No. D-1-GN-15-004336

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

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION, AND BRIEF IN SUPPORT

On March 1, 2016, Defendant Texas Department of Family and Protective Services (DFPS) made effective a new regulation at 40 TEX. ADMIN. CODE § 748.7. Exhibit 9.[1] Plaintiffs now seek all temporary injunctive relief needed to prevent DFPS from implementing § 748.7 while the validity of this regulation is litigated, as follows:

ISSUE BEFORE THE COURT

Whether Plaintiffs show a probable right to declaratory judgment that § 748.7 is invalid because it exceeds the child-care licensing authority that the Legislature has conferred on DFPS.

OVERVIEW

For almost a decade, DFPS itself repeatedly asserted that it lacked statutory authority to provide child-care licenses to immigrant family detention centers that the federal government operated in Texas. Exhibits 2, 3, and 5. Then on September 2, 2015, DFPS asserted that

[1] All Exhibits cited in this brief are attached to the Second Amended Petition that Plaintiffs filed simultaneously with this brief on May 3, 2016.

emergency rulemaking was needed to license these facilities for purposes of federal litigation pending in California. Exhibit 6 at 2. On November 12, 2015 this Court conducted an evidentiary hearing on whether the California litigation, or any other ground, justified emergency rulemaking under TEX. GOV'T CODE 2001.034. On November 20, 2015, this Court held that "Plaintiff has demonstrated a probable right to a declaratory judgment [under TEX. GOV'T CODE § 2001.038(a)] because no imminent peril to public health, safety or welfare exists as required ... to support the agency's use of emergency procedures," and issued a temporary injunction preventing DFPS's implementation of its emergency rule.

This Court also decreed that nothing in its order "shall prevent or preclude [DFPS] from proceeding through the traditional rule adoption procedures" stated in Texas law. DFPS then undertook traditional rulemaking, which attracted opposition from thousands of people and dozens of organizations, including comments asserting that DFPS lacks statutory authority to issue child-care licenses to immigration detention facilities. In February 2016 DFPS stated its reasons for rejecting these comments, and published its final rule. 41 TEX. REG. 1493-1502 (Feb. 26, 2016), Exhibit 8.

The rule took effect on March 1, 2016, and operates as follows:

(a) it defines immigration detention facilities as "Family Residential Centers" (FRCs), 40 TEX. ADMIN. CODE § 748.7(a);

(b) it classifies FRCs as "General Residential Operations" under TEX. HUM. RES. CODE § 42.002(4), which requires FRCs to meet minimum standards and secure a child-care license from DFPS, *id.* at § 748.7(b);

(c) it exempts FRCs from some minimum standards otherwise applicable to GROs, *id.* at § 748.7(c);

(d) it provides that DFPS may limit any regulatory exception in the future, *id.* at § 748.7(d); and

(e) it provides that DFPS may in the future require documentation concerning the division of supervisory responsibility between parents who are detained with their children, and facility operators, *id.* at § 748.7(e).

DFPS's justification for this rule is simply that some state regulation is better than none. 41 TEX. REG. at 1501-02, Exhibit 8 (DFPS's rationale supporting its rule "may be summarized by reiterating that the agency has concluded [that] the broad regulatory scheme in place for GROs will be more protective of children than taking no action ...."). Plaintiffs object to the regulation because it amounts to Texas's rubber-stamp seal-of-approval on the federal government's existing immigration detention policies, and one that DFPS offers to the federal government without the Legislature's considered judgment or consent. Consequently on May 3, 2016 Plaintiffs filed their second amended petition seeking declaratory judgment that § 748.7 is invalid.

In addition to Grassroots Leadership, Inc., the Plaintiffs include four individuals (E.G.S, A.E.S.G., F.D.G., and N.R.C.D.) who are currently in detention in one of the facilities at issue, and in support of their petition they have attached two declarations (Exhibit 11) that details the circumstances of their detention and the impact on themselves and their children.

