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Services Against Our Will: Texas Family Code § 264.203 Is Unconstitutional

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SERVICES AGAINST OUR WILL: TEXAS FAMILY CODE § 264.203 IS UNCONSTITUTIONAL

By: Beau T. Sinclair & Christina M. Davis

TABLE OF CONTENTS

I.	WHAT ARE SERVICES?	936
II.	WHAT MAKES § 264.203 UNCONSTITUTIONAL?	936
	A. <i>The Fundamental Rights Involved</i>	938
	1. The Right to Privacy	938
	2. The Right of a Parent to Direct a Child’s Upbringing	940
	B. <i>The Problem with § 264.203</i>	941
III.	HOW CAN § 264.203 BE FIXED?	943
	A. <i>Strict Scrutiny</i>	943
	B. <i>Burden of Proof</i>	944
IV.	CONCLUSION	945

There exists a well-known and ever-increasing problem throughout Texas: Texas Child Protective Services.¹ The Texas Child Protective Services (“CPS”) system is flawed, yet often, efforts are not made to correct the identifiable flaws. Perhaps progress can be made by ensuring that the statutes upon which CPS is built are, themselves, not flawed. At the most basic level, statutes must be constitutional; an unconstitutional statute will inevitably lead to application problems. One of CPS’s major flaws is its at-times inappropriate insistence that families participate in “services.” Upon closer inspection of this flaw, the statute that allows judges to order participation in such services at CPS’s request, section 264.203 of the Texas Family Code, is unconstitutional because the statute allows for state infringement of several fundamental rights without setting out any sort of a burden of proof to be met. Even if section 264.203 was not considered unconstitutional on its face, certainly it would be unconstitutional as applied.

1. Rebecca Lightsey & Marcy Hogan Greer, *The Role of the Judicial System in Improving the Lives of Texas’ Foster Children*, 73 TEX. B.J. 746 (2010). See Emily A. Cook, *Separate, Parallel Paths—These Lines Should Never Cross: Why Texas Needs a Bright-Line Rule to Determine When a Child Protective Services Agent Acts as a Law Enforcement Agent*, 40 TEX. TECH L. REV. 365, 366 (2008); Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287, 289–90 (1998).

I. WHAT ARE SERVICES?

The statute in question in this Article, section 264.203 of the Texas Family Code, allows courts, at the request of CPS, to order a parent, managing conservator, guardian, or other member of a child's household to participate in services prescribed by CPS.² Generally, "services" can be defined as programs offered to members of families with which CPS is involved.³ These programs are purportedly designed to help the family reduce the risk of abuse or neglect through education and counseling.⁴ According to section 264.201(d) of the Texas Family Code, services can include in-home programs, parenting skills training, youth coping skills, and individual and family counseling.⁵ Despite the wide range of possible services, all services must have four things in common: the services must all be designed to (1) prevent further abuse, (2) alleviate the effects of the abuse suffered, (3) prevent removal of the child from the home, and (4) provide reunification services when appropriate for the return of the child to the home.⁶ Additionally, the Department of Family and Protective Services (the "Department"), of which CPS is a branch, must provide or pay for every service offered.⁷ Family Based Safety Services ("FBSS") is the organization within CPS that offers and monitors the services in which families are participating.⁸

II. WHAT MAKES § 264.203 UNCONSTITUTIONAL?

Section 264.203 of the Texas Family Code states as follows:

Sec. 264.203. REQUIRED PARTICIPATION.

- (a) Except as provided by Subsection (d), the court on request of the department may order the parent, managing conservator, guardian, or other member of the subject child's household to:
- (1) participate in the services the department provides or purchases for:
 - (A) alleviating the effects of the abuse or neglect that has occurred; or
 - (B) reducing the reasonable likelihood that the child may be abused or neglected in the immediate or foreseeable future; and

2. TEX. FAM. CODE ANN. § 264.203 (West 2012).

3. See *Texas Child Protective Services Handbook § 1120—Guiding Principles of the CPS Program*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_1120.asp (last visited Sept. 20, 2012).

