08-16-00334-CV

ACCEPTED
08-16-00334-CV
EIGHTH COURT OF APPEALS
EL PASO, TEXAS
6/6/2017 9:35:14 AM
DENISE PACHECO
CLERK

No. 08-16-00334-CV

In the Court of Appeals for the Eighth Judicial District El Paso, Texas

FILED IN
8th COURT OF APPEALS
EL PASO, TEXAS
6/6/2017 9:35:14 AM
DENISE PACHECO
Clerk

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; HENRY WHITMAN, IN HIS OFFICIAL CAPACITY AS DFPS COMMISSIONER; TEXAS HEALTH AND HUMAN SERVICES; AND CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS HHSC EXECUTIVE COMMISSIONER; CORRECTIONS CORP. OF AMERICA; THE GEO GROUP

Appellants,

v.

GRASSROOTS LEADERSHIP, INC., GLORIA VALENZUELA, E.G.S., FOR HERSELF AND AS NEXT FRIEND FOR A.E.S.G.[1]

Appellees.

On Appeal from the
353rd Judicial District Court, Austin County

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Statement of the Case

Nature of the Case: Plaintiffs brought suit to challenge the adoption of an administrative rule under which the Department commenced the process of licensing two privately-run facilities that detain mothers and their children who are held by the federal government for potential immigration violations.

Course of Proceedings: The case proceeded on cross-motions for summary judgment.

Trial Court: 353rd Judicial District Court, Travis County
The Honorable Karin Crump

Trial Court Disposition: The trial court declared the rule invalid, but also enjoined the Department to continue exercising the regulatory oversight it had been exercising under the rule. CR.4210-4217.[2]

[2] Citations to the clerk's record appear as CR.__. Because transcripts and portions of the preliminary reporter's record have been introduced as summary-judgment evidence, some citations will have a CR.__:__, with the digit following the colon indicating any relevant linear citation.

Statement Regarding Oral Argument

Oral argument may be necessary in this case because (1) it presents a question of great public interest involving the regulation of privately-run family detention centers that hold families, including children detained for immigration related issues for the federal government; (2) the scope of the Department's statutory authority is an issue of first impression; and (3) the case involves difficult issues of administrative law.

Issues Presented

1. Do plaintiffs have standing to challenge Rule 748.7?
2. Is Rule 748.7 a substantively and procedurally valid administrative rule?
3. Was it proper for the district court to award injunctive relief?

TO THE HONORABLE EIGHTH COURT OF APPEALS

The district court's order is a contradiction in terms. It strikes down an administrative rule under which the childcare licensing division of the Department of Family and Protective Services has exercised oversight over the family residential facilities based on the conclusion that the Department lacks statutory authority to do so. Yet, having held that there was no statutory authority to supervise the facilities, the district court enjoined the division to continue doing so.

The district court's motivation for enjoining the division to continue regulating the facilities is clear—the district court has twice concluded that the Department's oversight is in the best interest of the children. CR.1111 ¶ 5; CR.4216.

There was no need for the district court to resort to so exotic a remedy. Given the uncontroverted fact that the Department's oversight has actually helped children, the district court should have applied the plain text of the Human Resources Code, which provides an ample basis for the challenged administrative rule. After all, regulating facilities that take care of children to make sure they do a better job is what the division does.

STATEMENT OF FACTS

This case sits at the intersection between two distinct areas of governmental regulation: the State of Texas regulates the provision of childcare within its borders, while the federal government regulates immigration policy for the entire country. Those two spheres of authority overlap at these family residential facilities, in which mothers and their children are housed together while detained by the federal government.

I. The Department and Regulation of Childcare Facilities

The Department's authority and obligation to license and oversee childcare facilities are set out in Chapter 42 of the Human Resources Code. These activities are carried out by a childcare licensing division, separate from Child Protective Services and other divisions of the Department. TEX. HUM. RES. CODE § 42.021(a); *see also id.* § 40.002(b)(3).

Chapter 42's purpose is to protect the health, safety, and well-being of the children of the State who are served by or reside in child-care facilities by establishing statewide minimum standards for their safety and protection and by regulating the facilities through a licensing program. *Id.* § 42.001. These goals are to be accomplished "through a licensing program." *Id.* The Legislature has defined various types of facility that require licensure. *Id.* § 42.002. These facilities cannot legally operate without a license from the Department. *Id.* §§ 42.041(a), .048. And it is, in turn, the existence of the license that triggers the Department's power to investigate and oversee the facilities. *Id.* § 42.0705 ("The department shall revoke or suspend a license or registration, place on probation a person whose license or registration has been suspended, or reprimand a license holder or registration holder for a violation of this chapter or a department rule."); *see also id.* § 42.074 (allowing suit for injunctive relief related to violation of a license or activities that require a license or registration).

One type of facility that can be licensed, and for which modifications to the statewide rules can be offered, is a "general residential operation" or "GRO." *Id.*

§ 42.002(4). A GRO "provides care for more than 12 children for 24 hours a day" and includes children's homes, halfway houses, and emergency shelters. *Id.*

The general licensing requirements can be modified to account for local conditions specific to each facility at the time a license is issued. *Id.* §42.048(b); *see id.* § 42.048(c) ("The department may grant a variance of an individual standard set forth in the applicable standards for good and just cause."); *see also id.* § 42.042(j) (allowing waiver of compliance based on economic impracticality). The Department reserves the right to condition or limit such rule-based exceptions. 40 TEX. ADMIN. CODE § 745.8313.

A different division of the Department, Child Protective Services, is empowered by statute and rule to investigate the treatment of children who are not in state-licensed facilities. *See* CR.3398:9-14; CR.3473:20-3474:9 (explaining that Child Protective Services can investigate family abuse but not abuse by facility staff); CR.3479:16-3480:24. Child Protective Services is part of the Department, which is required by statute to "ensure the independence of the [Childcare Licensing] division from the child protective services division." TEX. HUM. RES. CODE § 42.021(a).

II. Federal Immigration Policy and "Family Detention Centers"

The federal government is charged by the United States Constitution with controlling immigration. U.S. CONST. art. I, § 8. It operates two facilities in Texas at which adult women who are accompanied by children may be placed temporarily while seeking asylum. CR.1524. Immigrant women and children reside in these facilities until they receive an interview to determine whether they have a credible

fear of returning to their home county. CR.1534:25-1535:25. While some residents are deported directly from the centers, the vast majority are released into the community following their interviews. CR.1535:5-25.

The conditions of children residing in family residential centers are, in part, governed by the terms of a consent decree entered into in California district court in 1997, known as *Flores v. Johnson*. *See* CR.77-101 (enforcement order discussing contents of original *Flores* consent decree). The district judge, in 2015, entered an enforcement order barring the federal government from detaining children accompanied by their mothers in facilities that lack a state childcare license. *See* CR.77-101. The *Flores* settlement requires that minors be placed "temporarily in a licensed program," and defines that term as a "program, agency or organization that is licensed by an appropriate state agency to provide residential, group, or foster care services for dependent children." CR.88. Such facilities must also be "non-secure as required under state law." *Id.*

III. Detention Centers in Texas

A. The Federal Government Establishes Facilities in Texas

A first federal family detention center, the "T. Don Hutto Family Detention Center," opened in 2006 and closed in 2009. The Department did not license the Hutto facility, based, at least in part, on an understanding that the children were accompanied by a parent and that, therefore, there was no need to issue a license. *E.g.*, CR.3980-83. The facility eventually closed.

Nearly five years later, in 2014 and before the enforcement proceedings in *Flores*, two new family residential centers opened near the cities of Dilley and Karnes City, Texas.[3]

While there are restrictions on entry and exit from the centers, movement within the centers is not physically restricted. CR.1544:15-25; CR.1551:1-15. Mothers generally reside in the same units as their children, with some exceptions. CR.1524, CR.1561:10-19, CR.1568-69. However, children are not always within the immediate care of their mothers within the facility. CR.1550:1-17; CR.1569; CR.1571. A younger child may be left in care while a mother visits with an attorney, seeks medical attention, or travels off-premises for legal reasons. CR.1568-69; CR.1573-74, Ex. G. Children over 12 years old are permitted access to play areas and to be outside of their mother's care for periods of recreation. CR.1568-69; CR.1572-73. The centers provide meals, overnight shelter, clothing, medical care, education, staff supervision, and other services while the women and children live in the centers. CR.1543:4-20; CR.1549:11-24, CR.1552:6-22; CR.1557:5-1558:2, CR.1559:18-1560:22, CR.1562:20-1563:9, CR.1564:18-1565:19, CR.1568-69. CR.1571-74.

