

No. 26-369

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN TORSTEN LOOP,
Petitioner,

v.

WASHINGTON, ET AL.,
Respondents.

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

BRIEF OF DANIEL J. STURTEVANT, PhD,
AS AMICUS CURIAE IN SUPPORT OF
PETITIONER

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QUESTION PRESENTED

Amicus addresses only the second question presented by the petition, which asks:

Whether the Fourteenth Amendment permits a State to delegate adjudication substantially affecting a fit parent's fundamental liberty interest to a private arbitrator without the procedural safeguards constitutionally required before the State may interfere with the parent-child relationship.

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INTEREST OF AMICUS CURIAE

Amicus curiae Daniel J. Sturtevant holds a doctorate from the Massachusetts Institute of Technology in engineering systems.¹ His discipline is the design and analysis of complex systems: how an institution's structure, its rules, incentives, and accountability, shapes the behavior of the people within it.

For eighteen months he has applied that discipline to family law, beginning with the questions a systems analyst asks of any institution, which are not which party should win but what the institution is for, where the deciding vote sits, and what binds whoever holds it. The answer drew on three sources: the Court's precedents on the parent-child relationship, from *Meyer v. Nebraska*, 262 U.S. 390 (1923), forward; the tradition of political thought about the family and the State behind them; and the analysis of institutions as systems. The result is the Family Integrity Framework, circulated as working papers since 2025: a book manuscript, five papers, and a model statute. Its lead paper, *Constitutionalizing Family Law: The Madisonian Project in Troxel II* (2025), is posted at <https://ssrn.com/abstract=5450854>. Its central claim is that principles the Court has already announced, on the parental right, heightened proof, neutral adjudication, state action, and equal protection, assemble into a determinate constitutional floor beneath every family the law recognizes, and that the

¹ Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief; and that no person other than amicus and his counsel made such a contribution. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of amicus's intention to file this brief, at least ten days before its due date.

floor can be administered without recognizing any new right or disturbing any precedent.

The work has been tested in other hands. Elements of it have been used in legislative drafting in Washington and Idaho, and a bill introduced in the Washington House of Representatives in 2026 to establish “a constitutional floor in family law cases” takes its short title from the lead paper and provides that it “may be known and cited as *Troxel II*.” H.B. 2735, 69th Leg., Reg. Sess., tit. & § 2 (Wash. 2026). In Puerto Rico, the Bar Association is using it as a roadmap for family-court procedure.

Amicus files in his individual capacity. He is not related to or affiliated with any party, had no role in the proceedings below, and has no financial interest in the outcome. His interest is in the question presented, the visible edge of the problem his work addresses: the parental right is among the oldest the Court recognizes and the thinnest in doctrine, and a right without determinate content is given its content by whoever is handed the decision. The Court’s own precedents already answer the question, and answering it would settle more than this case.

SUMMARY OF ARGUMENT

The petition asks whether a State may hand the adjudication of a fit parent’s constitutional liberty to a private arbitrator and confirm the result under a general-purpose arbitration statute that forbids the confirming court to look at the merits. The delegation is not an aberration. It is what a legal system does when it has declared a right and never said what it requires.

I. A plurality of this Court has called the parental interest “perhaps the oldest of the fundamental liberty interests recognized by this Court,” *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion),

and in the same case declined to say what standard governs its infringement. The gap is older than the Court. Beginning with *Reed v. Reed*, 404 U.S. 71 (1971), equal protection rightly ended the sex-based status rules, and nothing replaced them. Two equal parents cannot break a tie, so when they disagree the deciding vote migrates outside the family: to the court, and from the court to evaluators, guardians, coordinators, therapists, and arbitrators, paid repeat actors with a stake in the dispute's continuation and none of the safeguards that discipline a court. A market grew to supply the missing vote.

II. No new doctrine is needed to see what is wrong with that. Due process entitles a litigant “to a neutral and detached judge in the first instance,” *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972), and “the command is no different when a legislature delegates adjudicative functions to a private party,” *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993). When the State moves to break up a family, it must prove unfitness to a heightened standard on individualized findings, and, on *Santosky's* reasoning, whatever the order that ends the relationship is called. A State that confirms a private award under a statute whose review “does not include a review of the merits,” *Davidson v. Hensen*, 135 Wash. 2d 112, 119, 954 P.2d 1327 (1998), and enforces it by arrest, has lent its coercive power to a determination none of those safeguards touched. Private consent to a forum cannot license that; the safeguards run to the State.

