

NO. 17-1028-A

DEPARTMENT OF FAMILY SERVICES	§	IN THE DISTRICT COURT OF
	§	
v.	§	KERR COUNTY, TEXAS
	§	
JORDAN EADS	§	216 TH JUDICIAL DISTRICT

**THIRD AMENDED COUNTER PETITION AND
APPLICATION FOR INJUNCTIVE RELIEF**

Respondent and Counter-Petitioner Jordan Eads files this Third Amended Counter Petition and Application for Injunctive Relief. Petitioner is the Texas Department of Family Protective Services (“the Department”). Mr. Eads seeks a declaration that portions of Texas Family Code §264.203 violate the Texas Constitution and an order enjoining those provisions’ enforcement. Mr. Eads also seeks a declaration that the allegations of abuse or neglect made against him were not supported by adequate evidence.

I. INTRODUCTION

This lawsuit seeks to vindicate Mr. Eads’ fundamental rights to parental autonomy, privacy, association, and due process under the Texas Constitution. Mr. and Mrs. Eads are the loving parents of three children, with no prior history of abuse or violence. Mrs. Eads is a former Department officer.

In 2017, Mr. Eads was accused of causing a bump on the head of one of the Eads’ children. As a result, the Department forced Mr. Eads from his home and subjected his wife and children to numerous interviews, investigators in the home, mandatory therapy sessions and other invasions of their privacy.

Despite months of investigation, the Department did not establish sufficient evidence of abuse or neglect to move forward with traditional legal proceedings. Nonetheless, the Department demanded that the Eads submit to additional months of Department oversight, interviews, and

therapy and denied Mr. Eads the right to resume his fatherly role in the home. Indeed, the Department demanded that Mr. Eads not be permitted to act as supervisor for the children until the additional Department mandated activities were complete. The Eads refused.

Because the Department lacks sufficient evidence to move forward with traditional legal proceedings where the Eads would have the full benefits of due process, the Department filed suit under Texas Family Code §264.203 to mandate that the Eads “cooperate, attend, and participate in *all* services and recommendations and safety planning and Plan of Services requested by the Department” (emphasis added). Under Section 264.203, this Court may issue an order requiring that the Eads comply with the open-ended and arbitrary demands of the Department (what the Department calls “services”) if the court believes that “abuse or neglect that has occurred” or there is a “reasonable likelihood that the child may be abused or neglected in the immediate or foreseeable future.” Failure to comply with an order under Section 264.203 can result in “sanctions... including the removal of the child.”

Mr. Eads seeks relief in this Court in the form of a declaration as to: 1) the proper standard of evidence required to support a finding of abuse or neglect or the likelihood of future abuse or neglect under Section 264.203; 2) that Section 264.203 violates the Due Course of Law provision by allowing the Department to mandate services based solely on allegations of the possibility of future conduct and places the burden on parents to establish the improbability of such conduct; 3) that Section 264.203 is unconstitutionally vague on its face because it does not define the nature or scope of “services”; 4) that Section 264.203 is unconstitutionally vague as applied in this case because it grants the Department unbridled discretion to determine the nature and extent of “services” required and requires that the Eads comply with any “services” demanded; and 5) that the allegations of abuse or neglect made against Mr. Eads are not supported by evidence.

II. DISCOVERY CONTROL PLAN

1. Counter-Petitioner intends to conduct Level 2 discovery under the Texas Rules of Civil Procedure.

III. PARTIES

A. Counter-Petitioner Jordan Eads

2. Mayra Eads and Jordan Eads are married and reside in Kerr County, Texas.

3. Mayra and Jordan were married on February 2, 2013, and have resided together since that time with A.C., Mayra's daughter from a previous relationship, and C.E., their son together. A.C. is the subject of a child custody Order, naming Mayra a joint managing conservator with Reuben Coronel and granting Reuben Coronel possession and access in accordance with the Standard Possession Order. A.C. has regular visitation with Coronel and his family, including her paternal grandparents. Mr. Eads is the father and a managing conservator of H.E., his daughter from a previous marriage. H.E. resides with her mother, and Mr. Eads has regular periods of possession and access with H.E. at the home he shares with Mrs. Eads.