B. The Department Investigates the Dilley and Karnes Facilities

Soon after the enforcement order in *Flores*, the Department took a second look at the functioning of the Dilley and Karnes facilities. While the Department had previously understood that the facilities were exempt from licensure, its investigation into the conditions at the Dilley and Karnes City facilities showed that

[3] The physical structure of the Karnes facility was described in the *Flores* enforcement order. CR.89.

the centers provide food, shelter, clothing, medical treatment, education, and some supervision—including shared supervision and exclusive supervision over children over the age of 12 using the play areas. CR.1520-1532, CR.1543:4-20; CR.1549:11-24; CR.1552:6-22; CR.1557:5-9:2, CR.1559:18-1559:22, CR.1562:20-1563:9, CR.1564:18-1565:19.

The facilities may or may not have been complying with federal standards. But they were not meeting the state requirements for licensure. The Department identified 12 violations of its standards at the Dilley facility alone, and the business running that center had to fire five employees as a result of the Department's background checks. CR.1593:8-1598:13; see CR.1111 ¶ 6 (court finding that Department discovered 12 deficiencies resulting in five firings); *see also* CR.3667:23-3669:15 (detailing deficiencies at Dilley facility that were remedied through licensing process).

C. Rule 748.7

Although it determined that the facilities were subject to licensure after determining the scope of their responsibility for the children, the Department's rules for licensure of the facilities as General Residential Operations would have required the facilities to separate mothers from their children at night and posed other impediments to the lawful operation of the facilities as they exist.

The Department first adopted an emergency rule under which it would license the Dilley and Karnes City facilities. The parties litigated the procedural issues implicated by that emergency rule. *E.g.*, CR.7 (setting out challenge to emergency rulemaking). After the trial court enjoined the emergency rule, the Department

proposed and adopted a final rule, section 748.7, through notice and comment rulemaking pursuant to the Administrative Procedure Act. 40 TEX. ADMIN. CODE § 748.7.

Rule 748.7 provides that facilities will be regulated as a specific type of GRO, known as a Family Residential Center when:

> (1) The center is operated by or under a contract with United States Immigration and Customs Enforcement;
>
> (2) The center is operated to enforce federal immigration laws;
>
> (3) Each child at the center is detained with a parent or other adult family member, who remains with the child at the center; and
>
> (4) 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.

Id. § 748.7(a)

It contains three specific exceptions to the state-wide GRO rules:

> (1) the limitation of room occupants to four in § 748.3357 of this title (relating to What are the requirements for floor space in a bedroom used by a child?), except that nothing in this exception shall be construed to require fewer than 60 square feet per child;
>
> (2) the limitation on a child sharing a bedroom with an adult in § 748.3361 of this title (relating to May a child in care share a bedroom with an adult?) if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member; and
>
> (3) the limitations on children of the opposite gender sharing a room in § 748.3363 of this title (relating to May children of opposite genders share a bedroom?), except that nothing in this exception shall be construed to permit children from different families who are over the age of six and members of the opposite gender to share a bedroom.

Id. § 748.7(c).

The adoption order explains that these exceptions are designed to allow a child who is over the age of three to share a bedroom with the child's mother and siblings of the opposite sex, which would otherwise be barred by section 748.661, which does not allow related adults to be in the same room as their children. CR.1524. Likewise, the Department explained the bases for the other exceptions as being designed to allow families to stay together notwithstanding statewide rules that would prohibit them from rooming together. *Id.*; *see also* CR.3666:16-3667:7.

Plaintiffs did not immediately challenge the new rule. *See* CR.3428:3-9 (rule was adopted on March 1 but not challenged until May 3). The Department engaged in the licensing process, and it issued an interim license to the Karnes City facility on April 29, 2016. *See* CR.517. The Department had almost completed the interim licensure process for the Dilley facility when, on May 3, 2016, plaintiffs amended their petition to challenge section 748.7 as finally adopted and obtained a temporary restraining order from the trial court that enjoined licensure of Dilley. CR.398. The live petition does not seek revocation of the Karnes license, but instead seeks to enjoin future licensure. *See* CR.881.

D. The Impact of Section 748.7

Under section 748.7, the Department was able to initiate its ordinary licensing process. *See* 40 TEX. ADMIN. CODE subch. D. The first step, after a technically compliant application is filed, is an onsite investigation. *id.* § 745.321. To receive a license, an entity must show that its employees have had background checks, *id.* subch. F. If there are deficiencies, they must be cured before the application process

is finished. After review of the application is complete, the Department may grant a temporary six-month license giving the Department an opportunity to determine whether the facility remains in compliance. *Id.* § 745.347; *see* CR.3689.138:11-3690:11; CR.1526 (describing process).

These requirements have yielded results. The facilities were not previously operating in compliance with state standards. An initial inspection of the Karnes facility found six deficiencies, and at Dilley there were 12 deficiencies. CR.1093; see CR.1580:11-1582:6, CR.1586:3-1590:14, CR.1593:8-1598:13. The facilities hired a significant number of additional staff to meet the minimum staffing requirements for licensure. CR.2517:16-259:8.

IV. The Litigation

Plaintiffs challenged section 748.7 on substantive the grounds that it (1) violated section 54.011(f) of the Family Code, (2) represented a change in policy, and (3) was inconsistent with the statutory definition of the term "general residential operation" found in section 42.002(4) of the Human Resources Code. CR.406-07. And they challenged it as lacking the reasoned justification required by section 2001.033 of the Government Code. CR.407. They sought a TRO prohibiting implementation of the rule and a declaratory judgment invalidating the rule. CR.407-08.

The plaintiffs listed on that first petition challenging section 748.7 were Grass Roots Leadership, a non-profit corporation, and four individuals who were at that time detained in either the Karnes or the Dilley facility. CR.399.

The Department challenged plaintiffs' constitutional and statutory standing to bring these claims. CR.520-529, and sought dismissal of plaintiffs' Chapter 37

claims, CR.529-530. It also pointed out that plaintiffs had failed to properly verify the pleading, as required to obtain injunctive relief, and that the minor plaintiffs had not met the requirements for a minor-initiating suit under Rule of Civil Procedure 44. CR.537.

In response, plaintiffs filed another petition, adding more detainee plaintiffs identified by their initials, only, and Gloria Valenzuela, who has a child care home license to operate a child care home in Horizon City, Texas, and who complained that the issuance of licenses to the federal facilities would diminish and disparage the value of her license by equating her to "a jailer." CR.542-43; CR.551. The new petition retained the core legal allegations, CR.551-52, and added detailed assertions related to the supposed rights and privileges of the plaintiffs, CR.552-53. The Department maintained its position regarding standing. *See* CR.740-43.

The companies that run the Dilley and Karnes facilities intervened in the lawsuit. *See* CR.720-30 (Geo Group); CR.756-63 (CCA).

The petition was amended again two times. CR.867-1060; CR.1131-1345. The final version of the petition includes both initials and some full names for eleven mothers bringing suit themselves and as next friends of their minor children, in addition to Valenzuela and Grassroots. CR.1131. It repeats the same substantive arguments, CR.1144-45 (invoking section 54.011(f) of the Family Code, section 42.002(4) of the Human Resources Code), and adds assertions that the rule (1) violates section 42.001 to "enable the federal government to continue detaining families for longer periods of time," and (2) was "issued prior to . . . compliance with [sections] 42.024(f) and 42.042(i) [of the Human Resources Code]." CR.1145.

Plaintiffs requested declaratory relief under Chapter 37 of the Civil Practice and Remedies Code. CR.1146-47. And they sought to enjoin the Department from licensing federal family detention facilities. CR.1147-48.

