No. D-1-GN-15-004336

GRASSROOTS LEADERSHIP, INC., *et al*.	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS DEPARTMENT OF FAMILY	§	
AND PROTECTIVE SERVICES (DFPS),	§	353rd Judicial District Court
et al.	§	(All proceedings assigned to the
Defendants.	§	250th Judicial District Court)

RESPONSE BRIEF SUPPORTING
PLAINTIFFS' APPLICATION FOR A TEMPORARY INJUNCTION

Below Plaintiffs respond to all arguments that Defendants have made to resist the temporary injunction that Plaintiffs sought on May 3.[1]

ISSUES BEFORE THE COURT

1. Whether children will be helped or harmed by a temporary injunction that delays licensing of CCA's Dilley facility pursuant to 40 TEX. ADMIN. CODE § 748.7.

2. Whether Plaintiffs have standing to dispute the validity of § 748.7.

3. Whether Plaintiffs have shown a probable right to declaratory judgment that § 748.7 is invalid under TEX. GOV'T CODE § 2001.038.

ARGUMENT

The pending matters are Plaintiffs' May 3 application for a temporary injunction and Defendants' May 5 plea to the jurisdiction and May 12 supplemental plea. The Court held that the

[1] Plaintiffs are Grassroots Leadership, Inc., Gloria Valenzuela, and eleven mothers and their children who have been detained at facilities operated by Intervenors Corrections Corporation of America (CCA) and The GEO Group (GEO). Defendants are the Texas Department of Family and Protective Services (DFPS) and the Texas Department of Health and Human Services (HHS). The arguments addressed below are found in the parties' various briefs filed May 3-13, 2016 and in the hearing transcripts from November 12, 2015 and May 13, 2016.

application and plea present overlapping issues and must be considered together. Tr. May 13 at 10:19-20. The overlapping issues largely concern the nature and extent of injury. So Plaintiffs begin with the question that the Court urged the parties to address. *See* Tr. May 13 at 198:13-15 ("I need to know whether ... allowing a license to happen or not allowing is going to harm or hurt these children.").[2]

I. The Temporary Injunction Would Help Children

The Court has prohibited DFPS from *licensing* CCA's Dilley facility under § 748.7, while emphasizing that DFPS may continue taking protective actions there. Order Extending TRO May 18 at 3. Plaintiffs seek a temporary injunction that maintains this precise *status quo* until final judgment. DFPS admits that it has authority to take all necessary protective actions at Dilley while the validity of § 748.7 is decided due to Dilley's pending license application alone. Tr. May 13 at 64:13-15 ("If there are areas that are out of compliance, the State requires those areas to be fixed before the license issues."); *id.* at 210:8-9 (inspections begin upon application); Tr. Nov. 12 at 16:3-9 (facilities must meet minimum standards prior to licensing).[3] After this Court emphasized that its TRO only prohibits licensure without prohibiting any protective actions, DFPS

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[2] To obtain a temporary injunction,

> the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. Whether to grant or deny a temporary injunction is within the trial court's sound discretion.

Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002) (citations omitted). In Part I, *infra*, Plaintiffs focus on irreparable injury to detained children. Plaintiffs also observe that further irreparable harm supporting the temporary injunction inheres in Gloria Valenzuela's license disparagement and Grassroots Leadership's information deprivation and resource diversion as described in Part II, *infra*, none of which can be redressed with money damages due to DFPS's sovereign immunity. In Part III, *infra*, Plaintiffs cite the evidence and authority showing their probable right to relief on their cause of action under TEX. GOV'T CODE § 2001.038.

[3] *Accord* Tr. May 13 at 210:16-20; *id.* at 212:3-6; *id.* at 220:7-12; *id.* at 240:17-19; *id.* at 241:18-23; *id.* at 244:3-8; 40 TEX. ADMIN. CODE § 745.345.

now takes the "same" protective actions at the unlicensed Dilley facility that it takes at the licensed Karnes facility. Shaw Depo. at 11:1 to 12:1.[4] Consequently DFPS's main argument at the May 13 hearing—that absence of licensure during this litigation would hurt children—is eviscerated. Despite the confusion on DFPS's pre-licensure authority that pervaded the May 13 hearing,[5] the record evidence now unequivocally proves that DFPS's current protective actions afford children the same safety as licensure while this litigation proceeds.

While the proposed temporary injunction would not diminish DFPS's capacity to protect children, by preventing licensure it would help children in at least three tangible ways.

A. The Injunction Would Block the Three Bedroom Exceptions

CCA has authenticated the document that Plaintiffs originally offered as Exhibit 8, which is part of CCA's contract with the U.S. Department of Homeland Security, Immigration and

[4] DFPS only stopped taking pre-licensing protective actions at Dilley because of its interpretation of the Court's order. Tr. May 13 at 216:3-14. The Court corrected DFPS's misimpression. Tr. May 13 at 228:1 to 229:13. Now DFPS provides the "same" oversight at Dilley that it does at Karnes. Even so, DFPS plans to seek no additional budgetary resources to regulate the Dilley and Karnes facilities over the next five years despite the fact that Dilley would be the largest child care facility ever regulated by DFPS. 41 TEX. REG. at 1501; Shaw Depo. at 34:23 to 35:1 and 136:9-13 (CCA seeks a license to detain up to 1,500 children at the Dilley facility, which would be the largest facility DFPS has ever regulated.).

