No. 83271-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of:
CHRISTIAN T. METCALFE,
Appellant/Cross-Respondent

v.

DONNA M. COCHENER,
Respondent/Cross-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
The Honorable Hillary Madsen

BRIEF OF *AMICI CURIAE* PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT AND PROF. EUGENE VOLOKH IN SUPPORT OF APPELLANT/CROSS-RESPONDENT

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* Counsel would like to thank Samantha Frazier, Katarina Rusinas, and Philip Raucci, UCLA School of Law students who worked on the brief.

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INTEREST OF *AMICI CURIAE*[1]

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law, where he has written extensively on First Amendment law, including in *Parent-Child Speech and Child Custody Speech Restrictions*, 81 NYU L. Rev. 631 (2006).

INTRODUCTION

I. The trial court violated the Establishment Clause of the First Amendment by ordering Mr. Metcalfe not to "put down Christianity" to or in front of his children.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

A. The order impermissibly bans criticism of Christianity in a manner similar to blasphemy laws, which violate the Establishment Clause.

B. The order further violates the Establishment Clause because it requires the court to make impermissible religious decisions. Courts cannot determine whether a particular course of action comports with a particular religious doctrine. *See Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450-51, 89 S. Ct. 601, 606-67, 21 L. Ed. 2d 658 (1969). Likewise, civil courts cannot decide what is a "put down" of Christianity and what is a fair comment or an accurate theological assertion.

C. Mr. Metcalfe has not waived his First Amendment claims. First, civil courts are prohibited from making religious determinations, regardless of whether the parties have agreed to let courts make such determinations. *See id.* at 449. Second, even if he could have, Mr. Metcalfe did not knowingly waive his First Amendment rights to freely discuss and criticize Christianity. A

general agreement in principle to teach his children to respect his ex-wife's religion does not amount to agreement to a particular, vague and potentially extremely broad prohibition on "put[ting] down Christianity."

II. By restricting Mr. Metcalfe's religious expression in violation of the Establishment Clause, the order also violates the Free Speech Clause. "A natural reading [of the First Amendment] would seem to suggest the Clauses have 'complementary' purposes," *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426, 213 L. Ed. 2d 755 (2022), and that is especially clear here. This Court should therefore consider Mr. Metcalfe's Free Speech Clause rights, which are entwined with his Establishment Clause claims.

A. The order is too vague to provide notice about what speech is prohibited. An order that is "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application" violates the First Amendment. *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S. Ct. 1316, 1320, 12 L. Ed. 2d 377

(1964). The order sharply chills Mr. Metcalfe's speech by forcing him into guessing what he can and cannot say about Christianity to his children.

B. The order in particular lacks the specificity required of a prior restraint restricting protected speech. "Indefinite wording [in prior restraints] is impermissible when the . . . line between protected and unprotected speech is very fine," because "such wording leaves [the court] unable to ascertain what speech the order actually prohibits." *In re Marriage of Suggs*, 152 Wn.2d 74, 84, 93 P.3d 161 (2004). The prohibition on "put down[s of] Christianity" is likewise "indefinite" and leaves Mr. Metcalfe "unable to ascertain what speech the order actually prohibits."

C. The order is also an unconstitutional prior restraint on protected religious speech because it cannot be justified as a time, place, and manner restriction and is therefore subject to strict scrutiny. The restraint is content-based because it singles out Christianity for protection—but even an order forbidding putting down all religions would still be content-based. The order is also

viewpoint-based because it turns on the "perspective of the speaker," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995): any "put down [of] Christianity" violates the order, but praise of Christianity does not.

III. Washington precedent requires a showing of harm when favoring one parent's religion over the other. The trial court failed to make any such showing here.

The trial court could have fashioned a narrowly tailored order that forbade either parent from personal criticism of the other parent. Instead, the trial court infringed on Mr. Metcalfe's First Amendment rights. The case should be remanded, with instructions to strike the relevant provision from the order.

STATEMENT OF THE CASE

The facts discussed in this brief are set forth in the parties' briefs filed in this Court. Most significantly for this brief, the lower court order required the parties "to raise their children to affirm all religious traditions, appreciate the good in the practice

of other faiths, and respect those who have no religious preference. No parent will put down Christianity to or in front of the children, or allow other members of their household to put down either parents' spirituality." (CP 1239.)