4. Mr. and Mrs. Eads share a loving marriage and demonstrate appropriate parenting of H.E., A.C., and C.E. Their home is safe, appropriate, and free from violence. Neither H.E.'s mother nor A.C.'s father have raised concerns about past or future abuse or neglect or the effects thereof. To the contrary, H.E. and her mother have raised concerns about actions of the Department that prevented visitation with Mr. Eads and resulted in H.E. missing her brother's birthday.

B. Petitioners the Texas Department of Family Protective Services

5. The Department is the State agency with authority to apply Section 264.203. The Department is therefore the proper defendant for Mr. Eads' claims that Section 264.203 violates

the Texas Constitution. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) (“For claims challenging the validity of statutes, the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity”).

C. Office of the Texas Attorney General

6. Because Counter-Petitioner brings a constitutional challenge to state law, Tex. Civ. Prac. & Rem. Code § 37.006 (b) requires the Texas Attorney General to be notified of this lawsuit. The Texas Attorney General has been served with Counter-Petitioner’s Counter-Petition.

IV. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction because Mr. Eads seeks to vindicate his rights under the Texas Constitution via the Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE § 37.003.

8. Venue is proper in Kerr County, Texas pursuant to Sections 15.002, 15.005, and 65.023 of the Texas Civil Practice and Remedies Code, because Counter-Petitioner resides in Kerr County and the actions giving rise to this litigation occurred in Kerr County.

V. FACTS

A. Texas Family Code § 264.203

9. This case is limited to a particular mechanism in place for restricting parental rights when the Department does not have basis to allege that a child is at imminent risk or a basis to investigate child abuse or neglect pursuant to the procedural requirements of the Texas Family Code.

10. When the Department does not have basis to allege that a child is at imminent risk or otherwise initiate a Department investigation or proceeding under the Texas Family Code, TEX.

FAM. CODE § 264.203 provides a mechanism whereby the Department may nonetheless petition the court to mandate that the child's family comply with orders issued by the Department.

11. Specifically, § 264.203 provides that the “court on request of the department may order the parent, managing conservator, guardian, or other member of the subject child's household” to “participate in the services the department provides “or” permit the child and any siblings of the child to receive the services, “if the court finds that” abuse or neglect that has occurred” or that there is a “reasonable likelihood that the child may be abused or neglected in the immediate or foreseeable future.”

12. “Services” are wholly undefined by statute, but in practice, “services” can include, among other things, restricting parental access to children, mandating that parents disclose private information, leave the home, submit to invasions of the home, turn over medical records, agree to counseling approved by the Department, and make their children available for counseling and interviews by Department staff.

13. There is also no clear standard articulated in the statute for establishing whether “abuse or neglect that has occurred” or whether there is a “reasonable likelihood that the child may be abused or neglected in the immediate or foreseeable future.” TEX. FAM. CODE § 264.203 (a)(1).

14. However, the Department maintains that a finding of less than probable cause is sufficient to mandate participation in “services” under § 264.203.

15. In practice, parents are often given less than a week to respond to motions under Section 264.203. The Eads were originally served only the day before the initial final hearing in this matter.

16. Despite this short notice, § 264.203 places the burden of proof at such hearings on parents to prove a negative and show that services are not needed. TEX. FAM. CODE § 264.203(d).

17. If the Court grants the motion to compel participation in services, no written opinion is required. TEX. FAM. CODE § 264.203(d). However, if the Court denies the motion to compel participation in services, “the court in writing shall specify the reasons for not ordering participation.” *Id.*

18. Once the court orders parents to participate in services, failure by the parents to comply with any request of the Department could result in “appropriate sanctions...including the removal of the child.” TEX. FAM. CODE § 264.203(c).

B. Procedural History

19. In 2016, Mrs. Eads left the Department after a dispute with her supervisor over what Mrs. Eads viewed as inappropriate behavior by the Department in other cases.

20. Several months later, the Department began an investigation of allegations of domestic violence and child abuse made against Mr. Eads arising from a bump one of the Eads’ children received on her head when she fell while playing.

21. These allegations are unfounded. Nonetheless, the Eads complied with the Department’s initial investigation and original request that the Eads attend family counseling and that Mr. Eads vacate the home for several weeks during the investigation.

22. The Department’s investigation included: photographing the Eads’ children and the Eads’ home; physical examinations of the Eads children and Mrs. Eads for evidence of abuse; visiting the Eads’ children at their school, daycare, and home; numerous interviews of the Eads and their children; interviews with teachers, family members, friends, co-workers, and acquaintances; and discussions with the Eads’ counselors and medical professionals.