DFPS currently intends § 748.7 to apply to two specific facilities. 41 TEX. REG. at 1494, Exhibit 8. Both have applied for child-care licenses under § 748.7. The Karnes County Residential Center is a 532-bed secure detention facility located in Karnes City, Texas. It is operated by the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), the political subdivision Karnes County, Texas, and a private prison contractor called The GEO Group. Exhibit 4. The South Texas Family Residential Center is a 2,400-bed secure detention facility located in Dilley, Texas. It is operated by ICE, the political subdivision of

Florence County, Arizona, and a private prison contractor called Corrections Corporation of America. *Id*.

Plaintiffs seek a temporary restraining order, and after hearing a temporary injunction, that prevent DFPS from taking any further action to implement or enforce § 748.7 until its statutory authorization to do so is finally decided in this litigation.

ARGUMENT

"An agency may adopt only such rules as are authorized by and consistent with its statutory authority." *Pruett v. Harris Cnty. Bail Bond Bd*., 249 S.W.3d 447, 452 (Tex. 2008). A rule may not impose burdens, conditions, or restrictions that are inconsistent with statutory provisions. *Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 57 (Tex. App.—Austin 2005, pet. denied). Where a statute does not grant an agency authority to regulate on a specific subject, courts "must ask whether that power is reasonably necessary for the [agency] to fulfill the express functions and duties the Legislature did give it." PUC of Tex. v. City Pub. Serv. Bd. of San Antonio, 53 S.W.3d 310, 315-16 (Tex. 2001). An agency may not exercise what is effectively a new power simply because the agency believes that the power is expedient for the agency's purposes. *Public Util. Comm'n of Tex. v. GTE–Southwest, Inc*., 901 S.W.2d 401, 407 (Tex.1995).

A person whose legal rights are impaired may seek a declaratory judgment that a rule is facially invalid. TEX. GOV'T CODE § 2001.038(a); *Teladoc, Inc. v. Texas Med. Bd*., 453 S.W.3d 606, 622-23 (Tex. App.—Austin 2014, pet. pending) (The Legislature intended § 2001.038 to ensure that "checks of transparency, public participation, and reasoned justification [will] precede [each] assertion of agency authority."). "To establish a rule's facial invalidity, the challenger must show that the rule (1) contravenes specific statutory language; (2) is counter to

the statute's general objectives; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Harlingen Family Dentistry, P.C. v. Tex. HHS Comm'n*, 452 S.W.3d 479, 481 (Tex. App.—Austin 2014, rev. dismissed).

Courts apply standard rules of statutory construction to decide whether a rule exceeds an agency's statutory authority:

> No inflexible rule can be announced for the construction of statutes. However, the dominant rule to be observed is to give effect to the intention of the Legislature. Generally, the intent and meaning is obtained primarily from the language of the statute. In arriving at the intent and purpose of the law, it is proper to consider the history of the subject-matter involved, the end to be obtained, the mischief to be remedied and the purpose to be accomplished. Where, however, the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. If the intentions of the Legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with general principles of law.

Pub. Util. Comm'n of Texas v. City of Austin, 728 S.W.2d 907, 912 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (quoting *City of Coahoma v. Pub. Util. Comm'n*, 626 S.W.2d 488, 490 (Tex. 1981)).

Plaintiffs urge three independent bases for concluding that DFPS lacks statutory authority to regulate the Karnes and Dilley facilities pursuant to § 748.7.

I. § 748.7 Would License Activity That TEX. FAM. CODE § 54.011(f) Prohibits

On its face, DFPS's regulation only requires licensure of facilities that "detain" children "to enforce federal immigration laws." § 748.7(a)(2)-(3), Exhibit 9; *accord* Exhibit 6 at 2 ("Both [Dilley and Karnes] are family residential facilities designed for detention of adults with children."); Exhibit 7 at 1 (infant's "ICE Resident" card from Karnes). DFPS explicitly requires licensure of these facilities even if "the facilities are classified as secure." *Id.* at § 748.7(b).

DFPS's explicit regulatory requirements violate the Legislature's absolute command:

> [a child] who has been taken into custody and is being held solely for deportation out of the United States, may not be detained for any period of time in a secure detention facility or secure correctional facility, regardless of whether the facility is publicly or privately operated.

TEX. FAM. CODE § 54.011(f).