[5] For example, Ms. Shaw testified that she believed that without a license, DFPS had no authority to investigate child abuse committed by a guard at the Dilley facility. Tr. May 13 at 218:24 to 219:8. Ms. Shaw could not point to any specific statute, regulation, or other document to support her view of this limit on DFPS authority. Tr. May 13 at 246:17-24. In fact, DFPS's own licensing regulation shows that no license is required for DFPS to investigate child abuse committed by a guard at the Dilley facility. *See* 40 TEX. ADMIN. CODE § 745.8413 ("Must I allow Licensing to inspect and/or investigate my operation? Yes, all operations, whether regulated or not, must admit us and not delay or prevent us from making inspections or conducting investigations during the hours of operation."). Days later in deposition Ms. Shaw claimed that she is unfamiliar with § 745.8413, and then her attorney directed her not to answer any questions about it. Shaw Depo. at 20:11 to 22:2. At the November 12, 2015 hearing in this case, Doug Barnes of the DFPS division that conducts child abuse investigations (Child Protective Services, or CPS) appeared and never disputed repeated testimony that CPS is authorized to investigate any and all abuse in the Dilley and Karnes facilities even without licensure. Tr. Nov. 12 at 24:19-20; *id.* at 121:1-10; *id.* at 108:18 to 109:4. Texas statutes confirm that the November 12 testimony is correct, and Ms. Shaw's contrary testimony is not. TEX. FAM. CODE §§ 261.001(5) and 261.301(a).

Customs Enforcement (ICE). Tr. Nov. 12 at 101:3 to 105:11 (Exhibit 8 marked and not admitted); Tr. May 13 at 287:13 to 290:3 (same exhibit discussed); CCA Email of May 25 (authenticating the same document).[6] That contract is dated September 15, 2014 and provides on page one:

> The Service Provider [CCA] shall seek licensing from the State agency responsible for residential programs that house juveniles (and family groups if applicable). Should the Service Provider be unable to secure State licensure, the Service provider shall nonetheless comply with all substantive requirements for State-licensed residential care programs and seek application of such requirements to the family residential center by the State.

Exhibit 8 at 1. DFPS's "substantive requirements" on September 15, 2014 included: (a) limitation of bedroom occupants to four, 40 TEX. ADMIN CODE § 748.337; (b) prohibition of children over three sharing a bedroom with an adult, *id.* at § 745.3361; and (c) limitation on children of the opposite gender sharing a bedroom, *id.* at § 745.3363. The Dilley and Karnes facilities have not complied with these three DFPS bedroom standards since opening. Shaw Depo. at 121:6-15; 127:1 to 128:20; 41 TEX. REG. at 1479-80. Consequently, DFPS is now attempting to conform its minimum standards to the actual practices at Dilley and Karnes so that it can license the facilities. Placing DFPS's seal of approval on sleeping arrangements that endanger child welfare necessarily harms rather than helps children. Licensing also lowers protections for children because without a license, the facilities will be required by federal contract to comply with all of the minimum standards relating to sleeping arrangements without exceptions.

The regulation challenged in this lawsuit attempts to exempt Dilley from compliance with the three bedroom standards. 40 TEX. ADMIN. CODE § 748.7(c); 41 TEX. REG. at 1494. DFPS's

[6] The federal government administers comprehensive regulation of all care at the facilities. Tr. May 13 at 147:1-5; *id.* at 271:13-16. DFPS knows that its regulation would overlap with existing federal regulation, but DFPS does not know the content of the federal regulations. Tr. May 13 at 263:3-6. So DFPS has no way of knowing whether its involvement protects children any more than extant federal regulations, or even whether DFPS requires standards that federal regulations forbid. Shaw Depo. at 28:3 to 31:9 (Q: "So if you haven't reviewed those [federal] regulations, there's no way to know which is better. For example, adults in the same room that are unrelated to a child, is there a standard in the federal regulations on that?" A: "I don't know.").

Ms. Shaw could not name any reason why allowing unrelated families to share a bedroom could help children in any way. Shaw Depo. at 115:21 to 116:10; *id.* at 125:2-9 (refusing to answer).

Sexual assault is one obvious risk of permitting a child to share a bedroom with unrelated adults. Tr. Nov. 12 at 8-15; 41 TEX. REG. at 1497. At least one Plaintiff child has actually suffered sexual assault because unrelated adults were allowed to share bedrooms with children. Tr. May 13 at 156:25 to 159:13; E.G.S. Declaration, Fourth Amend. Pet. Exhibit 11 at 3-4 ¶¶ 26-37. DFPS's exception allowing children to share bedrooms with adults "is intended to permit children to sleep in a room with their mothers" and that its exception permitting children of different genders to share a bedroom "strike[s] a balance between family preservation within the current facility and the paramount concern of child safety." 41 TEX. REG. at 1497. But if child safety is the "paramount concern" and DFPS aims to keep families united, then one obvious solution is to prevent children from sharing bedrooms with *unrelated* adults. Yet DFPS licensed Karnes with full knowledge that at least two families share each room there. Shaw Depo. at 121:6-15. Mothers and children detained at Dilley also share bedrooms with unrelated adults. Tr. May 13 at 105:11-23; *id.* at 122:10-21.

The only conceivable reason that DFPS permits unrelated adults and their children to share bedrooms is to crowd detainees together as a means of reducing incarceration costs and detianing the greatest possible numbers of children and mothers regardless of the consequences for child welfare. *See* Shaw Depo. at 116:23 to 117:6 (DFPS considers the fiscal impact of its rules on licensees, but Ms. Shaw now claims that she "was not involved in the rule process for this," and is not aware of how fiscal considerations figured in the bedroom exceptions that appear in § 748.7(c).); *see also id.* at 87:4-11 (refusing to disclose whether DFPS personnel have discussed development of § 748.7 with CCA or GEO); Tr. May 13 at 145:13-17 ("Does the GEO Group have a financial interest in filling beds at the Karnes facility? We have a financial interest, yes.");

id. at 146:12-19 (GEO "would expect reimbursement" from ICE of any additional costs caused by DFPS regulation.); *id.* at 234:23 (CCA and GEO are competitors in the same market.). While the Legislature provides that DFPS may consider the economic impact of its regulations, *see* TEX. HUM. RES. CODE § 42.02(j), the public comment and reasoned justification requirements in TEX. GOV'T CODE § 2001.033 should ensure transparency in exactly how the agency weighs cost considerations against such basic needs for child safety.