III. The larger question is answerable. The principles the Court has announced assemble into a coherent floor: a protected relationship between a child and each parent; a State power to protect the child, with a lane that opens at once on specific, articulable conduct indicating imminent, concrete danger; rules for the collision between the two, each a familiar

instrument; and the First Amendment’s limit on the State throughout. It recognizes no new right, overrules nothing, and is a floor, not a code.

IV. The question recurs, the state courts have answered it three different ways, and only this Court can settle it.

ARGUMENT

I. The question presented is the visible edge of a gap the Court has left open for a century.

A. The Court has declared the right and never supplied its content.

The lineage is familiar. Liberty includes the right “to marry, establish a home and bring up children,” *Meyer*, 262 U.S. at 399; “[t]he child is not the mere creature of the State,” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); and “the custody, care and nurture of the child reside first in the parents,” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The right belongs to each parent, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), and rests on the recognition “that natural bonds of affection lead parents to act in the best interests of their children,” *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

What the lineage has never supplied is a rule. The *Troxel* plurality recognized “a presumption that fit parents act in the best interests of their children,” 530 U.S. at 68 (plurality opinion), and then said: “We do not, and need not, define today the precise scope of the parental due process right in the visitation context.” *Id.* at 73 (plurality opinion). Justice Thomas observed that the plurality, Justice Kennedy, and Justice Souter all recognized the right, “but curiously none of

them articulates the appropriate standard of review.” *Id.* at 80 (Thomas, J., concurring in the judgment).

Professor Mnookin showed fifty years ago that the best-interests inquiry is “usually indeterminate and speculative.” Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 229 (1975). The right exists. What it requires, when two fit parents disagree or when the State moves against one of them, the doctrine does not say.

B. The gap is older than the Court, and equality exposed it.

The gap is as old as the liberal tradition the Court’s cases draw on. Locke, refuting the claim that a father’s power is a king’s, insisted that the power of parents could not be “wholly in the father, as if the mother had no share in it; whereas, if we consult reason or revelation, we shall find, she hath an equal title,” and proposed the name “parental power” in place of paternal. John Locke, *Two Treatises of Government* bk. II, § 52 (1689); see *id.* §§ 53, 64. He confined the husband’s “last determination” within marriage to “the things of their common interest and property,” *id.* § 82, referred the children on separation to whatever “such contract does determine,” *id.*, and left controversies to a magistrate who “only decides any controversy that may arise,” *id.* § 83. He gave two parents equal title and never said what they are to do when they disagree about a child, nor by what rule anyone else should decide for them.

Common law answered by status. Blackstone gave the father the legal power over the children, “for a mother, as such, is entitled to no power, but only to reverence and respect.” 1 William Blackstone, *Commentaries* *441 (1765). In the nineteenth century American courts carved an exception for young children that grew into the tender-years presumption,

under which the mother presumptively prevailed. *See Ex parte Devine*, 398 So. 2d 686, 689–91 (Ala. 1981) (tracing the presumption’s rise). Those rules differed in direction, not in kind: each assigned decisional priority by category, and neither ever defined the relationship it was allocating.

Then equality arrived. A mandatory preference for either sex “merely to accomplish the elimination of hearings on the merits” is “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.” *Reed*, 404 U.S. at 76. Over two decades it proved fatal to the sex-based custody presumptions. *See, e.g., Devine*, 398 So. 2d at 695; *Pusey v. Pusey*, 728 P.2d 117, 119–20 (Utah 1986). Equality was right, and nothing in this brief asks for any part of the old rules back.

Equality did not create the problem; it exposed one. The status rules had not solved the question of how two parents share authority over a child; they had hidden it by fixing the outcome in advance. Two equal parents cannot break a tie, and something had to.