23. None of the individuals interviewed stated that Mr. or Mrs. Eads were a threat to their children.

24. To the contrary, several spoke highly of both as parents.

25. In fact, the biological father of A.C., (the child who is the subject of the allegations against Mr. Eads in this case) spoke well of Mr. Eads as a parent.

26. Likewise, physical examinations of Mrs. Eads and the children did not reveal signs of abuse.

27. Nonetheless, the Department demanded that the Eads submit to a second round of “services,” including additional counseling, disclosure of private medical relationships, regular mandatory meetings with Department staff, and an open-ended prohibition on Mr. Eads acting as caretaker for one of the children until he completes additional rounds of counseling that meet the Departments’ preferences. The Eads refused.

28. Because of this refusal, the Department filed suit under Texas Family Code § 264.203 to mandate that the Eads “cooperate, attend, and participate in *all* services and recommendations and safety planning and Plan of Services requested by the Department” (emphasis added).

29. To comply with such an open-ended order, the Eads would be forced to effectively surrender their fundamental rights of parental autonomy, privacy, and association to the unbridled discretion of Department officers.

30. Failure to comply with a mandate issued under § 264.203, is grounds for removing the Eads’ children, pursuant to state law.

31. The Eads responded to the Department’s suit by filing an answer and a counter-petition raising constitutional claims, and a request to reschedule the hearing in order to conduct discovery.

32. The Eads served a number of discovery requests on the Department on January 30, 2018.

33. On April 18, 2018, the Department filed a notice of non-suit regarding its prior request for court ordered services.

34. However, because the non-suit was without prejudice, the Department could refile a motion to compel services under § 264.203 at any time.

35. The Department filed a plea to the jurisdiction arguing that the non-suit without prejudice mooted the Eads' claims.

36. That plea to the jurisdiction was denied.

37. The Department amended its non-suit to a nonsuit with prejudice.

38. Despite the nonsuit, however, the Department continues to assert that it had (and continues to have) sufficient evidence of abuse or neglect to petition this court to mandate that the Eads participate in services.

39. Moreover, by filing its original motion to compel services and attached affidavit, the Department made public claims that the Eads abuse their children. These claims injured and continue to injure the Eads' reputation, familial and personal relations, and their ability to acquire and maintain employment.

40. Despite the fact that the Department had non-suited its motion to compel services, the sworn allegations contained therein remained part of the public record.

41. Both sides moved for summary judgment and the Department renewed its plea to the jurisdiction.

42. This Court entered an order holding that a) the renewed plea to the jurisdiction was denied; b) the Eads failed to establish as a matter of law that the standard of proof for claims under

Section 264.203 is clear and convincing evidence; c) the Eads failed to establish as a matter of law that Section 264.203 violates the Due Course of Law provision of the Texas Constitution; d) the Eads failed to establish as a matter of law that Section 264.203 is unconstitutionally vague; e) the Eads did establish as a matter of law that the Department lacked sufficient evidence that Mayra Eads abused or neglected her children to file suit under Section 264.203; but f) a question of fact remains as to whether the Department had sufficient evidence to move against Mr. Eads.

43. The Court then entered a judgment requiring that the allegations and motion to compel services against Mrs. Eads be expunged both from the court's records and the Department's administrative files, and that the Department be enjoined from using those records "as evidence against Mrs. Eads in any future investigation, lawsuit, or administrative proceeding."

44. Shortly thereafter, Mrs. Eads filed a motion to sever her case from Mr. Eads' so that the decision in her favor would become final. That motion was granted.

VI. CAUSES OF ACTION

A. COUNT ONE: DECLARATORY JUDGMENT THAT ALL FINDINGS UNDER TEXAS FAMILY CODE § 264.203 MUST BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

45. The preceding paragraphs are realleged and incorporated by reference.

46. Pursuant to Texas' Uniform Declaratory Judgement Act, Counter-Petitioner respectfully requests that this Court enter a judgment declaring that the burden of proof for all findings under Texas Family Code § 264.203 must be supported by clear and convincing evidence.

47. Facially and as applied, Section 264.203 grants this Court authority to mandate that the Eads participate in "services" if the Court finds that abuse has occurred or is reasonably likely to occur in the "immediate or foreseeable future." TEX. FAM. CODE § 264.203 (a) (1).