Ms. Shaw repeatedly testified that one of DFPS's main reasons for creating the bedroom exceptions in § 748.7(c) was that a mother may bring four or more children with her from Central America, and families of five or more could not share a room in compliance with the four-person limit stated in 40 TEX. ADMIN CODE § 748.337. Tr. May 13 at 230:8-10; *id.* at 257:1-16; *id.* at 259:1-8; Shaw Depo. at 84:15 to 85:7. But Ms. Shaw also admitted that she has never heard of a mother bringing four or more children on a 2,000-mile journey across at least two international borders, and has no indication that Dilley or Karnes have ever seen such a family. Shaw Depo. at 85:8-9; *id.* at 86:7. Thus, DFPS used the possibility of such a unicorn family to justify increasing maximum bedroom occupancy to six for everyone. Now CCA has requested a variance for the Dilley facility that would double allowed the maximum bedroom occupancy to twelve. Shaw Depo. at 73:19 to 74:10.

By preventing Dilley's licensure, the temporary injunction will prevent DFPS from granting the variance that would allow CCA to double the numbers of people in each Dilley bedroom. One Plaintiff now at Dilley alleges that she and her daughter share a bedroom with five other mothers and their single children, so that six unrelated adults now share the same bedroom. Declaration of Rose Guzman de Marquez, Fourth Am. Pet. Exhibit 12. Of course this level of crowding has great consequences for families in terms of their fear of sexual assault, their chances of sexual assault, their privacy, and their basic comfort, which shows that the families are

irreparably harmed without an injunction. *See Albro v. Onondaga Cty., N.Y.*, 627 F. Supp. 1280, 1287 (N.D.N.Y. 1986) (overcrowding is irreparable harm). Although Ms. Shaw knows that Dilley is currently operating in violation of DFPS limits on the number of individuals permitted in a bedroom, she is waiting to take enforcement action until she decides whether DFPS will instead grant Dilley a variance that would allow more unrelated adults to share bedrooms there. Shaw Depo. at 128:13-20.

By preventing Dilley's licensure, the temporary injunction also ensures that under the CCA-ICE contract, CCA must "comply with all substantive requirements for State-licensed residential care programs." Exhibit 8 at 1. "[A]ll substantive requirements" includes 40 TEX. ADMIN CODE §§ 748.337, 745.3361, and 745.3363. Because these three regulations are stricter than § 748.7(c), the only way that CCA can comply with "all" four is to comply with the stricter regulations. Thus, the temporary injunction would have the salutary effect of optimizing protection of children by heightening the standards applicable to CCA and not lowering them pursuant to § 748.7(c), even while DFPS remains available to take all protective actions that it deems necessary to actually protect children.

B. The Injunction Would Prevent Increased Detention Length

Detention itself is the most significant harm faced by children in the Dilley facility. CCA concedes that if Dilley is licensed, children will stay in Dilley longer. CCA Brief May 13 at 9.[7] Plaintiffs allege that GEO wrote in a public record the same thing as to the Karnes facility. Third Am. Pet. Exhibit 15 ("Presently, the center operates as a short-term processing facility and [DFPS] licensing will allow for longer lengths of stay."); *see also Roper v. CitiMortgage, Inc.*, No. 03-11-00887, 2013 WL 6465637 at *2 n.3 (Tex. App.—Austin Nov. 27, 2013) (judicial notice is

[7] CCA offers three arguments for why it claims that increased detention length could benefit children: (1) medical quarantine; (2) education; and (3) time to seek help from families outside Dilley. CCA Brief May 13 at 9. These claims are unsupported and insupportable.

properly taken of facts that are matters of public record). CCA and GEO interpret a federal court's order to allow for lengthier detention if facilities are licensed. *See* First. Am. Pet. Exhibit 6 (*Flores v. Johnson*, No. 85-cv-4544, Docket No. 177 (C.D. Calif. filed July 24, 2015)).[8] DFPS licenses would facilitate lengthier detention under this interpretation.

DFPS cited *Flores*, and nothing but *Flores*, as its reason for originally issuing the rule that would permit licensing of the Dilley and Karnes facilities. Admitted Exhibit 4 at 2. DFPS concedes that it changed its legal view of its authority to regulate the Dilley and Karnes facilities soon after the *Flores* court ruled that children cannot be housed in unlicensed secure facilities. Tr. Nov. 12 at 21:14-23 ("[T]he federal judge did put a deadline on the parties ... and they're held up on us. ... We're not a party to that case. We're ... a cog that is implicated by it because ... [ICE and CCA] need the regulation to comply with the settlement agreement."); *id.* at 13:1-18 ("The emergency is not so much that there were—there have been kids out there that need to be regulated."); *id*. at 77:13-25 (same). These facts establish that at least one of DFPS's reasons for licensure is to facilitate ongoing and extended detention periods consistent with the federal government's interpretation of the federal court's orders in *Flores*.[9]

[8] The federal court's *Flores* decisions found multiple violations of law in the federal government's policies and practices of detaining children with their parents and issued an order which mandated that the government should release children and their parents from detention "without unnecessary delay." *Id.* at ¶¶ 2, 4. The court's order further mandated that children and their parents "shall not be detained by Defendants in unlicensed or secure facilities." Despite the clear mandate of the *Flores* court to dramatically circumscribe or end family detention, DFPS has sought to bail out the federal government and the private prison operators who operate Karnes and Dilley in an effort to allow continued family detention by issuing licenses to the existing facilities without ensuring that children are held in appropriate child welfare settings as intended by the licensing requirement.