The parties filed cross-motions for summary judgment, *see* CR.1491-1647 (Department's Motion); CR.3000-4179 (plaintiffs' motion). Plaintiffs urged that they have standing because (1) without the license, the facilities would close and the children would no longer be detained, CR.3012-3014; (2) Grassroots has standing because its "organizational mission . . . would be impaired by" the rule, CR.3015-3016; and (3) Gloria Valenzuela has standing because the rule "diminishes the value of her license," CR.3016-3018. They argued that the detainees' claims are not moot because they could be detained again and under the so-called "public interest" exception to mootness, CR.3019-3021. They asserted that section 748.7 violates section 54.011(f) because: (1) the Department "assists in detaining" the children by exercising regulatory oversight over the facilities, CR.3022-3033; (2) the definition of a GRO does not extend to these facilities, CR.3033-3041; (3) the Department violated the general-goals language of Chapter 42 of the Human Resources Code because it "Adopted [section 784.7] to Help ICE, Not to Help Children," CR.3041-3055; *see also* CR.3062-3063 (suggesting that the rule is invalid because it prolongs the length of detention); (4) the Department was required to go through additional procedure under section 42.042 of the Human Resources Code, subsections (f) and

(i), CR.3056-3058;[4] and (5) the justification of the rule did not substantially comply with section 2001.033 of the Government Code, CR.3059-3061. Finally, they urged that injunctive relief is appropriate to preclude future licensing of family detention centers. CR.3064-3066.

The Department urged that Rule 748.7: (1) is consistent with the Human Resources and Family Codes because the Department has express authority to grant exceptions to state-wide rules, including minimum standards, along with a license and because neither the Department nor the State of Texas is detaining the children; (2) was adopted in substantial compliance with the procedural requirements of the APA, because the responses to the comments were adequate and because the two procedural requirements of § 42.042(f) and (i) do not apply; and that (3) the plaintiffs lack standing because the detained mothers claims are moot, Grassroots lacks associational standing because it has no members, and Ms. Valenzuela is an uninterested third party to the rule. *See* CR.1493. The Department also sought dismissal of the Chapter 37 claims. *See id.*

The district court's final judgment: (1) dismissed the Chapter 37 claims and the request for attorney's fees, CR.4213-4214; (2) granted plaintiffs' motion for summary judgment on the ground that the rule "contravenes Tex. Hum. Res. Code § 42.002(4) and runs counter to the general objectives of the Texas Human Resources Code," CR.4214; (3) denied the Department's motion for summary

[4] A number of articles were cited in this portion of the motion for summary judgment. *See* CR.3057-558. The district court sustained defendants' objections, so those articles are not part of the summary-judgment record. CR.4180-81.

judgment, CR.4214, and (4) having asserted that the licenses would be illegal because they include exceptions to certain minimum standards, found that "it is in the best interest of the children" for the Department to "provide regular and comprehensive oversight consistent with the minimum standards required by the State of Texas," CR.4216. The District Court ordered that its order not be superseded, specifying the district court's belief that the variances from the state-wide sleeping-arrangements rules would endanger children and "facilitate longer periods of detention." CR.4215.

The order justifies the final judgment as being necessary to maintain the status quo and "allow [the Department] the ability to continue regulatory and protective functions for the benefit of children detained at Karnes and Dilley until the challenge to [section 784.7] proceeds through appeal." CR.4217.

The Department appealed. CR.4218-19. Plaintiffs have not filed a notice of appeal.

Summary of the Argument

Once the Department learned of the degree to which the facilities share oversight of the children with the mothers and are otherwise responsible for these children's care and wellbeing, it became aware of its statutory obligation to regulate these facilities as GROs. Section 748.7 satisfies that obligation.

The real crux of plaintiffs' position is that there should be no private detention facilities. But neither the Department nor the state of Texas is detaining the women and children—the federal government is. Make no mistake, there is no way to exercise judicial power in this case to close the Dilley and Karnes facilities or force the federal government to change its immigration-detention policies. Indeed, it is

equally possible that the federal government could separate the children from their mothers rather than allowing them to reside together in these facilities.

Plaintiffs thus lack a traceable, redressable injury to support standing. Grassroots has cited nothing but the expense of its own advocacy activities to support standing, which will not support an advocacy entity's standing. The individual detainees' claims related to the conditions of confinement both indicate that (1) they are *actually benefitted* by licensure and oversight, which means there is no injury, and (2) the claims are moot because none of the detainees remain in custody. And Ms. Valenzuela's claim cannot support standing because she has nowhere asserted that her child care home license is, in fact, devalued by providing a different type of license to the Karnes and Dilley facilities.

Assuming that there is standing, section 748.7 is amply supported by the text of the Human Resources Code:

(1) Section 42.004, which applies whenever a facility provides "assessment, care, training, education, custody, treatment or supervision" requires the Department to issue a GRO license when 12 or more children are at a facility 24 hours a day. TEX. HUM. RES. CODE § 42.002(3), (4). The facilities assess children, care for them (with or without their mothers), provide education, and supervise the circumstances of their conditions in the facility, 24 hours a day.

(2) Section 42.001's requirement that the welfare of children be protected by statewide rules is not to the contrary, given that the Code expressly allows the Department to provide necessary exceptions to the statewide rules for each facility or category of facility. *Id.* § 42.048(c).The exceptions granted in this case are good

for children because they keep families together and prevent opposite-gender children from being isolated from their mothers and siblings.

As the order adopting section 748.7 emphasizes, the childcare licensing division does not have authority to stop the federal government from detaining children, but it *can* exercise its regulatory powers to protect children while they are in the federal facilities. If those powers were not effective, the district court would not have enjoined the division to continue exercising them. The best way to protect children while residing in these facilities is to allow the division to continue its licensing activities.

Standards of Review[5]

The Department appeals the district court's grant of plaintiffs' motion for summary judgment and denial of the Department's motion. In addressing cross-motions for summary judgment, the reviewing court must affirm summary judgment if any of the summary-judgment grounds are meritorious. *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004) (citing *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995)). The grant of summary judgment is a question of law; the trial court cannot resolve any fact issues. *E.g.*, *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441-42 (Tex. 1997).

"When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary

[5] By rule, the Court is to apply the precedent of the transferor court in deciding this appeal if there would be any difference in the outcome. TEX. R. APP. P. 41.3.

judgment evidence presented by both sides and determine all questions presented." *Patient Advocates*, 136 S.W.3d at 648 (citing *FM Props.*, 22 S.W.3d at 872). When summary judgment is granted on specified grounds, the court must determine whether the grant was appropriate on that basis and may consider other grounds, if they are preserved in the appellate briefing. *Hernandez v. Porter*, 406 S.W.3d 789, 792 (Tex. App.—El Paso 2013, pet. denied) (applying *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996)). The ultimate goal is to render the judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Battista v. City of Alpine*, 345 S.W.3d 769, 774 (Tex. App.—El Paso 2011, no pet.).

This is a challenge to an administrative rule under section 2001.038 of the Government Code. TEX. GOV'T CODE § 2001.038(a). Section 2001.038 is a limited waiver of sovereign immunity that addresses only the validity or applicability of a rule. *Kidd v. Tex. Pub. Util. Comm'n*, 481 S.W.3d 388, 394 (Tex. App.—Austin 2015, no pet.). It does not inquire about the effects of a rule, or its application in a particular factual circumstance. *LMV-AL Ventures, LLC v. Tex. Dep't of Aging & Disability Servs.*, No. 03-16-00222-CV, 2017 WL 1315384, at *5-*6 (Tex. App.—Austin Apr. 6, 2017, no pet. h.). Whether the Department has acted within its statutory authority requires statutory interpretation, which is reviewed *de novo* but subject to "serious consideration" of the agency's view of matters within its regulatory authority. *R.R. Comm'n v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624-25 (Tex. 2011). Whether the rule was adopted in substantial compliance with the Administrative Procedure Act is determined under an arbitrary-and-capricious

standard, based only on the face of the order adopting the rule. TEX. GOV'T CODE § 2001.033; *e.g.*, *Gulf Coast Coal. of Cities v. Pub. Util. Comm'n*, 161 S.W.3d 706, 713 (Tex. App.—Austin 2005, no pet.).

The Department also appeals the district court's permanent injunction requiring it to oversee the facilities despite the conclusion that there is a lack of statutory authority to do so. The standard of review is clear abuse of discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). Under that standard, the court may reverse the trial court's ruling if the trial court acted without reference to any guiding rules and principles or its ruling was arbitrary or unreasonable, not merely a judgment with which the reviewing court disagrees. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *Mekeel v. U.S. Bank Nat'l Ass'n*, 355 S.W.3d 349, 356 (Tex. App.—El Paso 2011, pet. dism'd). This review encompasses both written filings and testimony offered at the injunction hearing. *E.g.*, *Tex. Dep't of State Health Servs. v. Holmes*, 294 S.W.3d 328, 334 (Tex. App.—Austin 2009, pet. denied).