DFPS's only attempt to reconcile its regulation with § 54.011(f) is this statement in its order (called a "reasoned justification") adopting § 748.7:

> the chapters of the [Family Code] in question relate to facilities operated by or on behalf of the Texas Juvenile Justice Department or on behalf of a juvenile board in the state of Texas. They do not govern federal facilities, including the [Family Residential Centers] under discussion in this rule promulgation.

41 TEX. REG. at 1500-01, Exhibit 8. The validity of § 748.7 must be decided on this justification alone. DFPS is not allowed to use a *post hoc* rationalization to support the validity of its rule. "If an order does not substantially comply with [the reasoned justification requirements of TEX. GOV'T CODE § 2001.035(a),] the rule is invalid." *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996).

DFPS's justification is insufficient because it does not cite any statutory text that limits the application of § 54.011(f) to facilities operated by the Texas Juvenile Justice Department or a juvenile board, or that excludes federal facilities from the scope of § 54.011(f). No such text exists. Much to the contrary, the Family Code decrees how and where *all* children may be detained in Texas regardless of who conducts the detention, and explicitly includes children detained for immigration purposes. *See* TEX. FAM. CODE § 51.12(a) ("a child may be detained only in ...."); *id.* at § 51.02(8) ("'Nonoffender' means a child who ... has been taken into custody and is being held solely for deportation out of the United States.").

Because the Family Code states a *specific* and absolute restriction on where immigrant children may be detained, the Family Code controls DFPS's *general* licensure authority under

the Human Resources Code Chapter 42 even if, *arguendo*, the two statutes conflict. *See Ramirez v. State*, 550 S.W.2d 121, 124 (Tex. Civ. App.—Austin 1977, no pet.) ("where a conflict exists between a general statute [in one Code] and a specific statute [in another Code] the general statute is controlled, or limited, by the specific statute[; the] specific statute is the clearer evidence of legislative intent) (collecting cases); *accord Texas Gen. Indem. Co. v. Texas Workers' Comp. Comm'n*, 36 S.W.3d 635, 641 (Tex. App.—Austin 2000, no pet.). The controlling force of the specific statute is even greater if the Legislature enacts the specific statute *after* the general statute. *See Ramirez*, 550 S.W.2d at 124. Here, DFPS's general licensing authority derives from a statute that was enacted prior to 1979 and has been amended almost every legislative session since. Exhibit 10 at 6 (§ 42.041 amendment history). The Legislature enacted the specific Family Code restriction as to detention of immigrant children in 2003. Acts 2003, 78th Leg., ch. 28. §§ 15, 16 eff. Sept. 1, 2003.

DFPS may argue that no conflict exists because § 748.7 only requires detention facilities to obtain child care licenses, and it does not by itself cause or require any children to be placed in secure detention facilities. But the Legislature broadly prohibits any act that "assists in detaining" an immigrant child in a secure facility. TEX. FAM. CODE § 54.011(f). DFPS has already admitted that its child-care licensing regulation does not merely assist, but is actually *necessary* for continued operation of the detention facilities pursuant to the settlement agreement at issue in *Flores v. Johnson*, Civil Action No. 85-4544 (C.D. Cal.). Exhibit 6 at 2.

Because § 748.7 on its face "contravenes specific statutory language" stated in § 54.011(f), § 748.7 is invalid. *See Harlingen Family Dentistry*, 452 S.W. 3d at 481.

II. The Legislature Has Not Authorized DFPS to License Secure Detention Facilities

DFPS and its predecessor agencies have issued child-care licenses at least since 1947. Op. Tex. Att'y Gen. No. H-104 (1973), Exhibit 1 at 3. They have never before provided child-care licenses to secure detention facilities. Indeed, the agencies "were not intended by the Legislature to [have] authority to [license] institutions whose main purpose [was something other than] caring for children." *Id.* at 5. This longstanding agency construction of its authorizing statute is entitled to great weight in resolving any ambiguities in the statute. *Id.* at 3 (citing *State v. Houston & T.C. Ry. Co.*, 68 S.W. 777 (Tex. 1902)).