4. *Texas Child Protective Services Handbook § 1110—Purpose and Objectives*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_1000.asp#CPS_1110 (last visited Sept. 20, 2012).

5. TEX. FAM. CODE ANN. § 264.201(d) (West 2010).

6. *Id.* § 264.201(a).

7. *Id.* § 264.201(d).

8. *Texas Child Protective Services Handbook §§ 3110–32*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_3000.asp#CPS_3110 (last visited Sept. 20, 2012).

- (2) permit the child and any siblings of the child to receive the services.
- (b) The department may request the court to order the parent, managing conservator, guardian, or other member of the child's household to participate in the services whether the child resides in the home or has been removed from the home.
 - (c) If the person ordered to participate in the services fails to follow the court's order, the court may impose appropriate sanctions in order to protect the health and safety of the child, including the removal of the child as specified by Chapter 262.
 - (d) If the court does not order the person to participate, the court in writing shall specify the reasons for not ordering participation.⁹

Section 264.203 deals with fundamental rights and freedoms, which compels constitutional analysis of the statute.¹⁰ It is undeniably important to recognize that the statute deals with fundamental rights and freedoms as opposed to any other right because of the protections fundamental rights are afforded.¹¹ The Fourteenth Amendment's Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."¹² The government interference that the Due Process Clause protects against appears in section 264.203 in the form of mandatory participation in services that CPS, a government agency, thinks will be beneficial.¹³ Further, two individual fundamental rights are involved in the statute: the fundamental right to privacy is involved when parents are required to participate in services (a, b);¹⁴ and the fundamental right of a person to direct his or her child's upbringing is involved when parents are ordered to allow their children to complete services (a, b).¹⁵ Yet, despite the fact that section 264.203 calls for government interference of at least two fundamental rights, the statute provides no heightened protection as is called for by the Due Process Clause.¹⁶

Essentially, section 264.203 says that if CPS wants a family to participate in services, a judge may order participation.¹⁷ Given that the statute deals with fundamental rights, the heightened protection should be present in the statute in the form of a heavy burden of proof to be met by the state before the government may interfere with those fundamental rights.¹⁸ Not only does the statute not require any sort of

9. TEX. FAM. CODE ANN. § 264.203 (West 2012).

10. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality).

11. *Id.* at 65.

12. *Id.*

13. § 264.203.

14. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

15. *Miller v. Mitchell*, 598 F.3d 139, 150 (3d Cir. 2010); *Troxel*, 530 U.S. at 65.

16. § 264.203.

17. *Id.*

18. *Troxel*, 530 U.S. at 63.

burden to be met before participation is ordered, but it goes in the complete opposite direction by requiring an explanation if the judge does *not* order the requested participation in subsection (d): “If the court does not order the person to participate, the court in writing shall specify the reasons for not ordering participation.”¹⁹ This lack of a burden of proof coupled with government interference with fundamental rights makes the application of the statute unconstitutional.²⁰

A. *The Fundamental Rights Involved*

1. The Right to Privacy

The fundamental right to privacy has, historically, been a broadly construed right. At its most basic, the right to privacy is a person’s “right to be let alone.”²¹ It branches out from the right to be let alone to protect many things, from consenting adults’ choice of sexual partners²² to a person’s refusal of medical treatment.²³ As evidenced below, the fundamental right to privacy is involved in the effect of an order under section 264.203.

When a judge orders participation in services, by definition, the judge is telling a parent that the parent must allow people and organizations into the parent’s life and home. The largest intrusion into the fundamental right to privacy this produces is that the parent must not only attend whatever services are ordered, but the parent must actually participate in the sessions.²⁴ For example, if a judge orders the parent to participate in counseling services, CPS will direct the counselor to cover specific topics, called the “identified need for treatment.”²⁵ The parent then has to show up and engage with the counselor, meaning the parent must relay any requested private family details and personal information to the counselor; CPS identifies this as “progress” made.²⁶ The effect of not doing so, of not participating in the counseling sessions and discussing things the counselor is required by CPS to discuss, is to be deemed by CPS as not having completed that particular service or to be found not in compliance with the judge’s order to participate and face sanctions from the

19. § 264.203.