ARGUMENT

I. The Order Violates the Establishment Clause

A. The Order Impermissibly Prohibits Criticism of Christianity

Under the Establishment Clause, the government is prohibited from protecting specific religions from criticism. "'[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . . .' The Establishment Clause prohibits any and all official judgments concerning the rectitude of religious belief." *United Christian Scientists v. Christian Sci. Bd. of Dirs., First Church of Christ, Scientist*, 829 F.2d 1152, 1161 (D.C. Cir. 1987) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505, 72 S. Ct. 777, 782, 96 L. Ed. 1098, 1108 (1952), which was based on the Free Speech Clause, but treating it as embodying Establishment Clause principles as well). At its

core, the Establishment Clause "forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma." *Edwards v. Aguillard*, 482 U.S. 578, 593, 107 S. Ct. 2573, 2583, 96 L. Ed. 2d 510 (1987) (emphasis in original).

The order's prohibition on religious criticism is similar to blasphemy laws that have been struck down on Establishment Clause grounds. For instance, in *Kalman v. Cortes*, 723 F. Supp. 2d 766 (E.D. Pa. 2010), the plaintiff's application to register his company as "I Choose Hell Productions LLC" was rejected under a state statute that precluded corporate names containing "[w]ords that constitute blasphemy, profane cursing or swearing or that profane the Lord's name." *Id.* at 770. The court held that this blasphemy statute was unconstitutional under the Establishment Clause, "as it permits speech deemed reverent to religious beliefs, yet excludes speech deemed irreverent to religious beliefs." *Id.* at 807. This exclusion of religious perspective rendered the blasphemy statute "alien to the tradition of disestablishment,"

id. (cleaned up), and "violates both the Establishment Clause and the Free Speech Clause," *id.* at 806. Likewise, in *Maryland v. West*, the court struck down Maryland's blasphemy ban, on the grounds that "[e]ffort[s] . . . to extend [the state's] protective cloak to the Christian religion or to any other religion is forbidden by the Establishment and Free Exercise Clauses of the First Amendment." *Maryland v. West*, 9 Md. App. 270, 276 (Ct. Spec. App. 1970) (emphasis added).

Here, the order similarly violates the Establishment Clause by prohibiting speech deemed critical of a particular religion. While the trial court stated that Mr. Metcalfe and Ms. Cochener "have agreed to raise their children to affirm all religious traditions," Parenting Plan at 3, the trial court did not order that the parents refrain from putting down "all religious traditions." (Its reference to affirming, appreciating, and respecting "religious traditions" and "faiths" more generally did not include a specific prohibition on "put[ting] down" any such belief system.) Rather, Christianity

was given special protection, and the power of the court was used to compel Mr. Metcalfe to abide by those protections.

By prohibiting "put[ting] down Christianity," the trial court fashioned a *de facto* blasphemy statute that goes further than the statute in *Kalman*. (Courts must "look at [an] injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down." *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 581, 91 S. Ct. 1076, 1080, 28 L. Ed. 2d 339 (1971).) "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 1683, 72 L. Ed. 2d 33 (1982).

But the order would be unconstitutional even if it had more generally prohibited criticism of "Ms. Cochener's religion" or even of all religion, rather than singling out Christianity. The statute in *Kalman*, for instance, prohibited not just "profan[ing] the Lord's name" (which likely focuses on Christianity, Judaism,

and perhaps Islam) but also all "blasphemy" more broadly—yet it was still unconstitutional.

B. The Trial Court's Order Calls for Impermissible Religious Decisions

The order further violates the Establishment Clause because it would require the court to make inherently religious judgments, of the sort forbidden by *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450, 89 S. Ct. 601, 606, 21 L. Ed. 2d 658 (1969).

In *Presbyterian Church*, the Supreme Court held that the state court erred in awarding property to local churches because the award was based on the court's determination that one of the churches had "departed from the tenets of faith and practice it held at the time of local churches affiliated with it." *Id.* at 441. In doing so, the state court violated the First Amendment (without expressly distinguishing the Establishment Clause from the Free Exercise Clause):

> [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Id. at 450.