48. “Services” are wholly undefined by statute, but in practice, “services” can include, among other things, restricting parental access to children, mandating that parents disclose private information, leave the home, submit to invasions of the home, turn over medical records, agree to counseling approved by the Department, and make their children available for counseling and interviews by Department staff.

49. Failure to comply with an order issued under Section 264.203 can result in the removal of the Eads’ children, not based on risk or safety but as a sanction to punish noncompliance. TEX. FAM. CODE § 264.203 (c).

50. Such restrictions implicate the right to privacy (by invading the most intimate relationships of the home)¹, parental autonomy (by restricting parental choices)², and association (by forcing both parents and children to associate and meet with counselors and Department staff).³

51. Section 264.203 is silent as to the burden of proof for establishing that abuse has occurred or is likely to occur. Therefore, Section 264.203 is silent as to the level of protection granted to parents under Section 264.203 before they can be deprived of their fundamental rights.

52. The doctrine of constitutional avoidance requires that courts should interpret statutes to avoid constitutional tension when possible. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

¹ See, *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (“The family has a privacy interests in the upbringing of children and the intimacies of the marriage relationship which is protected by the Constitution against undue state interference”).

² See, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“ not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); *In Interest of J.W.T.*, 872 S.W.2d 189, 199 (Tex. 1994) (Hect, J. concurring) (the “sanctity of the family ... is [so] deeply rooted in this Nation's history and tradition that the interests of its members in preserving its unity are also constitutionally protected.”

³ See, *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (parent has right to choose with whom their child associates).

53. Upon information and belief, the Department maintains that a probable cause finding of past or potential future abuse or neglect is sufficient to mandate participation in “services” under Section 264.203.

54. Interpreting Section 264.203 to allow such a low burden of proof violates both the procedural and substantive components of the Due Course of Law provision of the Texas Constitution.

55. As a general rule, the Due Course of Law provision requires compliance with the highest level of procedural safeguards before a court may place restrictions on fundamental rights. *See, e.g., Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). (Due Course of Law requires “the state to bear a serious burden of justification before intervention” in the parent-child relationship.)

56. Moreover, the substantive component of the Due Course of Law provision requires that any restriction on fundamental rights, including the rights of privacy, association, and parental autonomy be narrowly tailored to serve a compelling government interest. *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987).

57. Alleged violations of law that can result in deprivations of fundamental rights must, at a minimum, be proved by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 756–57 (1982) (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money”).

58. A probable cause showing is not sufficient under either standard to justify the eradication of fundamental rights. *See, State v. Deaton*, 93 Tex. 243, 54 S.W. 901 (1900) (Intervention in the parent-child relationship “can never be justified without the most solid and substantial reasons”).

59. Accordingly, to avoid constitutional conflict, this Court should enter an order declaring that Section 264.203 must be interpreted to require clear and convincing evidence of abuse or neglect and an ongoing threat of abuse or neglect before a court can mandate that a family submit to “services.”

B. COUNT TWO: DECLARATION THAT TEXAS FAMILY CODE § 264.203 VIOLATES THE DUE COURSE OF LAW BY DEPRIVING PARENTS OF FUNDAMENTAL RIGHTS BASED SOLELY ON ALLEGATIONS OF POTENTIAL FUTURE CONDUCT.

60. The preceding paragraphs are realleged and incorporated by reference.

61. Pursuant to Texas’ Uniform Declaratory Judgment Act, Counter-Petitioner respectfully requests that this Court enter a judgment declaring that Texas Family Code § 264.203 violates Article 1, Section 19 of the Texas Constitution by depriving the Eads of their fundamental rights based solely on the alleged risk of hypothetical future conduct.

62. As explained in the preceding paragraphs, Section 264.203 grants this court authority to place restrictions on the Eads’ fundamental rights of privacy, association, and parental autonomy by mandating that the Eads participate in “services” if the court finds that abuse has occurred *or* is reasonably likely to occur in the “immediate or foreseeable future.” Failure to comply with an order issued under Section 264.203 can result in the removal of the Eads’ children. TEX. FAM. CODE § 264.203 (c).

63. Because Section 264.203 is phrased in the disjunctive, the court may mandate services based solely on the Department’s allegations abuse or neglect could occur in the future, even if there is no evidence of past abuse.