ARGUMENT

Plaintiffs make no bones about their purpose: they do not like the policies of immigration-related detention of women who enter the country with their children and the use of private facilities for government detention of any kind. But neither of those policies have been adopted by the Department or by the State of Texas. Rather, the Department, having realized that its statutory duty to regulate the provision of child care extended to these facilities, was obligated to articulate a mechanism for regulating them through licensure. And, given that family groups prefer to be housed

together, it was common sense to create exceptions to state-wide rules governing sleeping arrangements for minors in order to allow mothers to stay with both their sons and with their daughters; but, under the statewide rules, mothers would have had to sleep in separate rooms from any child over three-years-old.

This is really a fight between plaintiffs and the federal government. So long as the children reside in these facilities, independent licensure and oversight makes them safer. It does not make sense to use a lawsuit against the State to remedy an action the State has not taken. And it makes no sense to remove a protection for children from the system merely to advance a particular argument about the wisdom of the federal government's policy determinations.

I. Plaintiffs Lack Constitutional Standing.

The district court was so eager to prevent the plaintiffs from being harmed by the withdrawal of Department oversight that it ordered the Department to continue acting *as though* the facilities were licensed. Because license-based oversight of the facility actually *benefit*s plaintiffs, plaintiffs have no cognizable injury based on the mere existence of a license. The Court should dismiss the lawsuit.

A. Constitutional Standing Ensures That a Dispute Is Appropriate for Judicial Resolution.

In Texas, constitutional standing derives from the separation of powers and prevents the issuance of advisory opinions. *E.g.*, *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 581 (Tex. 2013). The doctrine prevents the judiciary from resolving general policy concerns properly addressed to the legislative process. To establish constitutional standing, the plaintiff must "allege personal injury fairly traceable to

the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 154 (Tex. 2012) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

B. Grassroots Cannot Establish Standing.

Grassroots is an advocacy association. An associational plaintiff can sue on behalf of its members, in which case it must demonstrate standing based on at least one freestanding claim by a member in order to avoid the potential for sidestepping the class-certification process. *E.g.*, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446-47 (Tex. 1993) (adopting standard from *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Grassroots does not assert that it has members. Accordingly, it is required to establish standing based on injury to itself, as an entity. *E.g.*, *Tex. Ass'n of Bus.*, 852 S.W.2d at 447 (membership requirement for associational standing "weed[s] out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation"). The Texas Courts have not adopted a separate test for an advocacy organization to establish standing, and have allowed organizations to bring suit only under the associational standing test. *See*, *e.g.*, *Tex. Soc'y of Prof'l Eng'rs v. Tex. Bd. of Architectural Exam'rs*, No. 03-08-00288-CV, 2008 WL 4682446, at *3-*4 (Tex. App.—Austin 2008, no pet.) (mem. op.) (declining to find organizational standing where plaintiff association could not meet associational-standing test). As explained below, the federal precedent is not so broad as plaintiffs suggest and cannot support the recognition of a broader standing test for advocacy groups.

1. There is no special test for organizational standing in Texas, and the federal precedents on which plaintiffs rely are limited to particular statutory claims.

The United States Supreme Court has allowed advocacy organizations to proceed in federal Fair Housing Act cases by alleging economic injury to themselves. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 (1977)). This is not a separate test for associational standing, but rather an application of general standing principles to a particular congressional enactment. *Havens*, 455 U.S. at 378-79 (requiring that plaintiff entity have "a personal stake" in the outcome of the controversy).

Plaintiffs appear to believe that *Havens* imposes a lower *constitutional* threshold than the current injury standard in Texas. *See* CR.3016 (suggesting that when an entity is required to spend money to counteract a governmental policy, it has standing under *Havens*). This is incorrect. *Havens* addressed standing to seek damages under the Fair Housing Act, not standing generally. *Havens*, 455 U.S. at 378; *see Midpeninsula Citizens for Fair Housing v. Westwood Inv'rs*, 221 Cal. App. 3d 1377, 1385 (Cal. Ct. App. 1990) (declining to expand *Havens* beyond Fair Housing Act damages claims because it did not address constitutional standing). *Havens* applies an earlier decision in which the Supreme Court had held that the prudential elements of standing—including particularized injury—do not apply to Fair Housing Act claims, 455 U.S. at 372; *see City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262,

1275 (11th Cir. 2015) (applying *Havens* as a statutory "zone of interest" rule, rather than a constitutional-standing rule).[6]

This is not a Fair Housing Act case, so plaintiffs must meet the particularized injury test adopted by the Texas Supreme Court. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Lujan*, 504 U.S. at 560 n.1 ("[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way"); *MD Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 705, 707-08 (Tex. 2001) (plaintiff must be "personally aggrieved" to establish standing). *Havens*'s application of the pre-*Lujan* standing requirements cannot excuse Grassroots from meeting the Texas courts' post-*Lujan* rules governing the pleading of a particularized injury.

2. Grassroots cannot establish the necessary particularized injury.

The particularized injury standard is exacting and requires articulation of a specific ill that is expected to befall the plaintiff. There "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Tex. Ass'n of Bus.*, 852 S.W.2d at 446 (internal quotation marks omitted). This test has its roots in the separation of powers, which prohibits the courts from issuing general opinions regarding public policy. *Id.* at 443-44 (citing TEX. CONST. art. II, § 1). And it is textually anchored by the Open Courts provision,

[6] The United States Supreme Court has subsequently reversed the judgment in *City of Miami*, but accepted the premise that *Havens* is a zone-of-interest statutory-construction case, rather than a rule broadening the scope of constitutional standing generally. *Bank of Amer. Corp. v. City of Miami*, No. 15-1111, 15-1112, 2017 WL 1540509, at *6 (U.S., May 1, 2017) (applying *Havens* and other similar cases as zone-of-interest inquiry for Fair Housing Act, not general standing rule, while modifying distinction between prudential and constitutional standing).

TEX. CONST. art. I, § 13, which ties the availability of suit to an injury suffered, *id.* Standing is thus a constitutional predicate to the courts' exercise of jurisdiction over a lawsuit. *Id. Tex. Ass'n of Bus.,* 852 S.W.2d at 444; *see also Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004). The concreteness and particularity requirements ensure that the lawsuit resolves a judicially-appropriate dispute, rather than straying into the role of a second executive or legislative branch. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446. It is not clear that, under the Open Courts provision, the Texas Legislature could relax even the elements of prudential standing. Of course, that question is not presented here, where Grassroots attempts to use the zone of interest test for an irrelevant federal statute to avoid constitutional scrutiny of its standing.

Grassroots concedes that its main purpose is advocacy. *E.g.*, CR.1142 ¶ 54. It asserts generally that it operates to "advocate for, and educate the public about, private-prison regulation and the policy implications of for-profit incarceration." *Id.* To further its core mission that encompasses private prisons of all types, Grassroots Leadership conducts public education and organizing campaigns, and advocates before officials at all levels of government." *Id.* It alleges that it was required to "divert volunteer and financial resources from its other work, including . . . starting visitation programs to detained migrants at immigration detention centers around Texas, an advocacy campaign to end the immigration detention bed quota, and producing a research report on federal-court prosecution of migrants at the border." CR.1142-43 ¶ 55; *see also* CR.3415:18-3416:18 (specifying that all activities, except for a report to be drawn up, were either focused on facilities being challenged or

hypothetical intent to "partner with community organizations in other parts of the state"). In short, it asserts that it spent money on its advocacy activities related to opposing these private detention facilities.