C. When the law had no rule, the deciding vote migrated outside the family, and a market grew to supply it.

What happened next was structural, and no one chose it. While the deciding vote sat in one parent by status, parental authority, however wrongly allocated, stayed inside the family. When the priority rules fell with nothing to replace them, the vote moved outside it, to the court and to the professionals whose judgment the court would follow. Custody evaluators, guardians ad litem, therapists, parenting coordinators, and, as here, private arbitrators became the actors through whom the decision was shaped, and a market grew to supply and influence them.

Three features of that market matter here. First, its actors are repeat players in Professor Galanter’s

sense, facing parents who are one-shotters. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc’y Rev. 95, 97–98 (1974). Second, they are paid by the hour, by the parties, and their revenue rises with the dispute’s continuation. Custody evaluation’s “reliability, validity, efficacy, and efficiency” have “never yet been adequately demonstrated,” Benjamin D. Garber, *The Emperor Has No Clothes: A Systemic View of the Status and Future of Child Custody Evaluation (CCE)*, 61 Fam. Ct. Rev. 747, 748 (2023), while the average cost of a private custody evaluation has risen “from \$965 to \$12,465” over thirty-five years, *id.* at 754 n.24 (quoting Marc J. Ackerman et al., *Child Custody Evaluation Practices: Where We Were, Where We Are, and Where We Are Going*, 52 Prof. Psychol.: Res. & Prac. 406, 408 (2021)). Third, demand does not fall with price; a parent facing the loss of a child will spend nearly anything.

The incentives follow from the structure. Co-parenting between fit parents is a repeated game: parties are coupled for eighteen years whether they wish to be or not, and iteration disciplines behavior toward cooperation. Contested custody under an indeterminate standard converts it into a one-shot contest for the child, in which each parent’s best move is to escalate: to appear the better parent, make the other appear worse, and win the third vote now positioned between them and the child. Divorcing parents “bargain in the shadow of the law,” and the governing standards “provide a bargaining backdrop clouded by uncertainty.” Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 968–69 (1979). The dispute then pays to continue, and nothing in the structure ends it short of the child’s majority. The child becomes the lever.

The actors to whom the vote migrated together form a shadow judiciary: a structural drift in which professional judgment, public or private, supplies the content of adjudication while courts supply the order, so that the actors with constitutional effect carry no judicial duty, standard, or review. The profession has drawn the line itself: its guidelines let a parenting coordinator decide, “with or without a right of appeal,” minor changes to the children’s schedules, the logistics of exchanges, their health care, “disciplinary practices, bedtime routines, diet, and homework support,” their therapy and psychological testing, their schooling, and “[r]eligious observances and education,” yet forbid “decisions that would change custody.” Ass’n of Family & Conciliation Cts., *Guidelines for Parenting Coordination* XI.A, XI.B, XI.E, at 13–15 (2019). The distinction assumes custody is something other than the sum of those decisions. Courts have drawn one too: the Supreme Judicial Court of Massachusetts vacated an order, entered over a parent’s objection, that gave a parenting coordinator binding authority, as “an unlawful delegation of judicial authority,” because “a judge cannot shift the final decision-making authority granted by statute to a third party.” *Bower v. Bournay-Bower*, 469 Mass. 690, 691, 707, 15 N.E.3d 745 (2014). Neither can say what the State must show, and who must decide, before it burdens the relationship.

II. Principles the Court has already announced condemn the delegation at issue.

The petition describes a determination by a private arbitrator, confirmed by a state court “without meaningful de novo review,” Pet. 13, and enforced by a restraining order entered “PURSUANT TO AN ARBITRATION RULING” and backed by arrest. Pet. App. 11–12.