[9] DFPS argues that injury to detainees is impossible because Plaintiffs admit that the facilities will not close as a result of the temporary injunction they seek. Tr. May 13 at 7-10; *id.* at 283:6-10. But closure is not required to limit detention pursuant to the temporary injunction, just as CCA and GEO admit.

Any detention causes irreparable harm to children, and prolonged detention causes even more severe effects. Tr. Nov. 12 at 109:8-10. DFPS itself recites a litany of the serious psychological harms that detention inflicts on children, followed by this statement: "[w]hile DFPS is sympathetic to the concerns raised, the agency has no role in whether a person is placed or detained in one of the [facilities and should regulate even if the facilities] are harmful." 41 TEX. REG. at 1498-99.[10] Detained mothers so testified. Tr. May 13 at 104:3 to 106:20; *id.* at 112:6-25; *id.* at 116:8-16; *id.* at 120:1-6; *id.* at 123:22 to 125:23; *id.* at 130:7 to 131:12; *see also* Shaw Depo. at 96:25 to 97:8 (Q: "All other things being equal, it's not good to have children detained?" Mr. Disher: "I'm instructing [Ms. Shaw] not to answer that question.").

Other harms inhere in detention, particularly for prolonged periods. Professor Hines testified that children's immigration cases are compromised by extended detention with the resultant difficulty in accessing counsel, which impedes children's access to relief that could help them avoid deportation. Tr. May 13 at 163:12 to 165:14; *id.* at 177:12 to 178-2; *see also id.* at 93:4-14 (describing impact of detention on children); *id.* at 95:22 to 96:8 (difficulty accessing necessary mental health experts); *id.* at 98:3 to 99:1 (describing incidents); *id.* at 160:18 to 162:21 (describing incidents).

The Texas Legislature made clear its view that detention of immigrant children harms them when it prohibited use of secure detention facilities to hold children for deportation. TEX. FAM. CODE § 54.011(f). "[W]here a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury for the fact of the defendant's violation." *City of Houston v. Proler*, 373 S.W.3d 748, 765 (Tex. App.—Houston [14th Dist.] 2012), *aff'd in part, rev'd in part on other grounds*, 437 S.W.3d 529 (Tex. 2014) (quoting *Silver Sage Partners, Ltd. v.*

[10] *See also id*. at 1500 (DFPS "lacks authority to appoint an independent medical and psychological team to investigate reports of abuse, neglect and exploitation"); *id.* at 1501 (no response to comment about deficient access to psychiatrists and psychologists).

City of Desert Hot Springs, 251 F.3d 814, 827 (9th Cir. 2001)). This harm derives from the fact of detention independent of any conditions of detention that DFPS may address by licensing.

Consequently, even while DFPS is taking all protective actions that it wishes in the months until this litigation is concluded, detention length in the facilities should be minimized to prevent harm to children.

C. The Injunction Would Permit DFPS Time to Improve its Licensing Decision

DFPS is ready to license the Dilley facility right now, but for this Court's temporary restraining order. Tr. May 13 at 268:23 to 269:10. Advocates urge DFPS to take more time to carefully study this new and fraught business of jails for babies. *See* 41 Tex. Reg. at 1495-1500. Indeed, the Texas Legislature has *directed* DFPS to undertake the more careful study that the advocates seek. TEX. HUM. RES. CODE § 42.042(i).[11] DFPS failed to comply with § 42.042(i) prior to issuing § 748.7. Shaw Depo. at 113:12. The temporary injunction now at issue would provide DFPS time to comply. The Legislature directs DFPS's compliance to produce "better rules" and thus protect children more effectively. *Methodist Hospitals of Dallas v. Texas Indus. Acc. Bd.*, 798 S.W.2d 651, 657 (Tex. App.—Austin 1990, writ dism'd w.o.j.). Even short of DFPS voluntary modifications to § 748.7, the additional time afforded by the temporary injunction would also permit advocates to more carefully examine whether the Dilley facility qualifies for a license, and bring any disqualifying factors to DFPS's attention. One such glaring qualification is stated by *statute,* namely that no license should be allowed for either the Dilley or the Karnes

[11] This statute provides that "[b]efore the executive commissioner adopts minimum standards, the department shall ... convene a temporary work group to advise the executive commissioner regarding the proposed standards, composed of at least six members who represent the diverse geographic regions of this state, including (A) a department official designated by the commissioner to facilitate the work group's activities; (B) a person with demonstrated expertise or knowledge regarding the different types and classifications of child-care facilities, homes, agencies, or programs that will be covered by the proposed standards; (C) a parent with experience related to one of the different types or classifications of child-care facilities, homes, agencies, or programs that will be covered by the proposed standards; and (D) a representative of a nonprofit entity licensed under this chapter ...." TEX. HUM. RES. CODE § 42.042(i)(1).

facilities unless intake assessments are performed "before a child is placed in" any facility. TEX. HUM. RES. CODE § 42.042(f). DFPS knows that intake studies are not done prior to children's detention at Dilley and Karnes. Shaw Depo. at 101:8-25. DFPS wants to license these facilities even though the Texas Legislature plainly says this is not allowed.

II. Plaintiffs Have Standing

The cause of action at issue is provided by TEX. GOV'T CODE § 2001.038. This statute permits any person to challenge the validity of any regulation that "threatens" to "interfere" with that person's legal right. *Id.*; *see also Texas Dep't of Licensing & Regulation v. Roosters MGC, LLC*, No. 03-09-00253-CV, 2010 WL 2354064 at *5 (Tex. App.—Austin June 10, 2010, no pet.) (a person need not be subject to a regulation to challenge its validity under § 2001.038). This text broadly extends standing to constitutional limits. *Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 745 (Tex. App.—Austin 2014, pet. dismissed). Constitutional limits of federal and state standing are coextensive. *Heckman*, 369 S.W.3d 137, 154 (Tex. 2012).[12] The constitutional requirements for standing are: (1) the plaintiff suffered injury in fact; (2) a causal connection between the injury and the defendant's challenged act; and (3) likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing does not depend on quantity of injury; an "identifiable trifle" is sufficient. *Fowler*, 178 F.3d at 358 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)). "Even a small probability of injury is sufficient to create [standing], provided that the relief sought would reduce the probability." *Massachusetts v. EPA*, 549 U.S. 497, 525-26 n.23 (2007).