20. *Troxel*, 530 U.S. at 67–68.

21. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also *Katz v. United States*, 389 U.S. 347, 350 (1967).

22. *Lawrence v. Texas*, 539 U.S. 558 (2003).

23. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

24. See generally *Griswold v. Connecticut*, 381 U.S. 479, 514–15 (1965).

25. *Texas Child Protective Services Handbook § 8243.1—Counseling—Individual, Family, and Group*, TEX. DEP’T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8243.asp#CPS_8243_1 (last visited Sept. 20, 2012).

26. *Texas Child Protective Services Handbook § 8243.16—Handling Additional Duties*, TEX. DEP’T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8243.asp#CPS_8243_16 (last visited Sept. 20, 2012).

court.²⁷ Moreover, the counselor is then required to report the content of the counseling sessions to CPS, thus further spreading the private, personal information the parent was forced to reveal.²⁸ These court-ordered, forced revelations are an obvious intrusion into the parent's fundamental right to privacy.²⁹

In addition to actually participating in the services ordered, talking to a counselor and discussing the required topics, an order to participate in services under section 264.203 forces a parent to be physically present for the services ordered.³⁰ The services ordered are often time-intensive, occurring several times during the week.³¹ Although the right to privacy does not rest on the intensity of the invasion, the court-ordered participation takes up a parent's time and takes away a parent's choice to spend that time another way, producing yet one more intrusion on a parent's fundamental right to privacy.³²

Another effect of ordered participation under section 264.203 is that complying with an order to participate forces a parent to allow people of the court's and CPS's choosing into the parent's home based only upon CPS's administrative finding. For example, if the parent is ordered to complete protective homemaker services, those services are provided in the home.³³ Additionally, one of the required duties of a FBSS worker is to have a minimum of one face-to-face meeting with each at-risk child and each participating parent per month, with the majority of the meetings being in the home.³⁴ Although the CPS Handbook states that a CPS caseworker must follow constitutional mandates by obtaining permission to enter a parent's home, there are no safeguards in place for protection of the fundamental right of a

27. See *Texas Child Protective Services Handbook § 3167—Compliance with Family Service Plans*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_3160.asp#CPS_3167 (last visited Sept. 20, 2012); TEX. FAM. CODE ANN. § 263.005 (West 2011); TEX. GOV'T CODE ANN. § 21.001 (West 2004).

28. *Texas Child Protective Services Handbook § 8243.16—Handling Additional Duties*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8243.asp#CPS_8243_16 (last visited Sept. 20, 2012).

29. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also *Katz v. United States*, 389 U.S. 347, 350 (1967); *Griswold*, 381 U.S. 479 at 514–15.

30. *Texas Child Protective Services Handbook § 3220—Services Purchased*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_3200.asp#CPS_3220 (last visited Sept. 20, 2012).

31. *Texas Child Protective Services Handbook § 8223—Referring Clients for Family-Based Safety Services*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8200.asp#CPS_8223 (last visited Sept. 20, 2012).

32. See *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); see also *Katz*, 389 U.S. at 350; *Griswold*, 381 U.S. 479 at 514–15.

33. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 30.