A. The first adjudication must be by a neutral and detached decision-maker with no financial stake.

It “certainly violates the Fourteenth Amendment” to subject a person’s “liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.” *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The test is whether the decision-maker’s situation “would offer a possible temptation to the average man as a judge to forget the burden of proof required,” *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey*, 273 U.S. at 532). The litigant “is entitled to a neutral and detached judge in the first instance.” *Id.* at 61–62. “[T]he command is no different when a legislature delegates adjudicative functions to a private party,” and “[e]ven appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator.” *Concrete Pipe*, 508 U.S. at 617–18. *Concrete Pipe* itself found no violation, and the reason matters. The trustees, whose possible bias the Court assumed would bar them from adjudicating, acted only in an enforcement capacity; the first adjudication was before a “concededly neutral arbitrator” free to consider every factual issue independently; and because that was so, the Court found “no derivative constitutional defect” in the deferential review a court then gave the arbitrator’s findings. *Id.* at 618–20, 630. A court’s deference, in other words, is sound only if the first proceeding was constitutionally adequate. And the interest there was an employer’s money, as to which “the locus of the burden of persuasion is normally not an issue of federal constitutional moment” absent some “special interest.” *Id.* at 626. A parent’s relationship with a child is that special interest: “far more precious than any property right,” it is one the

Court protects, when the State moves to sever it, with a standard of proof it does not require for money. *Santosky*, 455 U.S. at 756, 758–59.

Two things follow. The first is that the question is the safeguards, not the title. Due process “has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer.” *Parham*, 442 U.S. at 607. What a State may not do is strip the actor of the disciplines that make a decision-maker neutral and then adopt the result. The second is that the Court’s test is structural. *Tumey* and *Ward* ask not whether a decision-maker was in fact partial but whether his situation “might lead him not to hold the balance nice, clear and true.” *Tumey*, 273 U.S. at 532. Amicus attributes no personal motive to the arbitrator here, a retired judge. The point is where the market for custody decisions places any decider: as a repeat player whose income rises with the dispute’s continuation, and whose award can route future disputes back to arbitration, as the draft parenting plan here would have done until the trial court struck the provision. See *In re Marriage of Loop*, No. 86382-7-I, slip op. at 5 n.7 (Wash. Ct. App. Jan. 21, 2025) (unpublished).

None of this condemns arbitration. A commercial award ends the dispute; a decider over a child’s custody sits in one that can run until the child’s majority, and his award can perpetuate his own role. A commercial award binds the parties who chose the forum and no one else; a custody award reaches a child who chose nothing, and the State’s *parens patriae* responsibility, which the parents cannot waive for it.

B. The State must prove its case to a heightened standard, on findings, with review proportioned to the interest.

When the State moves against the parent-child relationship, it bears a commensurate burden. “Procedure by presumption is always cheaper and easier than individualized determination,” but a procedure that “forecloses the determinative issues of competence and care . . . cannot stand.” *Stanley*, 405 U.S. at 656–57. The Due Process Clause “would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in the judgment)). Because “the social cost of even occasional error is sizable,” severance requires proof “by at least clear and convincing evidence.” *Santosky*, 455 U.S. at 747–48, 764. *Santosky* fixed that standard at the point of formal termination. Beneath that point the same deprivation now occurs on lesser standards. A protection order that lists a child as a protected party issues on a preponderance, Wash. Rev. Code §§ 7.105.225(1), 7.105.310(1)(b); a restraining order in a dissolution decree may reach the children and carries the same criminal legend, *id.* §§ 26.09.050(1), (2), 26.09.300(1); and each leaves the parent’s legal status intact, so that nothing is called termination and the standard *Santosky* set is never applied. *Santosky*’s holding reaches termination; the interest it protects, against “the irretrievable destruction of their family life,” 455 U.S. at 753, does not stop at the label. A State that may not sever the relationship on less than clear and convincing evidence may not end it in practice, for

as long as an order runs, by an order of another name on a lesser standard, or, as here, on a private determination whose evidentiary basis no court was permitted to examine. *See Davidson*, 135 Wash. 2d at 119. The Supreme Court of Texas recently saw as much in an order short of termination, sought by one divorced parent against the other, holding that “constitutional due process requires clear and convincing evidence to support a protective order prohibiting contact between a parent and her children” for longer than two years, because such an order is “[i]n that paramount sense . . . similar to the government’s termination of parental rights.” *Sтары v. Ethridge*, 712 S.W.3d 584, 587 (Tex. 2025). Among the interests the court named at the outset were “interference in family relationships, and hefty criminal consequences upon violation of the order,” *id.* at 586–87, and it treated an order sought by the other parent as “government interference with certain fundamental rights,” *id.* at 593: the State’s coercive power behind the order, not the identity of the party who sought it. That feature was present here: the order, entered February 23, 2024 on an arbitrator’s determination and running to September 1, 2025, was enforceable by the State on pain of arrest. Pet. App. 10–12, 16. How long such an order runs goes to how much process is due, not to whether any state actor must apply the standard; *Sтары* itself drew its line where the statute did and reserved shorter orders. *Sтары*, 712 S.W.3d at 595 n.60.