This activity cannot meet the test for individualized standing under *Brown*: it amounts to an assertion that merely because a group of citizens becomes organized to advocate a policy position, it can bootstrap that organization into constitutional standing to invoke the courts' power to order the executive-department to act. After all, if standing can be based on an asserted interest in a policy outcome, and is manifested by a requirement that you expend funds to further that interest, then any association could establish standing for any claim merely by raising money to advocate for a particular policy. No Texas court has accepted this bootstrapping argument.[7]

[7] Grassroots cites cases from other jurisdictions involving impairment of educational activities. *See* CR.3016 (citing *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015); *Ga. Latino Alliance for Human Rights v. Georgia*, 691 F.3d 1250, 1259-60 (11th Cir. 2012)). These decisions are non-precedential. *E.g.*, *Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298, 302 n.5 (Tex. App.—Austin 1993, no writ). And they are both distinguishable and nonpersuasive. While *People for the Ethical Treatment of Animals* expands *Havens* beyond the scope of the Fair Housing Act, it also requires that there was no access to "information and avenues of redress," 797 F.3d at 1094-95. The D.C. Circuit has subsequently limited that expansion by specifying that the concrete injury must be based on operational expenses, not advocacy expenses. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919-920 (D.C. Cir. 2015). The portions of Mr. Libal's statements included in plaintiffs' motion for summary judgment expressly focus on advocacy and outreach expenses, rather than operational expenses. CR.3016 (the rule "frustrates our ability to — to advocate for our goals" and "diverted us, right, from other projects that we were working on"). Because there is nothing in the record to show that Grassroots lost operational, as opposed to advocacy funding, *Food & Water Watch* would preclude application of *People for Ethical Treatment of Animals* if the federal precedent were binding. *Georgia Latino Alliance* likewise involves an impairment of non-advocacy activities, 691 F.3d at 1260.

Grassroots further suggests that it has constitutional standing because it seeks publication of the order-adoption justification and other information required by the Administrative Procedure Act because plaintiffs can seek the release of documents. CR.716 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (addressing campaign finance disclosures necessary to evaluate candidates); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989))). This claim is moot, as the record contains the official publication of the information that Grassroots claims standing to obtain.[8] CR.1520-1532. And to accept it, the Court would have adopt a false equivalence between the product of a governmental process and information held by the government and made public by statute. The federal statutes at issue in *Public Citizen*, like the Texas Public Information Act, address information held by the government in the ordinary course of business. TEX. GOV'T CODE § 552.021; *see A&T Consultants v. Sharp*, 904 S.W.2d 668, (Tex. 1995). It cannot be the case that an organization triggers constitutional standing based merely on its interest in the rule's publication: that would expand constitutional standing to every potential litigant in the state of Texas. *Norwood*, 418 S.W.3d at 591 (rejecting argument that section 2001.038 extends standing to all Texas residents, generally).

The potential for sidestepping the separation of powers and obtaining advisory opinions based on nothing but the policy objectives of a given group is likely why the text of section 2001.038 limits the availability of judicial review of administrative

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[8] Indeed, the declaration attached to plaintiffs' live petition asserts alleged injury deriving from the emergency rulemaking procedures. CR.1290-91. Such injuries are, of course, mooted by the notice-and-comment process for section 748.7. *See* CR.3413:7-3415:10 (explaining that Grassroots participated in process).

rules to parties that have a "right or privilege." TEX. GOV'T CODE § 2001.038(a). Standing is based on any injury that could be redressed by judicial action. *Heckman*, 369 S.W.3d at 155. The concepts of "right" and "privilege" are more narrow than the general category of "interest." They are "guaranteed," rather than merely protected, and require a settled legal status. *See* A DICTIONARY OF MODERN LEGAL USAGE 772 (2d ed. 1995) (defining "right"); *see also id.* at 693 (defining "privilege" as "a person's legal freedom to do or not to do a given act"). By requiring that any complainant have something more than an injury to challenge an administrative rule, the text of section 2001.038(a) ensures that advocacy groups do not bootstrap their participation in the notice-and-comment process into further litigation despite the lack of a direct interest in the application of the rule.[9]

3. Any injury Grassroots might have related to the continued existence of private facilities is non-redressable in this proceeding.

A cognizable injury must also be redressable by judicial action against a party to which the alleged harm is fairly traceable. Grassroots' primary purpose is to oppose private detention centers of all kinds. CR.3417:7-3418:8. But the Department does not operate the Dilley and Karnes facilities; nor is it responsible for detaining persons for violation of the immigration laws of the United States. To the extent the injury is

[9] The Third Court has previously remarked that it interprets the Texas Supreme Court's decision in *Norwood* to stand for the proposition that a party need establish only constitutional standing to maintain a section 2001.038 rule challenge. *Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 740 (Tex. App.—Austin 2014, pet. dism'd). The Department contests that reading of *Norwood*, which addressed the very different argument that section 2001.038 has a more relaxed standing requirement than the constitutional text, 418 S.W.3d at 581. The Department preserves for the Supreme Court its argument that none of the plaintiffs meet this more-narrow "right or privilege" test to establish statutory standing within the text of section 2001.038(a).

the continued operation of the facilities, no order of the Texas courts could remedy the situation because the Texas courts cannot issue judgments against the federal government. U.S. CONST. art. III, § 2. The alleged injury cannot be redressed by order of a Texas Court, because a Texas-court order against the Department will not result in the release of any detainee from custody.

Nor are the alleged injuries based on the mere existence of the facilities and the fact of confinement fairly traceable to the Department or the State of Texas. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App.—Austin 2010, no pet.) (injury must not be caused by "the independent action of a third party not before the court" (citing *Lujan*, 504 U.S. at 560-61)); *see also City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 136 (Tex. App.—El Paso 2016, no pet.) (same). And, as the flipside of the same coin, there can be no redress of injuries based on the mere fact of detention in this case, because no court order can require the State to release any detainees or prevent the federal government from detaining them in the first instance.

C. The Detainees Lack Standing.

1. They have not described a valid injury, because the licensing regime has helped, rather than harmed, them.

Most of the residents' complaints come from the fact that they are detained by the federal government or from various aspects of the federally-operated facilities unrelated to the Department's licensing activities. *E.g.*, CR.1133 ¶ 3; CR.1143 ¶ 56 (plaintiffs seek to "minimize the duration of their detention and to improve their conditions of detention"), ¶ 57 (minors have right to particular conditions of

detention governed by *Flores* settlement). As explained above, neither the Department nor any entity of the State of Texas has authority to change the federal government's exercise of immigration authority. Injuries related to the fact, or length, of detention are not properly traceable or redressable in this litigation.[10] *See supra*, Part I.B.

Moreover, to the extent any of plaintiffs' statements reference the safety of children, their claims would not support standing because they would themselves be injured, not benefited, by the relief requested. As the district court found, and the record establishes, the children benefitted from the Department's oversight. A judicial order requiring the Department to stop exercising oversight would not redress any harm related to the safety of children

2. Their claims have been mooted by their departures from the facilities.

Not one of the residents of the facilities was residing in the facilities at the time of judgment. CR.1551:9-12; CR.1553:1-6. Claims related to the conditions of temporary confinement become moot when the complainant is released. *Williams v. Lara*, 52 S.W.3d 171, 184-85 (Tex. 2000). That the residents were no longer housed at the facility thus renders their articulated injuries moot.

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[10] Additionally, plaintiffs suggest that the residents have a *jus tertii* interest in the contract between the facilities and the federal government. CR.3014. A third party beneficiary to a governmental contract must argue that the contract was entered into for the benefit of the third party to have a claim, *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306-07 (Tex. 2007), and may lack any standing to complain about the constitutionality of the statute authorizing the contract, *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 680-81 (2003) (Thomas, J., concurring). Plaintiffs have not established the elements of a third-party beneficiary claim.

Plaintiffs argue that potential recapture and detention is sufficient to prevent the claims from becoming moot. This argument is foreclosed by precedent. A former detainee cannot challenge the conditions of his confinement once he is released, and he cannot invoke the capable-of-repetition-yet-evading review exception to mootness. *Id.* The capable-of-repetition-yet-evading-review doctrine applies only in "exceptional situations." *Tex. A&M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290-91 (Tex. 2011) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). A plaintiff must demonstrate that (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Id.*; *Pharris v. State*, 165 S.W.3d 681, 687-89 (Tex. Crim. App. 2005). Plaintiffs cannot meet the second prong in light of *Lara*'s categorical bar on seeking injunctive relief related to the conditions of confinement after release. *Lara*, 52 S.W.3d at 184-85 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

D. Ms. Valenzuela Cannot Establish a Cognizable Harm to Her Childcare License.

Valenzuela asserts standing based on license disparagement. *See* CR.715 (citing *Tex. State Bd. of Podiatric Med. Exam'rs v. Tex. Orthopaedic Ass'n*, No. 03-04-00253-CV, 2004 WL 2556917, at *1 n.3 (Tex. App.—Austin 2004, no pet.) (mem. op.)). That argument fails because (1) the doctrine is not so broad as Valenzuela suggests

and (2) her own testimony shows that her allegations do not rise to the level of the doctors' complaints in *Board of Podiatric Medicine*.