34. *Texas Child Protective Services Handbook § 3313.2—Making Face-to-Face Contact*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_3310.asp#CPS_3313_2 (last visited Sept. 20, 2012).

parent to refuse entry.³⁵ A parent's exercise of this constitutional right is, instead, looked at in a negative light and can lead to a report of non-compliance with court-ordered services.³⁶ Compliance with an order under section 264.203 takes away a parent's right to exclude people from his or her home, which is a clear intrusion into the parent's fundamental right to privacy.³⁷

There is not a set list of services that may be ordered, but rather the services ordered vary from case to case and from county to county.³⁸ Given this fact, there are potentially many other examples of services ordered that infringe upon the Fourteenth Amendment right to privacy. In the above listed examples and many others that could arise, the effect of an order under section 264.203 is to take away a parent's choice: the choice to disclose or not disclose private facts, the choice to spend time a certain way, and the choice to exclude someone from the parent's home.³⁹

2. The Right of a Parent to Direct a Child's Upbringing

"The family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference."⁴⁰ The case law on this issue is extensive and repetitive.⁴¹ Although a subset of the right to privacy guaranteed by the Fourteenth Amendment, a parent's right to direct a child's upbringing deserves its own heading in this article because section 264.203 interferes with this right directly. Court-ordered participation in services under section 264.203 not only

35. *Texas Child Protective Services Handbook § 3115—Constitutional Requirements for Family Based Safety Services and Family Reunification Cases*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_3000.asp#CPS_3115 (last visited Sept. 20, 2012).

36. *Texas Child Protective Services Handbook § 3167—Compliance with Family Service Plans*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_3160.asp#CPS_3167 (last visited Sept. 20, 2012); TEX. FAM. CODE ANN. § 263.005 (West 2011).

37. See *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); see also *Katz*, 389 U.S. at 350; *Griswold*, 381 U.S. 479 at 514–15.

38. *Texas Child Protective Services Handbook § 8222—Identifying Available Services*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8200.asp#CPS_8222 (last visited Sept. 20, 2012).

39. TEX. FAM. CODE ANN. § 264.203 (West 2012).

40. *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990).

41. See *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972); *Griswold*, 381 U.S. at 495–96 (Goldberg, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 335–36 (1920) (Brandeis, J., dissenting); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (plurality) (O'Connor, J., concurring in part); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974).

infringes on this fundamental right of parents, but denies parents this right altogether.⁴²

Inherent in the right of a parent to direct a child's upbringing is the notion that a parent has the right to choose with whom the child associates based on the parent's own notion of best interest.⁴³ Yet, specifically included in a section 264.203 participation order is the order that a parent must allow all children to receive services, which often include counseling, meetings with a FBSS worker, and daycare employees, among others.⁴⁴ Once again, a parent's choice is taken away; a parent in this situation must allow his or her children to associate with people of CPS's and the court's choosing and may face sanctions for not doing so.⁴⁵ The effect of an order under section 264.203 is to deny a parent the right to choose the people with whom a child will associate and to subsequently infringe upon the fundamental right of a parent to direct his or her child's upbringing.⁴⁶

B. *The Problem with § 264.203*

The fact that court-ordered services under section 264.203 involve several fundamental rights does not, by itself, make the statute unconstitutional.⁴⁷ The Due Process Clause of the Fourteenth Amendment does not prohibit interference with fundamental rights, but rather, it requires that heightened protection be afforded to fundamental rights to guard against government interference.⁴⁸ The problem that exists in section 264.203, i.e., what makes section 264.203 unconstitutional, is the fact that it allows for government interference with fundamental rights without providing the requisite heightened protection.⁴⁹

One particularly notable United States Supreme Court case, *Troxel v. Granville*, which was later codified in part in the Texas Family Code, took up the issue of the Due Process Clause and the states' insertion of itself into the private realm of the family.⁵⁰ The United States Supreme Court clarified that the issue in *Troxel*, a case originating in the state of Washington, was not that the court intervened but that when it did, it gave no special weight to the parent's determination of what

42. See generally *Roberts*, 468 U.S. at 618–20 (discussing relationships that are protected by the Constitution); *Cleveland Bd. of Educ.*, 414 U.S. at 639–40 (discussing freedom of personal choice in matters of family).

43. *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality).