[12] DFPS argues that Plaintiffs disclaimed any reliance on federal law. Tr. May 16 at 28:13-15. But *Heckman* incorporates federal law into Texas law, which Plaintiffs cannot and did not disclaim. 369 S.W.3d at 154.

DFPS's plea to the jurisdiction primarily asserts that Plaintiffs lack standing. DFPS Brief May 12 at 1-3; DFPS Brief May 10 at 9-15.[13] Because Plaintiffs present identical claims and seek identical relief, a determination that any one of them has standing is sufficient for the Court to deny the plea. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011). To decide the facts as to standing, this Court liberally construes all pleadings in favor of jurisdiction. *Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Because DFPS presents an evidence-based challenge to jurisdictional facts that overlap with the merits, DFPS must carry a summary judgment burden to prevail on its plea to the jurisdiction. *Univ. of Texas v. Poindexter*, 306 S.W.3d 798, 807 (Tex. App.—Austin 2009, no pet.). The pleadings and evidence cited below establish standing for every Plaintiff.

[13] DFPS makes two jurisdictional arguments other than standing. First, DFPS argues that Plaintiffs cannot show that § 748.7 "threatens to interfere with [any of their] legal right[s]" under TEX. GOV'T CODE § 2001.038 because no detainee has any "right or privilege recognized under law to remain in the custody of the federal government in an unlicensed, as opposed to licensed, facility." DFPS Br. May 10 at 6 (citing *Salazar v. Tex. Dept. of Pub. Safety*, 304 S.W.3d 896, 905-08 (Tex. App.—Austin 2009, no pet.)); Tr. May 13 at 28:21 to 29:9. Plaintiffs rely on no such right. The rights that Plaintiffs rely upon to satisfy on § 2001.038 are stated in ¶ 58 of their Fourth Amended Petition. *Salazar* is inapposite because the right to a horizontally-oriented drivers' license as asserted by the plaintiffs did not exist, while the rights asserted by Plaintiffs do exist as cited in ¶ 58.

Second, DFPS argues that child care is a "pervasively regulated scheme" so that only DFPS is empowered to determine the scope of its own "exclusive jurisdiction." DFPS Br. May 10 at 22-23; Tr. May 13 at 29:15 to 30:14. Consequently DFPS argues that on temporary injunction the only relief that the court is empowered to order is invalidation of the rule or remand to the agency. *Id.* at 30:2-3. But no authority cited by DFPS is on point, and ample authority establishes that courts have jurisdiction to enter temporary injunctions to preserve the *status quo* while regulation validity is decided under § 2001.038. *See, e.g., Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 724 (Tex. App.—Austin 2009, no pet.) ("trial court has broad discretion to determine whether to issue a temporary injunction" to "preserve the status quo" while a claim under § 2001.038 is decided); *Texas Alcoholic Bev. Comm'n v. Amus.& Music Operators of Texas, Inc.*, 997 S.W.2d 651, 654 (Tex. App.—Austin 1999, no pet.) (same). Moreover, under Texas separation of powers principles, courts decide for themselves what scope of regulatory authority legislatures have conferred on executive agencies. *See PUC v. CPSB of San Antonio*, 53 S.W. 3d 310, 316 (Tex. 2001 (Courts "consider the agency's interpretation of its own powers only if that interpretation is reasonable and not inconsistent with the statute."); *Quick v. City of Austin*, 7 S.W. 3d 109, 123 (Tex. 1998) (Even a plausible agency reading of an ambiguous statute is "not controlling.").

A. Detainees Have Standing

The Plaintiff mothers and children who are subject to detention plainly have standing. DFPS so states. Tr. Nov. 12 at 41:4-7 ("if the children were here as plaintiffs, ... then there would be standing").[14] This is because as described in Part I, *infra*: (a) detention causes mothers and children to suffer physical and psychological injuries and impeded access to legal services that they need to fight deportation; (b) according to CCA and GEO, § 748.7 threatens to validate and prolong children's detention and entrench the three bedroom exceptions stated in § 748.7(c); and (c) invalidation of § 748.7 would shorten or eliminate detention and prevent implementation of the three exceptions to the minimum standards stated in § 748.7(c). *See Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 592 (Tex. 2013) ("Homeowners need not allege a more imminent impairment to their rights or allege a threat with more specificity. While the certainty and extent of injury would become clearer as the time for closing a home equity loan approached ..., to require a homeowner to wait to that point to challenge an interpretation would be to [effectively] deny [judicial] review ....").