The regulation challenged here is not only DFPS's first attempt ever to graft child-care standards onto secure detention facilities, it is an attempt that is complicated by four facts: (a) the federal government and local governments also have a say in the operation of these facilities; (b) the facilities detain the children with their mothers; (c) many if not most of the children and mothers have serious mental-health issues that require attention; and (d) the facilities have space for thousands of children, which would be the largest facilities ever licensed by DFPS. Or as DFPS puts it, "[f]rom the outset, DFPS recognized that the character of the FRCs is without an identical counterpart in the current regulatory structure." 41 TEX. REG. at 1497, Exhibit 8. Before DFPS is allowed to begin regulating such a complex, important, and sensitive field for the first time ever in the nation, DFPS requires not only specific permission from the Legislature, but also an appropriate budget to undertake this regulation competently, and standards by which it is expected to regulate in this unique environment. Even now DFPS appears to concede that it needs additional authority to do this work correctly. *See* 41 Tex. Reg. at 1500, Exhibit 8 ("DFPS lacks authority to appoint an independent medical and psychological team to investigate reports of abuse, neglect and exploitation" at the facilities to be licensed under § 748.7.).

Nowhere has the Legislature specifically authorized DFPS to regulate immigrant child detention facilities. DFPS relies only on its general child-care licensing authority in TEX. HUM. RES. CODE § 42.041 Consequently, the question before this Court is whether § 748.7 "is reasonably necessary for the [agency] to fulfill the express functions and duties the Legislature did give it" in § 42.041. *See PUC of Tex.*, 53 S.W.3d at 315-16.

In deciding whether an agency has exceeded its rule-making powers, the determinative factor is whether the rule's provisions are "in harmony with the general objectives of the Act involved." *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968); *accord Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) ("courts will construe the details of an act in conformity with its dominating general purpose'"). Historically, for over sixty years, the purpose of Texas child-care licensing has been to cover those facilities whose "primary function is child care." Op. Tex. Att'y Gen. No. H-104 at *passim*, Exhibit 1.[2] Now DFPS aims to expand its regulatory reach to facilities whose primary function is detention.

The statutory text does not permit such an expansive reading of DFPS's licensure authority. The Legislature's explicit purpose "is to protect the health, safety, and well-being *of the children of the state who reside in child-care facilities* by ... regulating the facilities through a licensing program." TEX. HUM. RES. CODE § 42.001 (emphasis added). The statute broadly defines "child care facility" to include any facility that provides "supervision" for a child who is

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[2] Upon examining legislative intent, the Attorney General concludes:

> Institutions which are not operated primarily for child-caring purposes but wh ich offer and provide some child care to patrons or customers as a service incident to the primary function of the business are not normally subject to licensing unless the primary purpose of the division involved is child care as determined by reasonable criteria established by rules and regulations promulgated by [DFPS's predecessor agency].

Op. Tex. Att'y Gen. No. H-104 at 15, Exhibit 1. Nowhere in the reasoned justification for § 748.7 does DFPS conclude, let alone support the conclusion, that the primary purpose of FRCs is child care. Exhibit 8. Much to the contrary, DFPS recognizes the indisputable fact that any child care is incident to the primary purpose of immigration detention. *Id.*

not related to the facility operator for any part of the day. *Id.* at § 42.002(3). But then the statute narrows the definition of "child care facility" by excepting a long list of facilities that supervise children from the statute's licensure requirement. *Id.* at § 42.041(b). Among these exceptions is:

> a juvenile detention facility certified under Section 51.12, Family Code, a juvenile correctional facility certified under Section 51.125, Family Code, a juvenile facility providing services solely for the Texas Juvenile Justice Department, or any other correctional facility for children operated or regulated by another state agency or by a political subdivision of the state.

Id. at § 42.041(b)(13). This text statutorily exempts the Karnes facility from DFPS licensure because Karnes is operated by a political subdivision of the state, namely Karnes County. Because § 748.7 explicitly requires a license of Karnes in contradiction of § 42.041(b)(13), § 748.7 is invalid. An even broader child-care licensing exemption applies to *any* facility operated by *any* state agency. TEX. HUM. RES. CODE § 42.041(b)(6). Historically, DFPS and its predecessor agencies interpreted this exemption as broadly as possible. *See* Op. Tex. Att'y Gen. No. H-104 (1973), Exhibit 1 at 6 ("It is probable that the Legislature was thinking in terms of the infeasibility of one governmental unit licensing another rather than in strictly geographical and political terms.").