44. *Texas Child Protective Services Handbook § 8222—Identifying Available Services*, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_8200.asp#CPS_8222 (last visited Sept. 20, 2012).

45. TEX. GOV'T CODE ANN. § 21.001 (West 2010).

46. See generally *Roberts*, 468 U.S. at 618–20; *Cleveland Bd. of Educ.*, 414 U.S. at 639–40.

47. *Troxel*, 530 U.S. at 63.

48. *Id.* at 65 (citing *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

49. TEX. FAM. CODE ANN. § 264.203 (West 2012).

50. TEX. FAM. CODE ANN. § 153.433 (West Supp. 2012); *Troxel*, 530 U.S. at 68–70.

was in her child's best interest.⁵¹ Essentially, in the statute at issue in *Troxel*, there was no heightened protection given to the parent's fundamental rights.⁵² The *Troxel* Court points out that the United States Constitution permits Washington to interfere with the right of parents to rear their children but only in order to prevent harm or potential harm to the child; the Washington statute at issue in *Troxel* allowed for such state interference but, unlike the Constitution allows, the statute did not require any "threshold showing of harm."⁵³ That is exactly what is at issue with section 264.203: no heightened protection.⁵⁴

Like Washington, Texas also has a codified provision allowing the state to interfere with parents' fundamental right to direct their child's upbringing.⁵⁵ Sections 262.001, 262.101, and 262.201 of the Texas Family Code set out the standard of "danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child."⁵⁶ Yet, as was the situation with the statute in *Troxel*, section 264.203 allows for state interference with that fundamental right without also including a required threshold showing of "danger to the physical health or safety of the child," or any other standard.⁵⁷ Thus, following the logic of the United States Supreme Court in *Troxel*, section 264.203 unconstitutionally infringes on the fundamental right of parents to direct their child's upbringing.⁵⁸

While *Troxel* does not specifically discuss the fundamental right to privacy, the same logic may be applied to that right.⁵⁹ As a fundamental right, according to the Due Process Clause of the Fourteenth Amendment, privacy must be afforded heightened protection.⁶⁰ Section 264.203 does not set out any protection: no threshold showing of harm, no burden of proof to be met or overcome.⁶¹ Without the necessary heightened protection, section 264.203 unconstitutionally infringes on the fundamental right to privacy.⁶²

51. *Troxel*, 530 U.S. at 69.

52. *Id.* at 65.

53. *Id.* at 63.

54. § 264.203.

55. TEX. FAM. CODE ANN. §§ 262.001, 262.101, 262.201 (West 2009 & Supp. 2012).

56. TEX. FAM. CODE ANN. § 264.201 (West 2010).

57. *Id.*; § 264.203.

58. *Troxel*, 530 U.S. at 69.

59. *Id.* at 65–66.

60. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

61. § 264.203.

62. *See Troxel*, 530 U.S. at 65, 67.

III. HOW CAN § 264.203 BE FIXED?

In order to be constitutional, section 264.203 must survive a strict scrutiny analysis, contain an appropriate burden of proof to be met before services may be ordered, and require a threshold showing of harm.

A. *Strict Scrutiny*

When analyzing statutes dealing with constitutional rights, different constitutional rights and freedoms are examined using different levels of scrutiny from low to high.⁶³ Fundamental rights, such as those involved in section 264.203, are examined using the highest level of analysis called strict scrutiny.⁶⁴ To pass a strict scrutiny analysis, a statute dealing with a fundamental right must be narrowly tailored to achieve a compelling state interest.⁶⁵ Section 264.203 fails the strict scrutiny analysis.⁶⁶

There is a sound argument to be made that a compelling state interest exists in requiring parents to participate in services under section 264.203.⁶⁷ A general need for CPS or a program similar to CPS is almost obvious; the state must protect abused and neglected children.⁶⁸ The state is not, however, the ideal family for a child, meaning that although the state must protect children who have suffered abuse or neglect, the state recognizes that it should not, in every case, take over permanent responsibility for abused or neglected children.⁶⁹ This concept inevitably creates some gray area in which the state tries to rehabilitate families and create safer homes for children. Section 264.203 operates within the gray area as it seeks to “reduce the risk of abuse or neglect” through the participation in services.⁷⁰ The state’s interest in requiring participation in services under section 264.203 is clear in that it wants to rehabilitate.⁷¹