B. Grassroots Leadership Has Standing

The parties do not dispute that for over a decade Grassroots Leadership has advocated on behalf of mothers and children who are detained while under orders of deportation, and worked to secure fair treatment for them that complies with all applicable law. Tr. Nov. 12 at 46:8-10 (Grassroots "continue[s] to work with people who have been released from the Karnes detention center and the Dilley detention center"); Tr. May 13 at 185:10-18 to 187:10 (describing work); Admitted Exhibits 1 and 2. With language barriers and an average age of six for children detained

[14] While DFPS cannot concede standing, it does concede this fact: "The named plaintiffs will benefit from additional oversight provided by DFPS during the pendency of this lawsuit to determine whether DFPS is allowed to do it." Tr. May 13 at 73:12-15. If Plaintiffs stand to benefit from DFPS salutary actions, they equally stand to be injured by DFPS detrimental actions, including variances built on the three bedroom exceptions as discussed in Part I.A, *supra*.

in the facilities, these detainees need advocates. Tr. Nov. 12 at 47:5. Grassroots Leadership thus has standing as an organization whose core mission and goals are threatened by the challenged rule. Tr. May 13 at 186:7-10 ("we wanted the state agency to take our comments seriously"). The right to comment on agency regulations is meaningless unless the agency is required to actually consider their merits and demerits as it crafts its rules. TEX. GOV'T CODE § 2001.033 is a legislative mandate to the executive branch, and one that would be undermined if the judicial branch denied standing to organizations with demonstrated commitments to enforcing § 2001.033. *See Fed. Election Comm'n v. Akins, 524 U.S. 11, 21 (1998); Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 449 (1989) (withholding information that a statute requires to be disclosed "constitutes a sufficiently distinct injury to provide standing to sue").[15]

C. Gloria Valenzuela Has Standing

Plaintiff Gloria Valenzuela holds a DFPS child-care license. DFPS Brief May 12 Exhibt A; Fourth Am. Pet. Exhibit 16. She claims that DFPS's rule would disparage her license and her work by expanding licensure to cover jailers. *Id.* The Texas Constitution explicitly guarantees standing to redress for such reputational injury. *See* TEX. CONST. art. I § 13 ("All courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have a remedy by due course of law."); *see also Texas State Bd. of Podiatric Med. Examiners v. Texas Orthopaedic Ass'n*, No. 03-04-00253, 2004 WL 2556917 at *2 (Tex. App.—Austin Nov.

[15] Independent of § 2001.033, Grassroots Leadership has standing because its work in challenging § 748.7 has diverted its resources from other specific work that Grassroots Leadership sought to undertake. Tr. May 13 at 187:18 to 188:16; *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (Organization has standing where its work "has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counselling and other referral services [and it] has had to devote significant resources to identify and counteract [defendants'] racially discriminatory steering practices."); *accord People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015); *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1259-60 (11th Cir. 2012).

12, 2004, no pet.) (medical doctor has standing to challenge licensing of lesser qualified persons to perform the same work because this disparages the doctor's license).

DFPS argues that Plaintiff Valenzuela nonetheless lacks standing because (a) she holds a daycare license and not a residential license of the kind sought by the Dilley and Karnes facilities under § 748.7; and (b) because "parents don't have a choice" as to whether to place their children in licensed care, no economic impact from any disparagement is possible. Tr. May 13 at 52:10-25. These arguments lack merit because (a) two different types of licenses were also at issue in *Podiatric Med. Examiners*, where the court made clear that standing may be predicated on potential for disparagement alone; and (b) because parents may always choose not to trust any DFPS-licensed child care for their children and instead care for their children themselves and with family members (i.e. a babysitter does not require a DFPS license), the potential for economic impact exists from disparagement of DFPS licensure. *See Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("Threatened injury to a business's reputation and good will with customers is frequently the basis for temporary injunctive relief.") (collecting cases).

Plaintiffs submit that the pleadings, evidence, and authority cited above prove standing under settled law. Should any doubt remain, Plaintiffs seek fair access to discovery on jurisdictional issues prior to any ruling on DFPS's plea to the jurisdiction. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 491-92 (Tex. 2012) (party granted six depositions, production from the state, and documents from other parties during the 13 months between filing of the suit and the ruling on the plea). The need for orderly discovery is proved by the fact that DFPS's Ms. Shaw refused to answer some dozen proper questions during her deposition on May 25. Shaw Depo. at 16:9-23, 21:10 to 22:2, 22:15-18, 23:3-16, 40:6 to 41:2, 43:1-21, 67:9-13, 86:8 to 87:7, 93:5-8, 96:5-18, 105:9-16, 107:25 to 108:4, 116:11-16, and 119:17-25.

III. Plaintiffs Show a Probable Right to Declaratory Judgment that § 748.7 is Invalid

DFPS's challenged regulation is invalid for two independent reasons discussed below. Examination of the merits only confirms that the temporary injunction now at issue will help children, and not prevent DFPS from acting to protect them if it so chooses.

A. The Texas Family Code Prohibits Secure Detention of Children

The text of TEX. FAM. CODE § 54.011(f) explicitly prohibits private prison companies from holding children in secure detention facilities pending deportation. The text of DFPS's challenged rule explicitly provides for licensure of facilities *even if* they violate § 54.011(f):

> The department does not oversee requirements that pertain to other law, including whether the facilities are classified as secure or in compliance with any operable settlement agreements or other state or federal restrictions.

40 TEX. ADMIN. CODE § 748.7(b). This text merits careful judicial scrutiny because it asserts that a Texas agency may assist a private company in violating Texas statutes. *But see* § 54.011(f) (prohibiting anyone from "assisting" in violations). DFPS concedes that it issued its licensing rule, at least in part, to aid the federal government in arguing that detention in the facilities complies with the *Flores* settlement agreement. Admitted Exhibit 4 at 2. This connects the merits to the length-of-detention injury discussed in Part I.B, *supra*. The Texas Legislature has decreed that children being held for deportation are not to be held in secure detention facilities at all. § 54.011(f).[16] By licensing the facilities, DFPS helps the private prison companies continue detention that the Legislature proscribes.

[16] DFPS argues that the Legislature already explicitly authorizes it to license secure facilities such as "residential treatment centers" under TEX. HUM. RES. CODE § 42.002(4). Tr. May 13 at 30:20-24. True enough, but the primary purpose of residential treatment centers is to help children. The primary purpose of immigration detention centers is to deport children. The Legislature rationally allowed one in § 42.002(4) and disallowed the other in § 54.011(f).

