

No. 26–369

In the Supreme Court of the United States

JOHN TORSTEN LOOP,
Petitioner,

v.

WASHINGTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THE DUE PROCESS PROJECT
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

Shannon M. Draughon
Counsel of Record
THE DUE PROCESS PROJECT
26311 NE Valley St
Ste A–123
Duvall, WA 98019
(425) 945–6862
sdraughon@theduepro-
cessproject.org

Sean Kuhlmeier
7511 Greenwood Ave N
PMB 1601
Seattle, WA 98103-4627
(206) 695-2568
seanfromseattle@gmail.com

Attorneys for Amicus Curiae

OCTOBER MMXXVI

TABLE OF CONTENTS

Table of Authorities.....	i
Interest of <i>Amicus Curiae</i>	1
Summary of the Argument	1
Argument.....	2
I. Due Process Requires a Neutral and Accountable Decisionmaker in the First Instance.....	2
II. Washington Places the Risk of Error on the Parent, the Reverse of What Due Process Requires	4
Conclusion	7

TABLE OF AUTHORITIES

Cases

<i>Addington v. Texas</i> , 441 U. S. 418 (1979).....	4
<i>Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust</i> , 508 U. S. 602 (1993).....	3, 5
<i>Goldberg v. Kelly</i> , 397 U. S. 254 (1970).....	3
<i>In re Murchison</i> , 349 U. S. 133 (1955).....	2
<i>Lavine v. Milne</i> , 424 U. S. 577 (1976).....	5
<i>M. L. B. v. S. L. J.</i> , 519 U. S. 102 (1996).....	2, 6
<i>Parham v. J. R.</i> , 442 U. S. 584 (1979).....	3

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

<i>Santosky v. Kramer</i> , 455 U. S. 745 (1982)	4, 6
<i>Speiser v. Randall</i> , 357 U. S. 513 (1958)	4
<i>Stanley v. Illinois</i> , 405 U. S. 645 (1972)	5–6
<i>Stary v. Ethridge</i> , 712 S. W. 3d 584 (Tex. 2025)	6
<i>Troxel v. Granville</i> , 530 U. S. 57 (2000)	2, 4
<i>Ward v. Village of Monroeville</i> , 409 U. S. 57 (1972)	2

Constitutional Provisions, Statutes, and Rules

U. S. Const., Amdt. 14	1, 3, 6
26 U. S. C. §501	1
Wash. Rev. Code §7.105.225	5
Wash. Rev. Code §7.105.310	5
Wash. Rev. Code §13.34.090	6
Wash. Rev. Code §13.34.180	6
Wash. Rev. Code §13.34.190	6
Wash. Rev. Code §26.09.191	5
Wash. Rev. Code §26.09.260	5–6
Wash. Rev. Code §26.14.020	4
Wash. Rev. Code §26.14.150	4
Wash. Rev. Code §26.14.902	4
This Court’s Rule 37	1
Wash. R. Evid. 1101	5

INTEREST OF AMICUS CURIAE¹

The Due Process Project (DPP) is a Washington-based nonprofit, tax-exempt under 26 U.S.C. §501(c)(3), that works to ensure the Fourteenth Amendment’s guarantees are honored in proceedings affecting children and families. This petition concerns two practices DPP sees in family courts nationwide: assigning decisions about a parent’s relationship with a child to private third parties, and placing on the parent a constitutionally imbalanced burden to undo a restriction once it is entered.

SUMMARY OF THE ARGUMENT

DPP addresses the second question presented: whether a State may delegate adjudication affecting a parent’s liberty interest to a private arbitrator “without the procedural safeguards constitutionally required before the State may interfere with the parent-child relationship.” Pet. for Cert. i. DPP respectfully submits that it may not, for two reasons.

First, due process requires a neutral and accountable decisionmaker in the first instance. Deferential review afterward does not supply one.

Second, the required safeguards include the standard of proof. Washington restricts a parent on the

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, its counsel made a monetary contribution intended to fund its preparation or submission. Notification pursuant to and as required by this Court’s Rule 37.2 has been given to all parties’ counsel of record.

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

lowest civil standard and lets the parent avoid the restriction only on clear and convincing evidence. That places the risk of error on the parent, the reverse of what this Court's precedent requires.

ARGUMENT

I. Due Process Requires a Neutral and Accountable Decisionmaker in the First Instance

Family courts often assign their most consequential decisions to arbitrators, guardians ad litem, and custody evaluators, then enter the result as the court's own order. This Court's precedent speaks directly to that practice.

The order is the State's. In *M. L. B. v. S. L. J.*, a father and stepmother, not a state agency, brought the case to end a mother's parental rights. This Court explained that "the challenged state action remains essentially the same," because only the State can issue the "official decree" that ends that relationship. 519 U.S. 102, 116, n. 8 (1996). The same is true when a court enters an arbitrator's award as its own order. The interest at stake is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

Neutrality is required in the first instance. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A litigant "is entitled to a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972).

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

The same rule governs private adjudicators. That command “is no different when a legislature delegates adjudicative functions to a private party.” *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U. S. 602, 617 (1993).

Appeal does not cure the defect. “Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.” *Id.*, at 618.