The same is true here. When enforcing the order, the court would have to decide whether something said by Mr. Metcalfe is a "put down [of] Christianity"—but what constitutes a put down of Christianity depends sharply on the observer's view of what is true or correct Christianity. For example, if Mr. Metcalfe were to say that "Christians believe homosexuality is a sin" or "Christians do not believe in evolution," some Christians might consider these "put down[s]," while others might consider them accurate descriptions of their religion's beliefs. That judgment touches "matters at the very core of a religion," and is not for a secular court to make. *Id.*

Indeed, a prohibition on "put down[s of] Christianity" may require theological judgments about which groups are genuinely Christian. For example, members of the Church of Jesus Christ

of Latter Day Saints (known as "Mormons") unequivocally consider themselves Christians given their worship of God and Jesus Christ; others disagree. *See* Dr. R. Albert Mohler, Jr., *Are Mormons Christian? The Beliefs of Mormonism vs. Christianity*, Christianity.com (Aug. 10, 2022), https://christianity.com/wiki/church/mormonism-is-not-christianity-11628184.html. Adherents of the Westboro Baptist Church identify as Christian, but some Christians disagree, given the Church's hateful public rhetoric and supposedly "anti-Christian" conduct.[2]

Indeed, some people even claim that Catholics are not Christians. *See* Les Jay, *Catholics Are NOT Christians* (2007); David J. Stewart, *Catholics Are Not Christians*, JesusIsPrecious.org

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[2] *See* Jim McKee, *Church is aberration of Christ's teachings*, Amarillo Globe-News, Mar. 4, 2011, https://amarillo.com/story/lifestyle/faith/2011/03/05/church-aberration-christs-teachings/13094368007/; *see also* Aaron Currin, *Is Westboro Baptist Church truly Christian?*, Bldg. 28 Church, (Oct. 1, 2013), https://bldg28.com/is-westboro-baptist-truly-christian/ (Answering the question in the title "no.").

(April 2019), https://www.jesusisprecious.org/false_religion/roman_catholic/not_christians.htm ("A common heresy that we often hear in the news is that Catholics are 'Christians.' It is simply NOT true based upon the clear teachings of the Holy Bible."); Vivian Bricker, *Why Do Some Assert That Catholics Are Not Christians?*, Christianity.com (Sept. 1, 2022), https://www.christianity.com/wiki/salvation/why-do-some-assert-that-catholics-are-not-christians.html ("Due to the teachings and practices of the Catholic Church, many denominations argue that Catholics are not Christians"). This may seem a hard conclusion to justify, historically or theologically; but it is not a determination that a secular American court may make.

Presbyterian Church demands that "[s]tates, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Id.* at 449. The same principle must apply to parenting plans involving religious differences. A court may not structure a parenting plan in a way that requires civil

courts to decide what is a "put down" and what is an accurate analysis of a religion's beliefs, or which denominations are part of "Christianity" and which are not.

II. Mr. Metcalfe Cannot Waive, and Has Not Waived, His Constitutional Claims

A. Mr. Metcalfe Cannot Waive His First Amendment Rights Because the State Cannot Make Religious Determinations

Ms. Cochener claims that Mr. Metcalfe cannot now contest the trial court's order that neither parent "put down Christianity" because he "affirmatively stated that he had 'no problem' teaching the children to respect Donna's religion." Resp. Br. at 30. But any such waiver would violate the Establishment Clause: courts cannot resolve religious questions even when the parties consent.

Thus, for instance, even a contractual agreement to have a court decide church property disputes involving religious questions is unconstitutional. Even where interpreting "church deeds, by-laws and canons," for instance, a court may not decide religious "doctrinal question[s]." *Ardito v. Bd. of Trustees*, 658 A.2d

327, 330 (N.J. Super. Ct. 1995). "'[P]rovisions in deeds or in denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from [religious] doctrine, could not be civilly enforced.'" *Draskovich v. Pasalich*, 280 N.E.2d 69, 77-78 (Ind. Ct. App. 1972) (quoting and endorsing *Md. & Va. Elder of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970) (Brennan, J., concurring)). And that is consistent with the Court's statement in *Presbyterian Church*, quoted above, that even "religious organizations[] and individuals must structure relationships involving church property *so as not to require the civil courts to resolve ecclesiastical questions*." 393 U.S. at 449 (emphasis added).