64. Indeed, the Department requested court mandated services in this case, despite a lack of evidence of past abuse or neglect.

65. As a general rule, a hypothetical risk of future conduct alone is not sufficient to deprive an individual of her constitutional rights. *See, Kansas v. Hendricks*, 521 U.S. 346, 357, (1997) (Due process “requires proof of more than a mere predisposition to violence; rather, it requires evidence of past violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated”).

66. Accordingly, because Section 264.203 allows deprivation of constitutional rights, based solely on the risk of hypothetical future conduct, it violates the Due Course of Law Provision of the Texas Constitution.

C. COUNT THREE: DECLARATION THAT TEXAS FAMILY CODE § 264.203 IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT DEFINE “SERVICES.”

67. The preceding paragraphs are realleged and incorporated by reference.

68. Pursuant to Texas’ Uniform Declaratory Judgement Act, Counter-Petitioner respectfully requests that this Court enter a judgment declaring that Texas Family Code § 264.203 is unconstitutionally vague because it does not define “services” in violation of Article 1, Section 19 of the Texas Constitution.

69. “It is a basic principle of due process that an enactment is void for vagueness if its [terms] are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

70. As the Supreme Court explained *Papachristou v. City of Jacksonville* 405 U.S. 156, 170 (1972), when “there are no standards governing the exercise of the discretion granted by [a law],” that law permits and encourages “arbitrary and discriminatory enforcement” and “furnishes a convenient tool for harsh and discriminatory enforcement by local...officials, against particular groups deemed to merit their displeasure.” *Id.*

71. For example, in *Yick Wo v. Hopkins* 118 U.S. 356, 366-67 (1886), the Court struck down an ordinance that made it unlawful to establish, maintain, or carry on a laundry within limits city of San Francisco without having first obtained the consent of the city's board of supervisors. The law was silent as to how the board would determine whether consent should be granted, and thus left the availability of a laundry license solely subject to the board's discretion. *Id.* This silence was sufficient for the Court to find the law unconstitutional.

72. More recently, in *Lakewood v. Plain Dealer Pub. Co.* (1992) 486 U.S. 750, 769, the Court struck down a law which allowed the Mayor to deny newspaper stand permits if he found that granting a given permit was "not in the public interest." The Court explained that the doctrine forbidding unbridled discretion requires that "explicit" textual limitations be placed on the discretion of those granting licenses in order to insure that such decisions are made for reasons related to "the health, safety, or welfare of [the public]." *Id.* at 770. Accordingly, because the permit process did not expressly limit or define what the Mayor could determine to be in the "public interest" the law was unconstitutional.

73. Like the laws at issue in the cases mentioned above, Section 264.203 grants this court authority to place restrictions on the Eads' fundamental rights of privacy, association, and parental autonomy by mandating that the Eads participate in "services" if the court finds that abuse has occurred or is reasonably likely to occur in the "immediate or foreseeable future." TEX. FAM. CODE § 264.203 (a).

74. "Services," however are not defined by statute.

75. Instead, once an order is granted, the Department has unbridled discretion to determine what "services" are necessary.

76. Once the court orders parents to participate in services, failure by the parents to comply with any request of the Department could result in “appropriate sanctions...including the removal of the child.” TEX. FAM. CODE § 264.203 (c).

77. Because “services” are not defined and left solely to the unbridled discretion of the Department, Section 264.203 is unconstitutionally vague on its face in violation of Article 1, Section 19 of the Texas Constitution.

D. COUNT FOUR: DECLARATION THAT TEXAS FAMILY CODE § 264.203 IS UNCONSTITUTIONALLY VAGUE AS APPLIED BECAUSE IT GRANTS THE DEPARTMENT UNBRIDLED DISCRETION TO DETERMINE THE SCOPE OF SERVICES REQUIRED

78. The preceding paragraphs are realleged and incorporated by reference.

79. Pursuant to Texas’ Uniform Declaratory Judgement Act, Counter-Petitioner respectfully requests that this Court enter a judgment declaring that Texas Family Code § 264.203 is unconstitutionally vague as applied because it grants the Department unbridled discretion to determine the scope of “services” required in violation of Article 1, Section 19 of the Texas Constitution.

80. The order requested by the Department in this case would require the Eads to “cooperate, attend, and participate in all services and recommendations and safety planning and Plan of Services requested by the Department.”