DFPS, CCA, and GEO have offered three arguments for why § 54.011(f) does not apply. First, they claim that even though the facilities may seem secure within the plain meaning of "secure," technically the facilities do not qualify as "secure detention facilities" under TEX. FAM. CODE § 51.02(14). Tr. May 13 at 39:1-25. But § 51.02(14) itself defines "secure detention facility" broadly as "any public or private residential facility that ... includes construction fixtures designed to physically restrict the movements and activities of juveniles [awaiting deportation]." This definition does nothing whatsoever to narrow the plain meaning of "secure detention facility." Abundant evidence proves that CCA and GEO operate "secure detention facilities" at Karnes and Dilley within the meaning of §§ 51.02(4) and 54.011(f), not least of which is the regulatory text at issue: "[e]ach child is detained." § 748.7(a)(3); *accord* Shaw Depo. at 38:2-4 ("doors are locked"); Tr. May 13 at 103:7 ("I am locked up in a jail."); *id.* at 108:12-15 ("I wanted to bring [my daughter] with me, but they didn't let me bring her."); *id.* at 111:14-15 ("[I]t's all fenced in. We're all inside the fences."); *id.* at 123:1-4 ("I cannot leave my room after 8:00. ... There's always an officer there."); *id.* at 123:16-19 ("it's all locked down ... the gates, the doors"); *id.* at 129:22-24 ("Q. [E]ven your one-and-a-half-year-old wears a badge? A. Yes."); *but see id.* at 40:9-10 (CCA argues: "They're not locked in at all. There's no locks. There's a gate. There's a gate. Okay.").

Second, Defendants claim that § 54.011(f) does not apply because mothers and children who are held at Dilley and Karnes may apply for various forms of immigration relief while they are detained, so they are not being held "solely for deportation." GEO Brief May 12 at 6. But the only evidence before this Court is that detainees at Dilley and Karnes are under orders of expedited removal under 8 U.S.C. § 1225 (INA § 235) or reinstatement of removal under 8 U.S.C. § 1231 (INA § 241). Tr. May 13 at 89:25 to 90:24.[17] They will be deported without even seeing

[17] Expedited removal under 8 U.S.C. § 1225(b)(1)(A)(i) provides:

an immigration judge unless they pass a screening interview and are given the opportunity to apply for some form of immigration relief. *Id.* ("Removal" is synonymous with "deportation."). In fact, every person everywhere, detained or not, who has received a final order of removal will be deported unless that person is granted some form of immigration relief from deportation. *Id.* at 92:18-25. Relief is generally determined as part and parcel of the removal proceedings. 8 U.S.C. § 1229a. There is no such thing as a person who cannot petition for any form of immigration relief while being held for deportation. *Id.*; *id.* at 96:18-19; *id.* at 183:2-7. This fact proves that "solely for deportation" in § 54.011(f) includes people who are being held for deportation subject to their application for subsequent immigration relief because otherwise § 54.011(f) applies to no one, and it is utterly meaningless. "In construing a statute, we give effect to all its words and, if possible, do not treat any statutory language as mere surplusage." *State v. Shumake,* 199 S.W.3d 279, 287 (Tex. 2006). Unless Defendants can identify a class of immigrants that they claim are detained "solely for deportation," their argument fails. If anyone is ever detained "solely for deportation," it is the mothers and children at Karnes and Dilley, who all arrive at these facilities under final deportation orders. *See* Tr. May 13 at 44:25 to 45:2 ("So what exactly was the Legislature addressing if not the two facilities at issue in this case?").

> "If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) , the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution."

Reinstatement of removal for immigrants who have been previously removed under 8 U.S.C. § 1231(a)(5) provides:

> "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."

Those in expedited removal or reinstatement of removal who fear persecution may apply for relief called "asylum" or "withholding of removal" under 8 U.S.C. §§ 1158 and 1231(b)(3), but only *if* they first pass a screening interview called a "credible fear interview" or "reasonable fear interview." Otherwise they are deported. 8 U.S.C. §§ 1158, 1225, and 1231.

Finally, GEO argues that the Texas Family Code headings suggest that § 54.011(f) applies only to the Texas Youth Commission and the Texas Juvenile Justice Commission. GEO Brief May 12 at 5.[18] But "[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." Code Construction Act, TEX. GOV'T CODE § 311.024. Moreover, nothing in the headings or statutory text indicates any legislative intent to limit the application of § 54.011(f) to certain Texas agencies.[19]

B. DFPS's Own Lawyers Concluded That DFPS Lacks Authority to Regulate Immigrant Detention Facilities

Independent of § 54.011(f), DFPS's own lawyers studied the authorizing statutes—TEX. HUM. RES. CODE §§ 42.001, 42.041, and 42.042—and concluded that DFPS lacks authority to regulate immigrant family detention facilities:

> at least in 2007, the Department had made a legal determination ... that the Department didn't have the authority to regulate [the T. Don Hutto facility] which did have mothers and children there.

Tr. Nov. 12 at 7:19-25; *see also* Tr. May 13 at 255:11-14 ("Is it fair to say that as of May 20, 2015, that the agency still did not believe that it had authority to regulate these facilities? That is correct."); Admitted Exhibit 11. DFPS cannot point to any relevant change in its statutory

[18] DFPS also argues that TEX. HUM. RES. CODE § 42.041(b)(13) "addresses what we think the Family Code prohibition refers to...." Tr. May 13 at 31:18-19. But no text in either § 42.041(b)(13) or § 54.011(f) suggests any such cross-reference or limitation. Moreover, Plaintiffs submit that § 42.041(b)(13) is an independent reason why DFPS lacks authority to apply § 748.7 particularly to the Karnes facility, which GEO admits it operates with a Texas local government. Tr. May 13 at 147:9-11; *see also* Pl. Brief May 3 at 10 (discussing § 42.041(b)(13)).