Thus, a contract stating that the recipient will keep certain property only so long as it remains "Christian" or does not "put down Christianity" could not be constitutionally enforced by a secular court, even though the parties may be said to have waived any objection by entering into the contract. American secular

courts cannot make these decisions. Likewise, even if Mr. Metcalfe and Ms. Cochener had explicitly agreed to a prohibition on "put[ting] down Christianity"—and they did not—it would still be impermissible for a court to adjudicate what sorts of religious commentary fall within those terms. *See* RAP 2.5(a) (stating that a party may raise, "for the first time in the appellant court," a claim of error based on a "manifest error affecting a constitutional right").

B. Mr. Metcalfe Did Not Knowingly Waive His Rights

In any event, Mr. Metcalfe did not knowingly waive his right to criticize religion: his general statement about an abstract willingness to teach his children to respect religion does not equal agreement with the court's particular—and particularly vague and broad—language prohibiting "put down[s of] Christianity."

Finding a valid waiver of a First Amendment right requires "clear and convincing evidence" that the waiver is "knowing, voluntary and intelligent." *Charter Commc'ns, Inc. v. Cnty. of Santa Cruz*, 304 F.3d 927, 935 (9th Cir. 2002). At a post-trial

hearing, Mr. Metcalfe stated that it "wouldn't be a problem" for him to "teach [his] children to respect Ms. Cochener's religion." RP 1731-32. He did not agree never to "put down Christianity" or any other religion in front of his children.

"[R]espect" is not synonymous with not "put[ting] down." Criticism can be given respectfully, but any criticism of Christianity might be interpreted as a put down. For example, one might say, "Christians do a lot of good in the world, but many Christian teachings about abortion and contraception are unjust and harmful." That is a respectful way to set forth a substantive disagreement on a fundamentally important question—but it might well be viewed by some as a "put down of Christianity," in the sense that any criticism (or perhaps any criticism that the observer subjectively perceives as unfair) could be seen as "put down."

III. The Order Violates the Free Speech Clause

A. The Order Is Impermissibly Vague Because It Fails to Properly Delineate What Speech Constitutes a "Put Down [of] Christianity"

"A natural reading [of the First Amendment] would seem to suggest the Clauses have 'complementary' purposes," *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426, 213 L. Ed. 2d 755 (2022). Accordingly, this Court should consider whether the order violates Mr. Metcalfe's free speech rights as a complementary inquiry to whether the order violates the Establishment Clause. And by fashioning a vague order that fails to delineate what speech constitutes a "put down [of] Christianity," the trial court violated not only the Establishment Clause, but also the Free Speech Clause.

Under the void for vagueness doctrine, a legal provision "forbidding . . . conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S. Ct. 1316, 1320, 12 L. Ed. 2d 377 (1964).

And such lack of notice in an order that regulates speech "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72, 117 S. Ct. 2329, 2344, 138 L. Ed. 2d 874 (1997).

Vague laws may chill protected speech by inducing citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett*, 377 U.S. at 372 (internal quotation marks and citations omitted). Where the First Amendment is implicated, "the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573, 94 S. Ct. 1242, 1247, 39 L. Ed. 2d 605 (1974). Here, the order violates the vagueness doctrine by failing to provide any guidance as to what sort of speech constitutes a "put down [of] Christianity," thus tending to lead a person of ordinary judgment to steer away from any potentially critical discussion of religion for fear of saying something prohibited.

Suppose, for instance, that Mr. Metcalfe's children ask him why he is not Christian: a question that children, especially as they get older, might reasonably ask, and for which they should be able to get an honest answer. One answer that is doubtless held, rightly or wrongly, by millions of people—"I find some of Christianity's tenets to be illogical"—could reasonably be seen as a "put down" by some, or as a fair basis for disagreement by others. Or take another possible answer: "Christianity says that non-believers cannot go to heaven, and I can't accept that." To some (especially Christians who believe that there is no salvation except through faith), this statement might be seen as an accurate characterization of the Christian belief system, while others might consider such criticism to be a "put down."