The delegation model at issue requires none of those things. Washington’s Uniform Arbitration Act, under which the state courts treated the award as confirmed, *see In re Marriage of Loop*, slip op. at 6, 8, directs that a court “shall” confirm unless the award is vacated on one of six enumerated grounds, none of which reaches the weight of the evidence or the child’s interests. Wash. Rev. Code §§ 7.04A.220, 7.04A.230(1).

Review under that regime “is exceedingly limited,” “does not include a review of the merits of the case,” and “[o]rdinarily, the evidence before the arbitrator will not be considered by the court.” *Davidson*, 135 Wash. 2d at 119 (construing former chapter 7.04); see *In re Marriage of Loop*, slip op. at 6–7 (applying *Davidson* under chapter 7.04A). A confirming court that may not reexamine the evidence cannot find that the evidence is clear and convincing. Nor does it matter whether a particular arbitrator chooses to write findings. What the Constitution requires is that the State’s coercive order rest on findings made under the required standard by a decision-maker bound to apply it, see *Santosky*, 455 U.S. at 769; *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), and here no state actor ever applied it: the arbitrator was not bound to, and the confirming court could not. The safeguards the Court has required were not applied badly; under the governing statute, they could not be applied at all.

C. State action is present, and private consent to a forum cannot waive what the Constitution demands of the State.

Two answers will be offered; neither holds. The first is that an arbitrator is a private actor. But the award did not enforce itself. The State’s statute directed its court to adopt the private determination without examining its merits, Wash. Rev. Code § 7.04A.220, and the State’s criminal process stood behind the result. A deprivation is attributable to the State where the party charged “has obtained significant aid from state officials,” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), and “the procedural scheme created by the statute obviously is the product of state action,” *id.* at 941. Amicus does not contend that every court-adjacent professional is a state actor. The constitutional defect lies in the State’s rule: a statute that lends the State’s coercive power to

a private determination of a parent's relationship with a child on terms that keep the State's own courts from reexamining it.

The second answer is consent. The district court described the parties as having "agreed to arbitrate the dissolution of their marriage." Pet. App. 3. Assume so; it is beside the point. The petition asks whether the State may rely on that agreement to dispense with safeguards that run to the State. Pet. 8 n.1, 14–15. The petition contends that the agreement here did not reach the order that issued, Pet. 3, 13; amicus takes no position on that, because the point is categorical. Two parents cannot by contract waive the child's interest in the relationship and cannot relieve the State of the judgment that attaches to its own coercive power. Even the state high court that has held parents have a constitutional right to arbitrate custody conditioned that right on a verbatim record and recorded findings and said the agreement must state "in clear and unmistakable language" that the parties understand and waive their right to judicial adjudication and should "reflect, with specificity, which issues" the arbitrator will decide. *Fawzy v. Fawzy*, 199 N.J. 456, 461–62, 480–82, 973 A.2d 347 (2009). Consent to a forum is not consent to the absence of a floor.

Consent cannot supply what the Equal Protection Clause removed. The deciding vote left the family because the Clause forbade allocating it by sex. The replacement cannot be a private vote exercised under no standard. Cf. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (a court deciding custody may not give effect to private bias, "directly or indirectly"). A system that moves the decision from a judge bound by equal protection to a private decider bound by nothing has not escaped the Clause. It has routed around it.

III. The larger question is answerable with the tools the Court already has.

The natural worry about a petition like this one is that it opens a question with no bottom: that a Court which took up the content of the parental right would find itself writing a federal family code. It would not; the answer can be built from the Court's own cases. Amicus doesn't ask the Court to adopt it now; its relevance is that the question has a tractable answer.