There exists a problem in section 264.203, however, with the other aspect of the strict scrutiny analysis: the statute must be narrowly tailored.⁷² Section 264.203 fails the strict scrutiny analysis on this point

63. See *Smith v. State*, 149 S.W.3d 667, 670–71 (Tex. App.—Austin 2004, pet. ref’d).

64. *Id.*; *Combs v. Tex. Entm’t Ass’n*, 287 S.W.3d 852, 857 (Tex. App.—Austin 2009), *rev’d*, 347 S.W.3d 277 (Tex. 2011).

65. *Smith*, 149 S.W.3d at 670–71; *Combs*, 287 S.W.3d at 857–58.

66. *Smith*, 149 S.W.3d at 670–71; *Combs*, 287 S.W.3d at 857–58; § 264.203.

67. § 264.203.

68. Jane Waldfogel, *Protecting Children in the 21st Century*, 34 *FAM. L.Q.* 311 (2000).

69. *TEX. FAM. CODE ANN.* § 263.401 (West 2009).

70. § 264.203.

71. *Id.*

72. *Id.*; *Smith v. State*, 149 S.W.3d 667, 670–71 (Tex. App.—Austin 2004, pet. ref’d).

because the statute has virtually no parameters.⁷³ There is no language in the statute setting out exactly what services may be ordered, how many services may be ordered, for what length of time the services must be participated in, or even that a legal finding of abuse or neglect has been made.⁷⁴ This statute is far from narrowly tailored and fails the strict scrutiny test on that account.⁷⁵

In order to pass the strict scrutiny test, section 264.203 must be amended to be only applicable to parents who have a judicial or sustained finding of abuse or neglect as opposed to just an administrative CPS finding of “reason to believe abuse or neglect occurred.” As previously noted, the state of Texas may interfere with the fundamental rights of a parent to prevent harm or future harm to a child.⁷⁶ Therefore, making this change in the statute then makes the statute only applicable when there has been a judicial or sustained finding of harm, and the state may constitutionally interfere with the fundamental parental rights to prevent future harm.⁷⁷ This change in section 264.203 removes it from the realm of unregulated application and into the arena of a statute narrowly tailored to reach a compelling state interest.⁷⁸

B. *Burden of Proof*

In order to be constitutional, section 264.203 must contain some sort of a burden of proof to be met before a judge may order a parent to participate in services.⁷⁹ In Texas, when dealing with children in legal matters, the most important thing to consider is what would be in the best interest of the child.⁸⁰ It is presumed that a parent acts in the best interest of his or her child, and until that presumption is overcome, a parent’s decisions concerning his or her child are not to be interfered with by the state.⁸¹ To that effect, it is not sufficient to merely allege that abuse or neglect has occurred before the state may interfere with fundamental parental rights; the allegation must be supported by a judicial or sustained finding.⁸² In order for the court to make that finding, there must be a sufficiently high burden of proof set out for the state, the party seeking to obtain an order for participation, and the state must, in fact, meet that burden.⁸³ Given that sec-

73. § 264.203.

74. *Id.*

75. *Id.*; *Smith*, 149 S.W.3d at 670–71; *Combs v. Tex. Entm’t Ass’n*, 287 S.W.3d 852, 857–58 (Tex. App.—Austin 2009), *rev’d*, 347 S.W.3d 277 (Tex. 2011).

76. TEX. FAM. CODE ANN. §§ 262.001, 262.101, 262.201 (West 2009 & Supp. 2012).

77. *Id.*

78. § 264.203; *Smith*, 149 S.W.3d at 670–71; *Combs*, 287 S.W.3d at 858.