Board of Podiatric Medicine does not articulate a general impairment-of-license theory for standing. Rather, it addresses the question whether the Texas Orthopaedic Association had associational standing based on the individual interests of its members, *id.* at *2. Its answer to that question was that there has to be a demonstrated divergence of the economic interest of two identified groups, created by the rule change. *Both* podiatrists *and* doctors were licensed to provide overlapping care. *Id.* (pointing out that the scope of podiatry defines the scope of an exception to the statewide licensing requirement). The injury in fact was based on the probability that, by expanding the scope of the exception to medical licensure, at least some patients would end up going to a podiatrist rather than a licensed medical doctor.[11] Thus, it is not *any* type of license disparagement that triggers standing, but only a licensure change that would put a previous license holder in direct economic competition with the new license holder.

That cannot happen to Valenzuela, because her facility has a different type of license and is located far away from the Karnes and Dilley facilities. CR.543. She does not allege that she will suffer any particular economic harm, only that she thinks that the detention facilities are "jails" and should not be licensed.

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[11] Plaintiffs also cite a D.C. Circuit case, *Am. Inst. Of Certified Pub. Accountants v. I.R.S.*, 804 F.3d 1193 (D.C. Cir 2015), for the proposition that any rule that hypothetically "dilutes" the value of a license confers standing, CR.3018. But *Certified Public Accountants* addressed the danger of increased, actual competition between two groups that would dilute the exclusionary effect of the license, making it just like *Board of Podiatric Medicine*, *see* 804 F.3d at 1197-98 (focusing on value of "stand[ing] out from the competition").

Finally, the premise of Valenzuela's argument is that parents will choose unlicensed child care. *See* CR.1075 (citing *Intercont'l Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (discussing threat to business reputation as basis for temporary injunctive relief)).[12] But it is illegal to run an unlicensed child care facility. TEX. HUM. RES. CODE §§ 42.041(a), .048. Unlike the line between doctors and podiatrists, in which there would have been a choice between two *legal* options, here the paying public is not faced with a choice between licensed and non-licensed facilities. It is improper to predicate standing on the speculative possibility that detainees will be detained again in the future, *see Lara*, 52 S.W.3d at 184-85 (future incarceration is too speculative to support CRYER exception to mootness), or on the presumption that the law will be broken, *e.g.*, *O'Shea*, 414 U.S. at 497.

E. There Is No "Public Interest" Exception to Standing or Mootness.

Plaintiffs seek to invoke a so-called "public interest" exception to mootness, which applied to the pre-*Texas Association of Business* standing inquiry. *E.g.*, CR.2607 (discussing *Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298, 304 (Tex. App.—Austin 1993, no writ)). *Buchanan* was decided exactly a month before *Texas Association of Business*, in which the Texas Supreme Court confirmed that standing is a constitutional doctrine in Texas and a limitation on the powers of the courts because it serves to preclude advisory opinions. *Compare Buchanan*, 848 S.W.2d at

[12] *Vopak* is not a standing case. And it stands for the proposition that it is easier to obtain temporary relief for injury to business good will "in the marketplace" because such damage is difficult to quantify and bond. *Vopak*, 354 S.W.3d at 895-96. *Vopak*'s discussion of market position depends upon some degree of belief that the brand will suffer in a particular marketplace.

298 (decided February 3, 1993), *with Tex. Ass'n of Bus.*, 852 S.W.2d at 440 (decided March 3, 1993). To the extent *Buchanan* suggests that a case may be resolved by the judiciary—regardless of whether it would yield an advisory opinion—merely because the question presented is "important," it is inconsistent with the prohibition on advisory opinions articulated in *Texas Association of Business* and subsequently applied by the Texas Supreme Court in cases like *Brown v. Todd* and *Heckman v. Williamson County*.[13]

II. Section 748.7 Is Valid as a Matter of Law.

Because all of plaintiffs' requested relief hinges on the invalidity of section 748.7, the only question the Court need address—if it reaches the merits—is the validity of that rule. The district court specified that judgment was based on plaintiffs' grounds that section 748.7 violates section 42.004 and "the general objectives of the Human Resources Code," which presumably refers to the general purposes of the statute set out in section 42.001. *See* CR.4214.

The appealing party must prevail on all of its own grounds for summary judgment in order to obtain rendition. *Cates*, 927 S.W.2d at 626. Summary judgment is not available on a ground not raised to the trial court. TEX. R. CIV. P. 166a. In order to preserve all possible error, this brief will address every issue raised in the Department's and plaintiffs' cross motions in order, starting with the statutory basis

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[13] It is not at all clear that *Buchanan*'s discussion of the "public interest" exception actually applies that standard. *Buchanan* distinguished an earlier case because the question of attorneys' fees had not yet been resolved and because some of the *Buchanan* plaintiffs had "direct interest" in the remedy, 848 S.W.2d at 304. Because fees and a direct interest are relevant to the general test for standing, it is inaccurate to see *Buchanan* as precedent for pure application of the so-called "public importance" exception to mootness as articulated by some commentators.

of section 748.7, addressing the supposed procedural defects, and explaining why section 42.001 of the Human Resources Code does not apply.

A. The Human Resources Code Provides Ample Statutory Authority for Both section 748.7 and Its Exceptions to the Statewide Bedroom Requirements.

There are two analytical issues to determine whether there is statutory authority to regulate the facilities as GROs: do the facilities qualify as GROs and, if so, whether there is a rational basis for the exceptions to the statewide bedroom requirements. Because the facilities care for the children in tandem with the detained mothers, and sometimes while the mothers are away from the children, in addition to providing education, guidance and other forms of supervision, they qualify as GROs. And the exceptions are rational because they keep families together in one room, a concern that does not arise when children are unaccompanied by their family in a facility. Certainly, the judgment that it is better for children to remain in their family groups is consistent with the general concept of the "best interest of the child" to which the district court appears to refer.

1. The Human Resources Code does not exclude facilities in which children are cared for 24-hours-a-day merely because the childrens' mothers are present at some times.

Plaintiffs' motion for summary judgment urges that there is a lack of statutory authority for section 748.7 because Chapter 42 of the Human Resources Code does not expand to situations where mothers are present. CR.3033-3041 (citing *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002), for

proposition that agencies cannot act outside their specific grant of statutory authority). This argument misreads the definitions set out in Chapter 42.

Chapter 42 charges the Department with protecting the health, safety, and well-being of children who reside in child-care facilities. TEX. HUM. RES. CODE § 42.001; *see Tex. Dep't of Family & Protective Servs. v. ASI Gymnastics, Inc.*, No. 05-09-01469-CV, 2010 WL 2764793, at *2 (Tex. App.—Dallas 2010, no pet.) (mem. op.). A child care facility cannot operate without a license. TEX. HUM. RES. CODE § 42.041(a).

a. The general definition of a child-care facility is broad.

Child care facilities include facilities that provide "assessment, care, training, education, custody, treatment or supervision" to a child not related to the owner or operator of the facility." *Id.* § 42.002(3). This definition is much broader than mere custody of the child—it extends to other activities in which the Dilley and Karnes facilities engage, including assessment, *see* TEX. HUM. RES. CODE § 42.042(f) (requiring preliminary service plan within 72 hours of admission to assess child's needs), education, CR.1552:6-22, custody, CR.1559:18-1560:22, and treatment, CR.1565:15-19. The facilities provide oversight to both mothers and children at the same time. CR.1543:7-14, CR.1549:15-19, CR.1557:5-1558:2; CR.1562:20-1563:2; CR.1564:18-1565:19; *see also* CR. 1563:3-9 ("they're providing care in different ways besides just supervision. They're making sure that the children have food, they're making sure their medical needs are met, they're making sure the children have clothing, they're making sure the childrens' basic needs are met"). While the mother has some responsibility, facility staff are assigned to individual children and

are ultimately responsible for the child's safety and well-being. CR.1569, 1572-74. The facilities thus meet the general statutory definition for a child-care facility.[14]

b. The specific definition of a GRO extends to facilities where children are with their mothers, because the facility shares responsibility with the mothers and has exclusive control over the children in many circumstances.