A. The principles already announced assemble into a coherent floor.

The architecture rests on four things. The first is the protected relationship: the child's relationship with each parent, a right held by parent and child alike, with content the Court has already described. It consists of "the emotional attachments that derive from the intimacy of daily association," *Smith*, 431 U.S. at 844; the parent's "uniquely valuable contributions to the child's development," *Lehr v. Robertson*, 463 U.S. 248, 262 (1983); and the authority "to direct the upbringing" of the child, *Pierce*, 268 U.S. at 534–35, held in trust. That is the "careful description," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), of the liberty the Court has protected since *Meyer*, and it describes a relationship, not a status. "A parent cannot parent without presence." *Stary*, 712 S.W.3d at 591. Unfitness must be proved, not presumed, see *Stanley*, 405 U.S. at 658; *Santosky*, 455 U.S. at 760, and a finding made without the safeguards that follow is not proof. A burden on the right therefore begins not at termination but wherever the State denies a parent one of those elements: the authority, as in *Meyer* and *Pierce*, or the access the attachment and the parent's contribution require. An ordinary allocation of time between fit parents does not cross that line; an order forbidding contact does.

The right is held by each parent individually, *see Stanley*, 405 U.S. at 651, and exercised jointly, so that the State may not rank one fit parent above the other.

The second is the protective power and the safety lane. The State has always had the power to protect a child from concrete harm, *Prince*, 321 U.S. at 166–67; the power is not an entitlement, *see DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195–96 (1989); and once exercised, it is bound, whoever exercises it: a court, an agency, or a private delegate. The lane is the route a claim of danger travels: the emergency door opens at once, before the other parent is heard, on specific, articulable conduct indicating imminent, concrete danger to the child, and on nothing else; and the claim, having opened the door, does not itself become a finding. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“specific and articulable facts”). It tells the State how to protect, not whether.

The third is the set of rules for the collision between the power and the relationship, each a familiar instrument. A presumption that fit parents act in their children’s interests, rebutted only as to a specific predicate proven by clear and convincing evidence of concrete harm or present incapacity. *See Troxel*, 530 U.S. at 68 (plurality opinion); *Parham*, 442 U.S. at 602; *Santosky*, 455 U.S. at 769. Strict scrutiny, with the least-restrictive-means inquiry it carries, for any burden on the relationship. *See Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment). Equal protection between fit parents, and among families, whatever their race, form, or means, so that the predicate for state action is individualized proof, not status. *Reed*, 404 U.S. at 76; *Palmore*, 466 U.S. at 433; *Stanley*, 405 U.S. at 658; *M.L.B. v. S.L.J.*, 519 U.S. 102, 107, 116 (1996). Non-abdication and auditable orders: advisors advise, judges decide, and written findings identify the evidence relied on, the standard applied, and the less restrictive alternatives rejected.

Cf. Ward, 409 U.S. at 61–62; *Goldberg v. Kelly*, 397 U.S. at 271. A procedure that reinforces rather than sabotages the fit parents’ duty to raise the child together. An epistemic boundary: decisions rest on evidence of specific conduct with a demonstrated causal link to concrete harm, never on labels or unfalsifiable constructs, because “imprecise substantive standards” leave determinations “unusually open to the subjective values of the judge,” *Santosky*, 455 U.S. at 762, and the Court has recognized how far psychiatric diagnosis rests on “impressions” that are “filtered through the experience of the diagnostician,” *cf. Addington v. Texas*, 441 U.S. 418, 430 (1979) (declining for that reason to require proof beyond a reasonable doubt). And reversibility: a restriction’s effects may not outlive its justification, and the State may neither credit the status quo its own order produced nor let a temporary order harden into permanent loss. *Cf. Santosky*, 455 U.S. at 763 (the State’s “power to shape the historical events that form the basis for termination”).

The fourth is conscience, speech, and petition: the First Amendment, which does not switch off in a family courtroom. No burden on the relationship may rest on a parent’s lawful belief, speech, or petition as such.

Those four things are the Court’s precedents, assembled, with the gaps filled by construction of the ordinary kind. The construction recognizes no new right, applies rather than revisits *Meyer* and *Pierce*, extends rather than contradicts *Stanley* and *Santosky*, declines to read *Troxel*’s plurality beyond what it held, and operates within the history-and-tradition methodology the Court applies to unenumerated liberties. *See Glucksberg*, 521 U.S. at 720–21; *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 256–57 (2022) (*Pierce* and *Meyer* not undermined “in any way”).