79. *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality).

80. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

81. *Troxel*, 530 U.S. at 68; *In re Derzapf*, 219 S.W.3d 327, 334 (Tex. 2007).

82. *In re Derzapf*, 219 S.W.3d at 334.

83. *Troxel*, 530 U.S. at 65.

tion 264.203 deals with fundamental rights, which require heightened protection, the burden of proof placed on the state needs to be high.⁸⁴

The best way to determine what the burden of proof should be is to look at the burden of proof in a statute that similarly deals with fundamental parental rights. Texas Family Code section 153.433 deals with possession and access by grandparents and thus similarly deals with the fundamental right of a parent to direct a child's upbringing.⁸⁵ In the grandparent access statute, the grandparent must overcome "the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being."⁸⁶ The preponderance of the evidence standard has been set out in the instance of grandparent access, which means that the grandparent must offer "the greater weight of the evidence; [the] evidence that has the most convincing force."⁸⁷ Given that the issue of grandparent access has been reviewed by the United States Supreme Court in *Troxel* and Texas amended its statute to comport with the Court's finding, it would seem that since the preponderance of the evidence standard was sufficiently high when dealing with the fundamental rights of parents involved in *Troxel*, the preponderance of the evidence standard would be likewise sufficiently high when dealing with similar fundamental rights in cases of court-ordered participation under section 264.203.⁸⁸

IV. CONCLUSION

Having identified the fundamental rights involved in the application of section 264.203, it is undeniable that the statute must be changed to better protect those rights.⁸⁹ As the statute currently reads, the application is nearly limitless, which is simply not acceptable when fundamental rights are at stake.⁹⁰ The job of providing heightened protection to fundamental parental rights is not one for the judge, who is limited by and given power by the statutes, and it is certainly not one for the state or CPS, whose interests may be completely misaligned with the parents' rights.⁹¹ The heightened protection should

84. *See id.*

85. TEX. FAM. CODE ANN. § 153.433 (West 2011).

86. *Id.*

87. *Id.*; BLACK'S LAW DICTIONARY 1220 (8th ed. 2004).

88. § 153.433; TEX. FAM. CODE ANN. § 264.203 (West 2012); *Troxel*, 530 U.S. at 68; *In re Derzapf*, 219 S.W.3d at 334.

89. *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Miller v. Mitchell*, 598 F.3d 139, 150 (3d Cir. 2010); *Troxel*, 530 U.S. at 65; *Kelson v. City of Springfield*, 767 F.2d 651, 654–55 (9th Cir. 1985); *Smith v. State*, 149 S.W.3d 667, 670–71 (Tex. App.—Austin 2004, pet. ref'd).

90. § 264.203; *Smith*, 149 S.W.3d at 670–71.

91. § 264.203; TEX. GOV'T CODE ANN. § 21.001 (West 2010).

be built into statutes as a guarantee of protection.⁹² Statutes, such as section 264.203 of the Texas Family Code, that do not have such protection, yet allow for state infringement of fundamental rights, are contrary to the United States Constitution and must be amended.⁹³ To be constitutional, section 264.203 must pass the strict scrutiny analysis, must require a threshold showing of harm, and must contain a burden of proof sufficient to provide the heightened protection required for fundamental rights.⁹⁴ Until those changes are made, section 264.203 of the Texas Family Code is unconstitutional in its application.⁹⁵

92. *Troxel*, 530 U.S. at 65.

93. *Id.*

94. *Id.*; *Smith*, 149 S.W.3d at 670–71; *Combs*, 287 S.W.3d at 857–58.

95. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Miller v. Mitchell*, 598 F.3d 139, 150 (3d Cir. 2010); *Troxel*, 530 U.S. at 65; *Kelson v. City of Springfield*, 767 F.2d 651, 654–55 (9th Cir. 1985); *Smith*, 149 S.W.3d at 670–71.