The order could thus chill Mr. Metcalfe from expressing any of these views, however politely he puts them. As a loving father hoping to maintain custody of his two children—and hoping not to be found in contempt or even threatened with contempt proceedings—Mr. Metcalfe would be powerfully pressured to steer

clear of any speech that a judge might possibly deem a "put down [of] Christianity." The vagueness of the order would thus exacerbate the constitutional problems, discussed below, caused by its breadth.

Indeed, the order's chilling effect would go beyond theological questions. Imagine that a religiously motivated hate crime takes place in Mr. Metcalfe's community and his children ask their father about the perpetrator's motivations; Mr. Metcalfe explains that horrible crimes are sometimes committed in the name of Christianity. Might this be considered a "put down"? Or suppose one of Mr. Metcalfe's children learns about the Crusades at school and wants to discuss them over dinner. Might Mr. Metcalfe's noting that there were religiously motivated brutalities committed by Christians during the Crusades constitute a "put down"? In the eyes of some, it might. The phrase "put down" is subjective, forcing Mr. Metcalfe to guess what comments a family court judge may consider to be impermissible under the current order.

And, as noted above, even the term "Christianity" is vague enough to require a person of ordinary intelligence to guess as to its meaning in some contexts. *See supra* Part I.B. For instance, it is not clear whether expressing disapproval of Mormonism—whether based on its theology, its moral teachings, or its social organization—would be forbidden by the order.

B. The Order Is an Impermissible Prior Restraint on Mr. Metcalfe's Speech Because It Lacks the Requisite Specificity Demanded of Such Restrictions

"Prior restraints are official restrictions imposed upon speech or other forms of expression in advance of actual publication." *Sanders v. City of Seattle*, 160 Wn.2d 198, 224, 156 P.3d 874 (2007) (cleaned up). Washington courts have found that "prior restraint of constitutionally protected expression is *per se* unconstitutional." *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 6, 891 P.2d 720 (1995). Here, the order restricts religious speech, which is "doubly protect[ed]" by the First Amendment, *see Kennedy*, 142 S. Ct. at 2421.

Indeed, even when prior restraints are limited to constitutionally unprotected expression, they must still be sufficiently clear about what speech they are restraining. In *In re Marriage of Suggs*, 152 Wn.2d 74, 84, 93 P.3d 161 (2004), a man petitioned for a protective order against his former wife. A Superior Court judge issued an anti-harassment order stating that the wife could not "knowingly and willfully mak[e] invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming" her ex-husband, which she argued was an unconstitutional prior restraint on speech. *Id.* The Supreme Court held the order was indeed unconstitutional, because it lacked the specificity demanded for prior restraints on unprotected speech:

> Fearful of what allegations may or may not ultimately be deemed invalid and unsubstantiated, [the ex-wife] may be hesitant to assert any allegations, including those she deems truthful. Thus, [the ex-wife] is left with an order chilling all of her speech about [the ex-husband], including that which would be constitutionally protected, because it is unclear what she can and cannot say.

Id. (cleaned up).

The need for specificity is even stronger in Mr. Metcalfe's case. In *Suggs*, the speech fell within an existing legal category of unprotected speech, whereas the speech in this case is protected speech. There is no established definition of what constitutes a "put down [of] Christianity," leaving Mr. Metcalfe unsure of what speech is prohibited. "Indefinite wording is impermissible when the Court has repeatedly stated that the line between protected and unprotected speech is very fine. Such wording leaves us unable to ascertain what speech the order actually prohibits." *Id.*

Moreover, the order's language is vaguer than the anti-harassment order in *Suggs*. The *Suggs* court found the anti-harassment order's "invalid and unsubstantiated" language to be "problematic," because "what may appear valid and substantiated to [the ex-wife] may ultimately be found invalid and unsubstantiated by a court." *Id.* What constitutes a "put down [of] Christianity" is an even more subjective inquiry because it requires a determination of whether something is a factual statement about

Christianity or a "put down." This entails an impermissible judicial examination of religious doctrine, *see supra* Part I.B, whereas a determination of whether a statement is "invalid and unsubstantiated" might reasonably be determined through some judicial inquiry.

