact the constitutionality of this statute. It's not a requirement. The legislature could have reasonably - furthermore, it would not be enough to protect the public interest in this case.

Disclaimers could be misunderstood. Could not be understood. Frankly if I was a 17 year old getting ready to go to college, I don't know that I would know what approved by an accrediting agency meant, or approved by the state. If I see the word degree, I think that's what I want.

BRISTER: Well they shouldn't be graduating from college if they don't understand that. And if you get one of these and then you put on your resume masters degree, or college degree. Isn't that fraud by the student rather than the institution?

WARR: It very well could be. What Tyndale used in this case it said bachelors level diploma. A student could easily make a mistake...

BRISTER: What if I told somebody come be my briefing attorney for 3 years. You are going to get an education just as good as a law degree. I didn't tell them that got a law degree. Right? We've got to assume people are not fools.

WARR: We've got some job applications and other applications where it says now what is your highest level of education of study. Check the box. I think this also comes down to what box do you check? There is no room for you know other or comments. I don't think that the average student or possibly even the average employer could understand that.

JEFFERSON: Have you cited in the brief or in the record any institution that goes by the name of seminary that is not religious based?

WARR: We did cite something like that in the briefs. I think there is a school up North somewhere.

O'NEILL: But you've acknowledged that it has religious.

WARR: Absolutely. Even if 100% of institutions who call themselves seminaries had a religious affiliation, I don't think that takes away from the fact that when someone has a degree from a seminary they can take that and not just go into the ministry, but go into academia. Lots of seminaries don't just have pastoral programs. They have academic programs. You can go and teach religion in college. You can go into the private sector. Go into the government sector. There is no limit on where you can go from there.

I did want to say something about vagueness and over breath. Those claims are not before the court. Mr. Shackelford did bring them up. Over breath was never brought forward in the DC or in the CA. It's simply not before this court. Vagueness was only pled as a due process vagueness claim, not as a first amendment vagueness claim in the lower courts. Their briefs seem to indicate that they are trying to convert their vagueness claim into a first amendment claim. And that would be raised for the first time in this court. So they cannot do that.

Mr. Shackelford was also saying that for the free speech claim that the state is required to show that it's regulation is the least restrictive means. And that is not correct, because that standard applies to content based regulation. And here we are talking about commercial speech. You have to look at who the speaker is and who the recipient is.

Mr. Shackelford would like us to look only at who the speaker is. If the speaker is a religious organization, then that makes the speech per se religious or content based. And that's not true. I think if the church were having a bake sale or a yard sale and they put up signs, that they would not be immuned from zoning regulations or any other regulations on...

BRISTER: But education is inherently religious. In education you decide to teach some things and not others. And the things you decide to teach are the things you think are important. That's going to be a religious choice for religious institution what's important. Regardless.

WARR: I think if it's limited to religion and they want to absolutely limit it to religion...

BRISTER: Could a religion not decide that old testament Greek was more important than calculus?

WARR: Absolutely.

BRISTER: So whatever they decide to teach is going to be religious even whether or not it includes calculus. If they exclude calculus because they would rather teach something else that's a religious decision?

WARR: Alright. And the state is not keeping schools from making such a religious decision. But if they are not offering the breath(?) of curriculum, including math, science, humanities that people come to expect from a degree, then they may not call it a degree. And that is not a regulation of religion. That is a regulation of education. And it is important that this apply across the board.

BRISTER: And they never use the word degree?

WARR: No. They use bachelors, masters, Ph.D.

BRISTER: In their catalog they said a diploma equivalent to a bachelor's level. Did they say anything more than that?

WARR: They did use the word Ph.D. Their professors for example were listed as having a Ph.D. from Tyndale Theological Seminary. So they did represent without any sort of qualification that that was what...

BRISTER: Does the statute reach how you describe the faculty's degrees?

WARR: That certainly is an indication - if a student were to read the catalog and see that professors had a Ph.D. from Tyndale Theological Seminary, they would think oh, I can get that too. That's what this institution offers. The statute goes to the context. You can't just look at the

name of the degree. You have to look at the catalog at the way they describe it. Because there are lots of way to get around the words that the legislature put in the statute.

BRISTER: But the only one here is diploma equivalent to - the only one they used here at all, anywhere, is diploma equal to a bachelors, master level, whatever.

WARR: I'm not sure I can agree with that. The catalog does use Ph.D. I'm not sure whether they described it as...

BRISTER: Forget about how they describe their faculty. We're talking about what degrees they are doing. What they are telling the students they are going to get. Anything other than diploma equivalent to a bachelors level.

WARR: I don't remember.

BRISTER: Please let us know. This is what you fined them for. We would like to know what it is you are complaining about.

WARR: We are complaining about the description that...

BRISTER: You can't complain about just generally what they are doing. You fined them for something and I want to know specifically what it is. If it's something more than diploma let me know.