**B. The construction is administrable,
respects federalism, and protects
children and parents at once.**

Administrability. The construction replaces an unanswerable comparative question (which of two fit parents is better for this child) with answerable ones: what predicate was proven, by what evidence, under what standard, with what lesser alternatives rejected, and for how long. *Cf. In re Gault*, 387 U.S. 1, 18 (1967) (“unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure”).

Federalism. The construction is a floor, not a code. “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States,” *In re Burrus*, 136 U.S. 586, 593–94 (1890), and the domestic-relations exception is a limit on federal jurisdiction, not on the Constitution, *Ankenbrandt v. Richards*, 504 U.S. 689, 700, 703–04 (1992). The Court has long set constitutional floors in fields otherwise governed by the States without federalizing them: *Goldberg v. Kelly* inside state welfare administration, *Gault* inside state juvenile courts. It tells States what they may not do to a parent, not how to structure their courts, and it fixes no schedule, percentage, or equal-time presumption; equality between fit parents is a no-ranking rule, not an arithmetic one.

Dual protection. The construction rests on the premise that the two failures family law is accused of, the child left with a dangerous parent and the parent wrongly severed from a child, share a cause: an adversarial architecture that floods the record with strategic noise and a standard with no content to filter it. Whether a system built this way reduces both errors, and by how much, is a hypothesis awaiting measurement, and amicus states it as one. The

construction is written for every family the law recognizes and protects whichever parent is on the losing end, because it is a rule about how harm must be shown, not about who wins by default.

IV. The question recurs, the States have answered it three ways, and only this Court can settle it.

Amicus takes no position on the first question presented and does not vouch for any disputed fact. The facts that matter appear on the face of the record: a private arbitrator’s determination, Pet. 3, 12–13; Pet. App. 3, confirmed under a statute whose review “does not include a review of the merits,” *Davidson*, 135 Wash. 2d at 119, and enforced by criminal sanction, Pet. App. 11. Petitioner alleges that he is a fit parent and that no finding of unfitness was ever made. Pet. 12. Whether that is so is precisely the question the safeguards described in Part II exist to answer; it cannot be assumed by the design of the forum.

The question recurs, and the lower courts have no guidance. A 2016 uniform act, Unif. Family Law Arbitration Act (Unif. Law Comm’n 2016), extends arbitration to child-related disputes, conditions confirmation of a child-related award on a best-interests finding, and leaves to each State whether a reviewing court “may exercise de novo review” or is confined to the arbitration record. *Id.* §§ 16(c), 19(d) & legislative note. State courts have answered the underlying question three ways. New Jersey holds that parental autonomy includes a constitutional right to arbitrate custody, reviewable beyond the arbitration statute’s narrow grounds only for threatened harm to the child. *Fawzy*, 199 N.J. at 461–62, 478–79. Michigan holds that parents “cannot waive the authority that the Child Custody Act confers on the

circuit court.” *Harvey v. Harvey*, 470 Mich. 186, 193–94, 680 N.W.2d 835 (2004) (per curiam). A New York appellate court holds that custody is not arbitrable at all, because “the court’s role as *parens patriae* must not be usurped.” *Goldberg v. Goldberg*, 124 A.D.3d 779, 780, 1 N.Y.S.3d 360 (2d Dep’t 2015) (internal quotation marks and citations omitted). None of them addresses what the Fourteenth Amendment requires of States that lend their coercive power to a private forum, because this Court has never said.

Nor is the problem confined to divorce. The same structure, coercive power exercised through actors who are not judges and reviewed thinly if at all, operates in the child-protection system, where an estimated 37.4% of American children, and 53.0% of Black children, experience a child-protective-services investigation before age eighteen, Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 Am. J. Pub. Health 274, 274 (2017), and where, as one critic writes, authorities act “with stunningly little judicial constraint or public scrutiny,” Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* 23 (2022). Whatever the Court says about the floor beneath a parent’s relationship with a child will govern both halves of that system, which is a reason to say it carefully rather than let it be answered by default, one private forum at a time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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