A GRO is a child-care facility that "provides care for more than 12 children for 24 hours a day." TEX. HUM. RES. CODE § 42.002(4). Because the facilities are child care facilities, and provide care for more than 12 children for 24 hours a day, they fall within the Department's regulatory ambit.

Plaintiffs have argued that the facilities cannot meet the definition of a child care facility because their mothers are present. CR.3039 (asserting that the facilities are not GROs because the GROs are not providing "direct care" to the children at all times). This "direct care" argument requires the insertion of the word "direct" into the statute. The Legislature is presumed to choose words with care, and it is inappropriate to insert additional terms into a statute when construing it, except to give effect to clear legislative intent. *E.g.*, *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010) ("We presume the Legislature selected

[14] Plaintiffs suggest that the legislative creation of a "Temporary Shelter Permit" that covers any "shelter or other facility that is designed to provide temporary living accommodations to individuals and families," TEX. HUM. RES. CODE § 42.201(1), forecloses the Department from regulating the facilities as GROs. This is a different category of permit, however, because it applies only to temporary care while a responsible adult is away from the facility. *Id.* § 42.201(2)(C). Likewise, the invocation of the statute allowing shopping centers and religious bodies from providing care without licensure on a temporary basis, *id.* § 42.041(b)(3), does not apply here, because the children remain in the tandem care of their mothers and the facilities at all times, even if they are sometimes cared for by a childcare facility exclusively.

language in a statute with care and that every word or phrase was used with a purpose in mind."). In this case, given that the Legislature defined the term "care" broadly, it only makes sense to read the definition provisions of Chapter 42 as a whole, so that the various provisions cover the entire gamut of childcare facilities without leaving regulatory lacunae. *See* TEX. GOV'T CODE § 311.021(2); *see In re S.S.A.*, 319 S.W.3d 796, 799 (Tex. App.—El Paso 2010, orig. proceeding) (reciting proper standard).

Chapter 42 does not make the provision of care, assessment, treatment, and supervision exclusive of the provision of direct care; childcare is a broad term and can encompass all these activities. There are other licensed GROs at which parents also reside. *E.g.*, CR.1599:16-1600:7. The record shows that the facilities exercise some control over the care provided by the accompanying mothers at all times, in addition to the time during which employees separately supervise children over 12. CR.152-1532; CR.1543:4-20; CR.1549:11-24; CR.1552:6-22; CR.1557:5-1558:2, CR.1559:18-1560:22, CR.1562:20-42:9. The centers monitor the children's general activities and provide specialized care whenever necessary. CR.1568-69, CR.1571-74. Perhaps even more importantly, the centers control provision of proper medical care, educational opportunities, and food that is appropriate in light of any dietary restrictions. CR.1557:5-1558:2, CR.1559:18-1560:22, 1562:20-1563:9, CR.1564:18-1564:19.[15] And section 748.7 itself underscores its policy rationale by requiring the

[15] Indeed, the assertion that the mothers were not actually in charge of their children was an important part of plaintiffs' factual assertions. *See* CR.2355 (Answer to Interrogatory 9: "The mothers and children do not control their own lives, the facilities and the guards do, from what they eat to what they wear when they are confined to their rooms.") While the State disagrees with the legal characterizations in the interrogatory response, it demonstrates that the legal position taken in plaintiffs' filings is in considerable factual tension with plaintiffs' own discovery responses.

centers to submit their policy and procedures related to the division of care between the mothers and the facility's employees. 40 TEX. ADMIN. CODE § 748.7(e).

Plaintiffs attempt to counter the statutory definition of a child-care facility by arguing that the use of the word "care" in section 42.002(4) excludes the other forms of oversight listed in the general definition of "childcare facility" in section 42.002(3). *See* CR.3036-38. Apart from requiring the Court to insert the word "direct" into the statute, this approach makes little sense, since the word "care" is part of "childcare" facility, and as an application of the ordinary use of language, the "care" provided by a GRO is of the same nature as the care provided by all other childcare entities.[16]

2. The Department has authority to adopt the exceptions to statewide policy found in section 748.7.

The district court's order predicates counter-supersedeas and temporary injunction relief on an assertion that it is contrary to the "best interest of the child" to provide exceptions to the statewide bedroom restrictions permitted for a Family Residential Center License. CR.4215-16. ("The [rule] provides for exemptions to our State Minimum Standards that run counter to the objectives of the Texas

[16] This is true, as well, under the ordinary meaning rule. *See Thompson v. Tex. Dep't of Licensing & Regulation*, 455 S.W.3d 569, 571 (Tex. 2014). The word "care" is defined broadly in ordinary usage to include "provide physical needs, help, or comfort," "protective or supervisory control," to be an "object of or cause for concern," and to be "made the legal responsibility of a local authority by order of a court." COLLINS ENGLISH DICTIONARY 312 (12th ed. 2014). The breadth of these meanings echoes the breadth of the definition of childcare facility in section 42.002(3), suggesting that the scope of "care" is far broader than plaintiffs would have it. *See* THE AMERICAN HERITAGE DICTIONARY 281 (5th ed. 2016) ("care" means "watchful oversight; charge or supervision"). There is no reason of ordinary usage that the "care" contemplated by a GRO should be treated as more narrow than the full spectrum of activities contemplated for childcare facilities. These facilities are responsible for nearly every aspect of care in the daily lives of these children.

Legislature, as well as the *Flores* Settlement Agreement, and does not require the facilities to comply with the State's Minimum Standards for residential operations."). That approach is nonsensical: the Legislature expressly provided for exceptions to the statewide rules when necessary. TEX. HUM. RES. CODE §§ 42.048(c), .042(j). And neither the Department nor the State is a party to the *Flores* settlement.

For a rule to be invalid, it would need to be contrary to statute. The statute allows exceptions to the rule for local conditions. And the local condition in the facility is that the statewide rules governing General Residential Operations, which were drafted for facilities in which children are cared for without their families, would disallow family groups from being housed together in the same room.

3. The general goals of the Act do not change the analysis.

The district court suggested that the rules are inconsistent with "general principles." Taken on its face, this statement would eviscerate the careful balance in the APA between judicial review of administrative proceedings and the independent powers of the courts.

a. The district court's order sidesteps the limitations on APA judicial review to litigate from the bench.

There is no common-law right to judicial review of administrative actions unless the order adversely affects a vested property right or otherwise violates the constitution. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001). Accordingly, some executive-department actions are unreviewable by the courts, when there is neither a constitutional violation nor a legislative grant of

review. *Gulf Land Co. v. Atl. Ref. Co.*, 134 Tex. 59, 73-74, 131 S.W.2d 73, 82 (1939); TEX. CONST. art. II, § 1. These rules are consistent with the American constitutional presupposition that the government is divided into three branches, and that the courts are the most circumscribed of the three. *See* THE FEDERALIST No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the judiciary ought to be the least powerful branch). The Texas Constitution makes this requirement express. TEX. CONST. art. II, § 1; *In re House Bill No. 537 of the Thirty-Eighth Leg.*, 113 Tex. 367, 368-72, 256 S.W. 573, 573-75 (1923) (stating that the courts' powers are limited and must have a specific source in the Constitution). The Constitution further prohibits courts from issuing injunctive relief to control the acts of executive-department officials within their statutory authority because to do so would result in a suspension of the laws of the State. TEX. CONST. art. I, § 28; *State v. Ferguson*, 133 Tex. 60, 67, 125 S.W.2d 272, 276 (1939).

The APA maintains the constitution's and common law's concern about balancing the respective roles of the judicial and executive departments. For example, the "substantial evidence" rule for agency contested-case determinations not only sets the parameters on a waiver of immunity from suit, *see Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 198 (Tex. 2004), but it embodies a pre-existing common-law standard framed to avoid separation-of-powers problems, *e.g.*, *Fire Dep't of City of Fort Worth v. City of Fort Worth*, 147 Tex. 505, 509-510, 217 S.W.2d 664, 666 (1949). The touchstone of this inquiry is that the court rules on the reasonableness of the body's order, not its correctness. *E.g.*, *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665

S.W.2d 446, 452 (Tex. 1984). If courts were to do more—by resolving policy matters based on their own preferences—the administrative process would be rendered meaningless. Thus, the Supreme Court has struck down statutes requiring more than substantial-evidence review as constituting an overreach of judicial authority. *Davis v. City of Lubbock*, 160 Tex. 38, 59-60, 326 S.W.2d 699, 714 (1959); *Fire Dep't of Fort Worth*, 147 Tex. at 509-510, 217 S.W.2d at 666 (statute requiring trial de novo is unconstitutional unless construed to require substantial-evidence review based on new record made in trial court); *but see Key W. Life Ins. Co. v. State Bd. of Ins.*, 163 Tex. 11, 26, 350 S.W.2d 839, 849-850 (1961) (allowing de novo review when issue was one otherwise entrusted to courts).