[19] The only § 54.011(f) argument that DFPS is allowed to assert is the single paragraph contained in its reasoned justification at 41 TEX. REG. at 1500-01. *See Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996). As DFPS explains, "our argument is [that the reasoned justification] decides the whole case right here, and we're bound by whatever's in there. If there's something missing in there, and it's flawed, then it's flawed." Tr. Nov. 12 at 9:17; *see also id.* at 70:16-18 ("the Department lives or dies by what's in that document"); Tr. May 13 at 59:13-15 ("Certainly this preamble is dispositive of whether the Agency complied with the Administrative Procedure Act.").

authority since it made this 2007 determination. Instead, after Judge Gee's *Flores* order in July 2015, DFPS simply gathered "new lawyers in the room" who read the statutory text differently. xcr1 8:6-25. But courts defer to agency constructions of statutes that are *contemporaneous* with enactment, especially when they are so longstanding that the Legislature may be said to have approved them. *See Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998); *Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.) (collecting authorities); *Texas Citrus Exch. v. Sharp*, 955 S.W.2d 164, 170 (Tex. App.—Austin 1997, no pet.) ("we give greater deference to an agency interpretation that is long-standing and applied uniformly"). Courts do not defer to agency interpretations made for litigation purposes, such as *Flores*. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never [accorded deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question ....").

While no law supports DFPS's change in its view of its authority, DFPS argues that two new facts have altered its view of its authority. First, DFPS argues that licensure is necessary to help the federal government continue to operate the facilities in compliance with the federal court's order in *Flores*. Tr. May 13 at 209:7-9 (*Flores* "played a role, but it wasn't the sole factor."). But no reason or authority indicates that the federal government's exigencies have anything to do with the scope of regulatory power that the Legislature has granted to DFPS.

Second, DFPS argues that it recently learned that mothers at Dilley and Karnes do not have complete control over their children's welfare for all 24 hours of every day, and mothers must rely on care from the facilities during times when mothers and children are apart. Tr. May 13 at 58:6 to 59:3; 208:9-19. But ten years ago DFPS knew full well that immigrant mothers did not have full control over their children at the Hutto detention facility that was operated by CCA to detain

the same categories of immigrants as those detained in the Dilley facility, and DFPS deliberately declined to regulate Hutto. Shaw Depo. at 50:4-13; Tr. May 13 at 87:16-23 ("The children wore prison uniforms. They were escorted around by guards. There was no education. There was no pediatrician on staff. The children lived in cells. Toys were not allowed in the cells because they were considered to be weapons .... It was a horrific prison regime, and it operated without a license."); *id.* at 88:1-4 ("the federal government argued that they were unable to obtain a license, that it was—that it could not be licensed under state law."); Tr. Nov. 12 at 116:9-18 (Hutto was a similar family detention center known to not licensed by DFPS). The fact that mothers do not have full control over their children at immigration detention facilities has not only been long known to DFPS, it is patently obvious from the fact of detention itself. *But see* Tr. May 253:20 to 254:6 (DFPS took "many, many months" to learn that mothers do not have complete control of their children 100% of the time.). Detention is by definition a loss of control. If DFPS did not know more details sooner about mothers' interactions with their children at Dilley, this is simply because DFPS did not want to know prior to Judge Gee's *Flores* decision in July 2015.

Importantly, DFPS issues at least two basic types of licenses: daycare licenses and residential licenses. Tr. May 13 at 225:5-22. This litigation involves whether DFPS can issue residential licenses to the Dilley and Karnes facilities under § 748.7. Fourth Am. Pet. at ¶¶ 54-59. In May and August 2015, DFPS issued daycare licenses to Dilley and Karnes. Tr. Nov. 12 at 26:24 to 27:7; Shaw Depo. at 53:18 to 54:6. No one has yet challenged these daycare licenses because they are not based on any new DFPS rules and they do not implicate *Flores*. But the existing DFPS daycare licenses at Dilley and Karnes are critical to this case because they prove that the facilities already have, or can get, daycare licenses covering all times *when children are not directly supervised by their parents*. Tr. May 13 at 107:19-23 (Other than school, "she spends the remainder of the day with me, under my care."); *id.* at 119:22-23 (Other than school the gym,

"[a]ll the rest of the time she's in my care."); *id.* at 131:13-17 ("Do you take care of your child all the time mostly during the day? Yes. When do you not? There is no time."). When do you not [care for your toddler]? There is no time."). The residential licenses that DFPS seeks to grant in this case would only cover times *when children are supervised by their parents*, principally in their bedrooms while they are asleep. Plaintiffs submit that daycare licenses alone could address all of DFPS's concerns about mothers not supervising their children 100% of the time, and this fact cannot be used as a justification to enact the three bedroom exceptions in § 748.7, which *only* apply when parents are with their children.

For temporary injunction purposes, the Court must weigh this evidence against DFPS's concession quoted above at Tr. Nov. 12 at 7:19-25, and determine whether DFPS probably lacks authority to regulate the facilities. *See Butnaru*, 84 S.W.3d at 204. Plaintiffs submit that the facts and law overwhelmingly establish that DFPS lacks authority to issue residential child care licenses to the Dilley and Karnes facilities.

CONCLUSION

Jails are not child-care facilities. Absent clear authority from the Legislature, DFPS should not be allowed to vastly expand its regulatory reach in a rush simply to help the federal government detain children as part of a plan that it created over a decade ago. The Court should deny Defendants' plea to the jurisdiction, or if the Court deems necessary, grant limited discovery prior to ruling on the plea. In either case, the Court should grant Plaintiffs' application for a temporary injunction preventing licensure of CCA's Dilley facility while this litigation proceeds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I sent a true, correct, and complete copy of the foregoing document to counsel for Defendants by electronic transmission the same day that I submitted this document for filing in this Court.

/s/Robert Doggett
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