Deference compounds the problem. Requiring an adjudicator to accept a possibly biased party’s findings “even if they were probably incorrect” raises “a substantial question of procedural fairness under the Due Process Clause,” because the opposing party “would seem to be deprived . . . of the impartial adjudication in the first instance to which it is entitled.” *Id.*, at 626. Family courts use that structure routinely: the parent must overcome an untested recommendation, or vacate an arbitrator’s award under a deferential standard. The Constitution does not require a judge to perform every factfinding task, *Parham v. J. R.*, 442 U. S. 584, 606–607 (1979), but the decision “must rest solely on the legal rules and evidence adduced at the hearing,” with reasons stated, before “an impartial decision maker.” *Goldberg v. Kelly*, 397 U. S. 254, 271 (1970).

Here, the arbitrator’s award included a restraining order protecting petitioner’s former spouse and their child, which the superior court entered over his objection. App. 3, 11. The form’s finding that he had “reasonable notice and an opportunity to be heard” rests on a single checked entry: “THIS ORDER IS ENTERED PURSUANT TO AN ARBITRATION

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

RULING” App. 11–12. None of the boxes for service, presence at the hearing, or actual notice of the hearing is checked. *Ibid.* According to the petition, no party requested that relief. Pet. for Cert. 3. The order was enforceable by arrest and criminal penalty. App. 11–12, 15. For arbitration agreements made on or after January 1, 2024, Washington excludes protection orders from family-law arbitration and requires a court to find any child-related award “in the best interests of the child.” Wash. Rev. Code §§26.14.020(3)(h), 26.14.150(3), 26.14.902.

II. Washington Places the Risk of Error on the Parent, the Reverse of What Due Process Requires

This Court’s precedent speaks just as directly to the risk of error.

The standard of proof allocates the risk. It “serves to allocate the risk of error between the litigants.” *Addington v. Texas*, 441 U. S. 418, 423 (1979).

In termination, an even split is intolerable. “[A]t a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable.” *Santosky v. Kramer*, 455 U. S. 745, 768 (1982).

The burden can decide the case. “[W]here the burden of proof lies may be decisive of the outcome.” *Speiser v. Randall*, 357 U. S. 513, 525 (1958).

A fit parent should not bear the burden of disproof. The *Troxel* plurality found a violation where the trial judge “placed on [the mother], the fit custodial parent, the burden of disproving” the challenged visitation. 530 U. S., at 69.

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

Convenience does not justify presumption. *Stanley v. Illinois* rejected “presuming rather than proving [the parent’s] unfitness solely because it is more convenient to presume than to prove.” 405 U.S. 645, 658 (1972).

DPP recognizes that the burden of persuasion “is normally not an issue of federal constitutional moment.” *Concrete Pipe*, 508 U.S., at 626 (quoting *Lavine v. Milne*, 424 U.S. 577, 585 (1976)). A parent’s relationship with a child is not the normal case; it is not a dispute over money or property.

Washington reverses that allocation in three steps.

Restriction on the lowest civil standard. A parent’s residential time “shall be limited if it is found that a parent has engaged in” listed conduct, with no heightened standard for the finding. Wash. Rev. Code §26.09.191(4)(a). Protection orders issue on “a preponderance of the evidence,” §7.105.225(1), and “may suspend the respondent’s contact with the parties’ children under an existing parenting plan,” §7.105.310(1)(f). Apart from privileges and a few other exceptions, the rules of evidence “need not be applied” in those proceedings. Wash. R. Evid. 1101(c)(4).

Exit only on clear and convincing evidence. Unless both parents are limited, the parent may avoid the limits only through “express written findings based on clear and convincing evidence” that contact will cause no harm. Wash. Rev. Code §26.09.191(6)(a), (7)(a).

Relief only on changed circumstances. Once limited, a parent who does not have the child most of the time “may not seek expansion of residential time

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

under [a minor-modification provision] unless that parent demonstrates a substantial change in circumstances specifically related to the basis for the limitation.” §26.09.260(7).

The lowest civil standard restricts the parent; the parent bears the heavier burden to lift it. Later modification does not cure this, just as appellate review is not “a curative for an inadequate burden of proof.” *Santosky*, 455 U. S., at 757, n. 9.

A state high court applying this Court’s precedent has recognized the problem. The Supreme Court of Texas held that “constitutional due process requires clear and convincing evidence” before a parent is barred from contact with her children for more than two years, because such orders are “similar to the government’s termination of parental rights.” *Stary v. Ethridge*, 712 S.W.3d 584, 587 (Tex. 2025). And Washington itself guarantees a parent facing termination proof by “clear, cogent, and convincing evidence” and appointed counsel, Wash. Rev. Code §§13.34.090(2), 13.34.180(6), 13.34.190(1)(a)(i), but provides neither to parents restricted under the statutes above. Where a State extends a safeguard to some parents and withholds it from others, the Fourteenth Amendment is implicated. *Stanley*, 405 U. S., at 658; see *M. L. B.*, 519 U. S., at 120.

* * *

These practices arise in family courts every day. Only this Court can settle what the Fourteenth Amendment requires.

Brief of The Due Process Project as *amicus curiae*
in Support of Petitioner

CONCLUSION

This Court should grant certiorari.

Respectfully submitted.

Shannon M. Draughon
Counsel of Record
THE DUE PROCESS PROJECT
26311 NE Valley St
Ste A-123
Duvall, WA 98019
(425) 945-6862
sdraughon@thedueprocess-
project.org

Sean Kuhlmeier
7511 Greenwood Ave N
PMB 1601
Seattle, WA 98103-4627
(206) 695-2568
seanfromseattle@gmail.com

OCTOBER 2026

Attorneys for Amicus Curiae