As noted above, the lack of clarity will tend to lead Mr. Metcalfe to hesitate to engage in any speech regarding Christianity at all. Mr. Metcalfe is thus facing a prior restraint that chills an impermissibly wide range of protected religion-related speech.

C. The Order Is an Impermissible Prior Restraint Because It Is Content-Based and Viewpoint-Based

The prior restraint on Mr. Metcalfe's protected speech also cannot be justified as a time, place, and manner restriction. Time, place, and manner restrictions on protected speech are constitutional only if they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Bering v. SHARE*, 106

Wn.2d 212, 222, 721 P.2d 918 (1986). Here, the restriction on Mr. Metcalfe's speech is not content-neutral—rather, it is content and viewpoint-based, and therefore subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015).

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. The order targets a particular message, speech critical of Christianity, and thus "requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* (internal quotation marks omitted). Thus, the order cannot be "justified without reference to the content of the regulated speech"—which is, in this case, religious criticism. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 106 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989).

Further, the order "goes beyond mere content, to actual viewpoint, discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S. Ct. 2538, 2540, 120 L. Ed. 2d 305 (1992). A "put down [of] Christianity" will be treated differently than a put down of Hinduism, Buddhism, or Judaism, and a "put down" of a religion would be treated differently from praise of the religion. Indeed, even an order banning put downs of *any* religion would still be content-based and viewpoint-based because it would ban critical viewpoints about religions (and not about other matters).

Such a content-based regulation cannot be sustained unless it survives strict scrutiny. *See Reed*, 576 U.S. at 171 (finding that content-based restrictions can only stand if the government proves that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest") (internal quotation marks and citations omitted). And the order will not survive such an exacting review because it is not narrowly tailored: the terms used are vague and cover a great deal of valuable speech on religious topics. *See supra* Part III.A.

IV. Washington Courts Require a Showing of Harm to the Children When Favoring One Parent's Religion over Another

"Although a trial court may consider the parents' and the children's religious beliefs when fashioning a parenting plan . . . it may not favor either parent's religious beliefs without a clear showing of harm to the children." *In re Marriage of Black*, 188 Wn.2d 114, 135, 392 P.3d 1041 (2017). "In order to protect the parents' respective constitutional rights to the free exercise of religion, Washington courts have created a separate standard where a trial court's order regarding decision-making authority restricts those rights: there must be a substantial showing of actual or potential harm to the children from exposure to the parents' conflicting religious beliefs." *In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 490, 899 P.2d 803 (1995). "[F]indings of actual or potential harm must be made with reference to specific evidence and the specific needs of the children involved." *Id.* at 491-92.

The trial court made no such finding before issuing its order. It is possible that courts concerned with harm to children can issue general non-disparagement orders that restrict parents from engaging in personal criticism of the other parent to their children. But, instead, without any showing of harm, the court crafted a broad restriction on speech critical of a belief system—Christianity—and not just on speech directly critical of Mr. Metcalfe's ex-wife.

CONCLUSION

By forbidding Mr. Metcalfe from "put[ting] down Christianity," and requiring the court to eventually adjudicate what constitutes a "put down," the order violates the Establishment Clause. And the vagueness and lack of notice provided by the order will chill Mr. Metcalfe's protected speech, violating his Free Speech rights.

While protecting children is an important purpose, even the most important of purposes cannot be served by violating fundamental constitutional principles. Therefore, *amici* ask that the

court remand the case with instructions to strike the "put down Christianity" language from the parenting plan.

This document contains 4,814 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 5th day of October 2022.

Respectfully Submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Amici Curiae*** in Court of Appeals, Division I 83271-9-I to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 5, 2022 at Seattle, Washington.

/s/ Brad Roberts
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October 05, 2022 - 10:14 AM

Transmittal Information

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Appellate Court Case Number:	83271-9
Appellate Court Case Title:	In re the Marriage of: Donna M. Cochener, Resp/Cross App v. Christian T. Metcalfe, App/Cross Resp

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