This text confirms that detention facilities in Texas are regulated by agencies other than DFPS. Before DFPS is permitted to interpret its general grant of licensure authority to include enormous new power that is of enormous political and economic significance, which includes presuming to instruct the federal government on how to operate its immigrant detention facilities, DFPS must have specific permission from the Legislature. The State of Texas itself made and prevailed on this very argument in *Texas v. United States*, 809 F.3d 134, 182-83 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016). In that case, Texas argued that when Congress authorized the U.S. Department of Homeland Security (DHS) to regulate as necessary to carry out U.S.

immigration statutes, Congress did not authorize DHS to issue regulations deferring deportation of millions of undocumented persons. *Id.* at 183 ("[T]he broad grants of authority in 6 U.S.C. § 202(5), 8 U.S.C. § 1103(a(3), and 8 U.S.C. § 1103(g)(2) cannot reasonably be construed as assigning 'decisions of vast economic and political significance, such as [the deferred deportation program] to an agency."). Indeed, the U.S. Supreme Court has repeatedly held that legislatures do not "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), so that agencies aiming to exercise broad and sensitive new powers far exceeding their historical exercise must obtain specific legislative authorization. *See, e.g., Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate [new and important matters], we typically greet its announcement with a measure of skepticism."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (where FDA historically declined to regulate tobacco products despite arguably broad regulatory authority to do so, specific legislative authorization would be required before the agency could exercise such economically and politically important powers).

In light of all statutory history, text, and purpose described above, it is not "reasonably necessary" for DFPS to expand its longstanding interpretation of the law and now license secure detention facilities. *See PUC of Tex.*, 53 S.W.3d at 315-16. Before DFPS may assume such vast new power, it must have additional authorization from the Legislature.

III. The Legislature Has Not Authorized DFPS to License Facilities Where Parents Supervise Their Children

The Legislature defines "general residential operation" (GRO) to mean "a child care facility that provides care for more than 12 children *for 24 hours a day* ...." TEX. HUM. RES. CODE § 42.002(4). DFPS's formal regulations place responsibility for child care on the facility

"for all of the 24-hour day." 40 TEX. ADMIN. CODE § 40.745.35. Parents are *never* responsible for providing care in a GRO as GROs are defined by the Legislature. *See id.* at 42.0427 ("All areas of a licensed facility must be accessible to a parent of a child who is receiving care at the facility if the parent visits the child during the facility's hours of operation.").

Because the statutory definition of GRO requires the facility and not the parent to be in charge of child care "for all of the 24-hour day," DFPS has admitted that the Texas Legislature has not provided it with statutory authority to regulate immigrant detention facilities as GROs when the parents themselves are responsible for providing care for part or all of the 24-hour day. Exhibit 5 (On May 20, 2015, DFPS Executive Commissioner Specia wrote that because "children reside at [the Dilley] facility with their parents[,] DFPS has neither jurisdiction nor standing to [regulate the facility.] ... DFPS can only regulate a facility [as a GRO] when it provides 24-hour direct care for children."). Yet without securing any change in the statutory definition of GRO, § 748.7 purports to regulate immigration detention facilities as GROs even though § 748.7 on its face provides that a "parent or family member with a child provides the direct care for the child except for specific circumstances when the child is cared for directly by the center or another adult in the custody of the center." 40 TEX. ADMIN. CODE § 748.7(a)(4).

Because § 748.7 attempts to classify facilities as GROs even when the facilities do not meet the statutory definition of GRO, § 748.7 is inconsistent with the statute and thus invalid. *See Harlingen Family Dentistry,* 452 S.W.3d at 481. The regulation is similarly invalid because it would render compliance with § 42.0427 impossible because in a secure facility, parents plainly lack a right to access "all areas of a licensed facility ... during the facility's hours of operation. Inability to comply with the statutory requirement of § 42.0427 only confirms that the

Legislature did not intend DFPS to regulate secure detention facilities, particularly those where parents are detained with their children.

CONCLUSION

The Court should issue a temporary restraining order and a temporary injunction to prevent DFPS from taking any further action to implement § 748.7 until the validity of this rule is fairly briefed and decided on summary judgment.

Respectfully submitted,

TEXAS RIOGRANDE LEGAL AID, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I sent a true and correct 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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