GREEN: How can they get around the statute?

WARR: If it were just confined to the words that are listed in the statute - bachelors, masters, Ph.D., and didn't have the equivalence in there, then someone could use the word baccalaureate. They could use the word doctorate. They could use college level diploma, graduate level diploma. They could use a lot of words that mean the same thing but aren't listed exactly in the statute. That's why the legislature made it a little broader to account for people who are very clever in trying to get around the statute.

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REBUTTAL

HECHT: This statute was passed 30 years ago. Where has everybody been? Why is it all of a sudden a problem?

SHARPE: This is not in the record, but to answer your question. The legislative history on this shows that the legislature was concerned with some diploma mills out of California.

O'NEILL: The seminary piece wasn't added until recently. And is that what spawned the

problem?

SHARPE: No. This problem existed before seminary was ever added. In fact the amicus briefs show that seminaries in this state have been under attack by the coordinating board for years. It's just that this was the first seminary that was willing to take on the state and challenge it.

BRISTER: Well its' the internet too.

SHARPE: And that's also a part of it too. But what the legislative history shows is, that there was some saw(?) mills in California offering secular degrees that concerned the state. And that's what this was designed originally to _____. There is nothing in the legislative history that shows the State of Texas has ever had any problem with any of its private or parochial schools, period, from their inception. In fact until 1973, private parochial schools were not even touched in the State of Texas. This came about simply because of some secular _____. There is nothing in the legislative history that the seminaries have ever created a problem for anybody. Not in this state at all.

When they talk about they are saying well you know we just have a few protected terms and if you don't use those protected terms, well then you are okay. There is one problem with that. How do they tell you you can't use the protected terms. They say if you let us regulate your 21 areas, then we can use the "protected term."

JEFFERSON: If one of the courses at the seminary was in psychology and that the person - a student goes there really to get a psychology degree but they appreciate the religious context in which their education is received. That person could then go out and say I have a degree in psychology from the seminary and begin counseling persons. Is that permissible? Is that something that you think is the effect of holding that this statute is unconstitutional?

SHARPE: No. As Mr. Shackelford said, we are simply saying to the court in the lawsuit that was filed - remember you've got two lawsuits here. You've got our declaratory judgment suit and then you've got the state's counterclaim to which constitutional defenses were raised against them.

JEFFERSON: Let's say I'm an atheist. I can't get into UT. The grades are too low. Maybe I can get into this seminary. I'm not interested in being a pastor, a priest. That's not my concern. I want to be a psychologist. And so I am going to go to the seminary and get my degree in psychology and then use it within the private sector to make money. Is that a concern of ruling this statute unconstitutional or not?

SHARPE: No. Because mental health counselors in the State of Texas are licensed by the state. And they have to meet certain requirements. You have pastoral counselors throughout this state and have had before the state even got into the business of counseling. And by the way, psychology was a religious discipline before it ever became a state discipline. The state is several

centuries behind the church on that. But those pastors who do counseling that are not licensed mental health counselors, they are not covered at all. And they haven't been. And the legislature has saw fit not to try to cover pastoral counseling because that's one of the most significant part of religious ministry anyhow. As a practical matter a sermon that a pastor gives on a Sunday morning for all practical purposes is counseling when you get right down to it as opposed to what he might do in his office with a couple or a family that came to see him or an individual. No. This is not going to knock it down.

As Mr. Shackelford said, we are simply asking the court to find that this chapter 61 as applied to seminaries offering theological disciplines that you get to the end, that as far as we're asking the court to go. It leaves the whole balance of the thing in tact. It regulates all the other courses that parochial and private schools offer by way of degrees.

Let me be sure that the court is clear on the "protected terms" that they say if you don't use them you are okay. The only way you get to use their protected terms is you have to submit to their 21 regulations. Otherwise you can't use their language. Now that is a controlled curriculum anyway you cut it. And what are you determining by way of seminary?

O'NEILL: Does Tyndale want to use the term degree? I understand you want to use the term seminary, but do you also want to be able to issue degrees from the seminary?

SHARPE: Tyndale would like to use degrees. But back in 1991, when it checked to see what it would have to do to be able to offer degrees, it determined theologically it couldn't agree to that kind of state regulation. So it consciously tried every way in the world to avoid using the term degree.

O'NEILL: I guess what I am saying is, are you asking us to carve out an exception for religious institutions from that piece of the chapter?

SHARPE: We've attacked that as unconstitutional as applied to seminaries. You cannot deprive the seminary the right to offer degree in theology. Period. The state does not have that authority. It just simply doesn't have it. And look at these regulations here. They determine your governing board, the faculty qualifications. And that's what's one of the most egregious things out there. Who is the state to say that a person who teaches teach Evangelism has got to have an earned masters degree. Billy Graham doesn't qualify. What does he know about Evangelism? But yet a seminary could not use him and the commissioner in his deposition said so.