81. “Services and recommendations and safety planning and Plan of Services” are not defined.

82. As written, the Eads would simply have to comply with virtually any order given by the Department.

83. Such an open ended order is unconstitutionally vague and violates due process. *See, Yick Wo*, 118 U.S. at 373 (An order which clothes a government actor with unbridled

discretion “hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void”).

E. COUNT FIVE: DECLARATION THAT THE ALLEGATIONS OF ABUSE AND NEGLIGENCE MADE AGAINST THE MR. EADS ARE NOT SUPPORTED BY THE EVIDENCE

84. The preceding paragraphs are realleged and incorporated by reference.

85. Pursuant to Texas’ Uniform Declaratory Judgement Act, Counter-Petitioner respectfully requests that this Court enter a judgment declaring that the allegations of abuse or neglect made against the Eads are not supported by evidence.

86. The Department investigated the allegations against the Eads for several months without issuing findings.

87. The Department admits that it has closed the investigation and is not collecting additional evidence.

88. The evidence in the record shows that these allegations were unfounded.

89. Nonetheless, when the Eads refused to submit to services, the Department filed suit alleging that abuse had occurred or was reasonably likely to occur in the future.

90. After the Eads filed a constitutional claim, the Department non-suited those claims, despite the fact that no additional evidence was added to the record.

91. Despite nonsuiting its lawsuit, the Department’s sworn allegations against Mr. Eads remain in the public record, and the Department continues to assert the claims in the lawsuit are true.

92. Having these findings levied against him in the public record damages the Mr. Eads’ reputation and affects his ability to acquire and maintain employment, or act as a supervisor or chaperone for school and church functions for his children.

93. Moreover, agency practice requires that even a non-suited filing for services against Mr. Eads be considered evidence of abuse or neglect in any future investigation or proceeding.

The filing of the motion to compel services therefore continues to generate legal harm to Mr. Eads.

94. There is no other remedy for these injuries outside of declaratory relief from this Court.

95. Any administrative appeals process the Department may have to challenge its internal findings does not affect the public court filings against Mr. Eads.

96. Declaratory and injunctive relief is therefore proper.

F. COUNT SIX: DECLARATORY JUDGMENT OF THE PROPER STANDARD FOR FINDINGS UNDER TEXAS FAMILY CODE § 264.203.

97. The preceding paragraphs are realleged and incorporated by reference.

98. Pursuant to Texas' Uniform Declaratory Judgement Act, Counter-Petitioner respectfully requests that this Court enter a judgment declaring the proper standard of proof for all findings under Texas Family Code § 264.203.

99. Facially and as applied, Section 264.203 grants this Court authority to mandate that the Eads participate in "services" if the Court finds that abuse has occurred or is reasonably likely to occur in the "immediate or foreseeable future." TEX. FAM. CODE § 264.203 (a) (1).

100. "Services" are wholly undefined by statute, but in practice, "services" can include, among other things, restricting parental access to children, mandating that parents disclose private information, leave the home, submit to invasions of the home, turn over medical records, agree to counseling approved by the Department, and make their children available for counseling and interviews by Department staff.

101. Failure to comply with an order issued under Section 264.203 can result in the removal of the Eads' children, not based on risk or safety but as a sanction to punish noncompliance. TEX. FAM. CODE § 264.203 (c).

102. Such restrictions implicate the right to privacy (by invading the most intimate relationships of the home)⁴, parental autonomy (by restricting parental choices)⁵, and association (by forcing both parents and children to associate and meet with counselors and Department staff).⁶

103. Section 264.203 is silent as to the burden of proof for establishing that abuse has occurred or is likely to occur. Therefore, Section 264.203 is silent as to the level of protection granted to parents under Section 264.203 before they can be deprived of their fundamental rights.

104. The doctrine of constitutional avoidance requires that courts should interpret statutes to avoid constitutional tension when possible. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

105. Upon information and belief, the Department maintains that a less than probable cause finding of past or potential future abuse or neglect is sufficient to mandate participation in “services” under Section 264.203.

⁴ See, *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (“The family has a privacy interests in the upbringing of children and the intimacies of the marriage relationship which is protected by the Constitution against undue state interference”).

⁵ See, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“ not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); *In Interest of J.W.T.*, 872 S.W.2d 189, 199 (Tex. 1994) (Hect, J. concurring) (the “sanctity of the family ... is [so] deeply rooted in this Nation's history and tradition that the interests of its members in preserving its unity are also constitutionally protected.”

⁶ See, *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (parent has right to choose with whom their child associates).

106. Interpreting Section 264.203 to allow such a low burden of proof violates both the procedural and substantive components of the Due Course of Law provision of the Texas Constitution.

107. As a general rule, the Due Course of Law provision requires compliance with the highest level of procedural safeguards before a court may place restrictions on fundamental rights. *See, e.g., Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976). (Due Course of Law requires “the state to bear a serious burden of justification before intervention” in the parent-child relationship.)

108. Moreover, the substantive component of the Due Course of Law provision requires that any restriction on fundamental rights, including the rights of privacy, association, and parental autonomy be narrowly tailored to serve a compelling government interest. *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987).

109. Alleged violations of law that can result in deprivations of fundamental rights must be proved by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 756–57 (1982) (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money”).

110. At a minimum, Texas Family Code 105.005 provides that unless otherwise indicated, “the court's findings shall be based on a preponderance of the evidence.”

111. A probable cause showing is not sufficient under either standard to justify the eradication of fundamental rights. *See, State v. Deaton*, 93 Tex. 243, 54 S.W. 901 (1900) (Intervention in the parent-child relationship “can never be justified without the most solid and substantial reasons”).

112. Accordingly, to avoid constitutional conflict, this Court should declare the proper standard for findings under Section 264.203—whatever that standard is—so that Mr. Eads and others like him have notice of what they must establish to prevail on their claims and defend their parental rights.

VII. APPLICATION FOR PERMANENT INJUNCTION

113. The preceding paragraphs are realleged and incorporated by reference.

114. An injunction is proper when there is a risk of imminent and irreparable harm that could be prevented by granting the injunction.

115. “The denial of a constitutionally guaranteed right . . . as a matter of law, inflicts an irreparable injury.” *S.W. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 368 (Tex. Civ. App.—Amarillo 1979). And this Court has “no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right.” *Henry v. Greenville Airport Commn.*, 284 F.2d 631, 633 (4th Cir. 1960).

116. Mr. Eads’ Amended Counter-Petition, above, demonstrates that enforcement of TEX. FAM. CODE § 264.203 violates the Texas Constitution.

117. Mr. Eads faces imminent and irreparable harm from the Department’s continued enforcement of TEX. FAM. CODE § 264.203.

118. Mr. Eads has no other adequate legal to adequately compensate for the continued deprivation of his constitutional rights.

119. Mr. Eads therefore respectfully asks the Court, following a hearing on the merits, to issue a permanent injunction against the Department, enjoining the enforcement of the challenged provisions of TEX. FAM. CODE § 264.203.

VIII. ATTORNEY'S FEES

120. Under the Uniform Declaratory Judgment Act, Mr. Eads is entitled to recover “costs and reasonable and necessary attorney's fees as are equitable and just.” Tex. Civ. Prac. & Rem. Code Ann. § 37.009.

121. Mr. Eads seeks an award of their reasonable attorneys’ fees for the preparation of this suit, prosecution of this suit, and all appeals.

IX. PRAYER AND CONCLUSION

122. **THEREFORE**, Mr. Eads requests the Court issue the following relief:

- a. A declaration of the proper standard of proof that is required to support any finding of abuse or neglect or the likelihood of future abuse or neglect under TEX. FAM. CODE § 264.203;
- b. A declaration that the challenged portions of TEX. FAM. CODE § 264.203 violate the Due Course of Law provision of the Texas Constitution;
- c. A declaration that TEX. FAM. CODE § 264.203 is unconstitutionally vague on its face and as applied in this case;
- d. A permanent injunction prohibiting the enforcement of TEX. FAM. CODE § 264.203.
- e. A declaration that the allegations of abuse or neglect made against Jordan Eads are not supported by evidence.
- f. An injunction that the allegations and motion to compel services against Mr. Eads be expunged both from the court’s records and the Department’s administrative files, and that the Department be enjoined from using those records

as evidence against Mr. Eads in any future investigation, lawsuit, or administrative proceeding.

- g. An award to Plaintiff of his attorneys' fees and reasonable costs; and
- h. All other and further relief to this Court may deem proper in law or equity.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on June 10, 2020, via electronic service:

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