In sum, a court does not sit in a purely judicial capacity when it performs judicial review under the APA, but rather applies a set of statutory remedies designed to preserve the balance between the Legislative and Executive Departments. Courts referee the executive determinations before them, rather than issuing directly-binding judgments. *See Farmers & Merchants Ins. Co. v. State Bd. of Ins.*, 321 S.W.2d 354, 357 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.). This distinction prevents the courts from substituting their own assessment of public policy for that of the administrative body. *Key W.*, 163 Tex. at 26, 350 S.W.2d at 849-50 (distinguishing *Farmers & Merchants*, 321 S.W.2d at 357, on this ground).

The district court's order undermines all these principles. Based, in essence, on its own view of the "best interest" of the children, it has rendered a judgment based on factors that are outside the childcare licensing division's knowledge and control. It has thus chosen a policy outcome that is not mandated by statute. And, to add

insult to injury, the district court has acted as a mini-legislature, ordering the division to continue oversight of the facilities even though, according to the district court, it lacks statutory authority to do so. Just as the common law cannot provide a mechanism for the courts to set state policy, so this section 2001.038 proceeding cannot be the catalyst for the district court to impose its policy preferences on the Department and the State of Texas.

b. Under the proper test, the rule and its exceptions withstand judicial scrutiny.

To avoid the type of separation-of-powers problem invoked by the district court's general reference to "the goals" of the statute, there is a specific test for determining the statutory validity of section 748.7. This analysis should apply to plaintiffs' assertions that the exceptions to the rule are barred by the very statute that empowers the Department to make site-specific exceptions to the general state-wide rules.

Plaintiffs suggest that it is appropriate to reverse the rule because one potential motivation for it was "to Help ICE, Not to Help Children." CR.3041. As explained above, putative motive is not the test for a rule's validity. The only analytical question is whether the text of the statute extends to the rule implemented. *E.g.*, *Dupont Photomasks, Inc. v. Strayhorn*, 219 S.W.3d 414, 420 (Tex. App.—Austin 2006, pet. denied) ("In determining whether a rule is valid, we are limited to ascertaining whether the rule is contrary to the relevant statute."). Using section 42.001 as a pretext for looking beyond the text of the statute would violate the separation of powers.

Plaintiffs further suggest that it is legally relevant to this case that, at one time, the Department determined that it did not have jurisdiction over this type of facility but, later, determined that it had such authority. *See* CR.330-33 (citing record evidence affirming that the change in position occurred). But the change in position is immaterial; consistent with the separation of powers, the only proper inquiry is whether the new position is authorized by statute. *E.g.*, *Texas Citizens*, 336 S.W.3d at 625 (indicating that agency cannot be required by court to add additional considerations to a list of considerations that is consistent with statute).

It is, of course, unnecessary to engage in deference in this case, where the plain text of Chapter 42 unambiguously requires the Department to regulate a broad swathe of facilities where child care, including the supervision and instruction of children occurs, without excepting facilities where mothers are present. *See supra*, Part II.B. But to the extent there is ambiguity, the doctrine of "serious consideration" applies. *Tex. Citizens*, 336 S.W.3d at 625. Plaintiffs' summary-judgment argument depends entirely on the presupposition that the new rule extends the Department's regulatory authority into an entirely new area, because the facilities contain so many children. CR.3035. But a change *in scale* is not a change in the type of activity that occurs. By plaintiffs' argument, at some point any daycare could avoid state regulation simply by enrolling a sufficiently large number of children. The Department's conclusion that it has an obligation to regulate such large facilities in more than 12 children are detained for 24-hour periods, given the degree of responsibility the facilities have for resident children, is entitled to serious consideration. If the Department did not believe that the size of these facilities was

an impairment to applying the plain text of the statute, there is no basis for a court to decide otherwise.

B. There Is No Procedural Defect.

Consistent with the APA's concern with the separation of powers, it addresses procedural defects in the administrative process under the "substantial compliance" test. TEX. GOV'T CODE § 2001.033. A challenge under section 2001.033 is limited to the face of the order finally adopting the rule. *E.g.*, *State Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 131 S.W.3d 314, 327 (Tex. App.—Austin 2004, pet. denied) (collecting authority). This is not a substantive challenge: the goal is to determine whether the agency's adoption order gives commenters fair notice of the policy justifications for the rule. *Reliant Energy, Inc. v. Pub. Util. Comm'n of Tex.*, 62 S.W.3d 833, 840 (Tex. App.—Austin 2001, no pet.). The test is met if the four corners of the agency's final notice present the agency's justification in a relatively clear, precise, and logical fashion. *Reliant*, 62 S.W.3d at 840. The order must contain (1) a summary of the comments received, a summary of the factual basis for the rule, and (2) the reasons the agency disagrees with any comments. TEX. GOV'T CODE § 200.033(1). The standard of review is arbitrary and capricious. *Reliant*, 62 S.W.3d at 841. An agency does not act arbitrarily if it considered the relevant factors articulated in the comments and engaged in reasoned decision making. *Id.* An agency rule is arbitrary if it (1) omits a factor, (2) includes an irrelevant factor, or (3) reaches a completely unreasonable result after weighing only relevant factors. *Id.*

1. Plaintiffs fail to articulate reasoned-justification defect.

Plaintiffs have no reasoned justification claim, because they either rely on evidence extrinsic to the order adopting section 748.7 or because they attempt to prevail based only on analysis of the preamble, without looking to the content of the responses to comments. To be clear, their motion for summary judgment does not assert that the adoption statement is, taken as a whole, insufficient to satisfy the substantial-compliance test.

a. The policy arguments in the motion for summary judgment do not make out a viable substantial-evidence claim.

Most of plaintiffs' policy arguments appear to be framed as substantial-compliance claims. Plaintiffs' motion for summary judgment suggests that any provision allowing adults to remain in a bedroom with children over age two violates Chapter 42. CR.3049-50, 3052-53. Likewise, the assertions that the Department failed to obtain information, CR.3051-3, and that it did not address the concern that licensure could potentially prolong detention, CR.3054-55, are substantial-compliance points. Plaintiffs' procedural argument is that, if the court looks at other evidence, presented in comments and in evidence to the court, it will be convinced that the Department should have treated that evidence as dispositive. *E.g.*, CR.3055. ("The record thoroughly establishes that DFPS failed to gather the facts that it would have needed to have determined whether [section 748.7] is in harmony with the Legislature's directive.") Moreover, plaintiffs' argument on this point extends to evidence outside the rulemaking process that seeks to undermine the reasoned justification for the rule. *See* CR.3044-45 (stating that Department's awareness that

the rule would "help[] ICE comply with *Flores*" to maintain these facilities vitiates the reasoned justification for the rule).

These arguments are not properly presented under the substantial-compliance standard: nowhere do plaintiffs identify a particular answer to a comment in the rule adopting section 748.7 as being out of substantial compliance. Rather, the argument is that *other evidence* should sway the court to reach a different policy result. Reasoned justification, however, is limited to the face of the order adopting the rule. *State Office of Public Utility*, 131 S.W.3d at 327. And a section 2001.038 claim cannot address the results of an administrative rule, but only whether that rule applies to a plaintiff, an issue not in question here. *See LMV-AL*, 2017 WL 1315384, at *5-*6. Plaintiffs' various appeals to policy are not proper substantial-compliance claims, because they seek to have the Court displace the Department's policy judgments with its own preferences.

Nor is it a legally cognizable criticism that the Department declines to take into account the fact that its rule prevents the federal government from having to close these facilities under the *Flores* consent decree. The enforcement of the decree and immigration policy general are within the power of the federal courts and the federal executive branch, respectively. An agency is free to disregard comments based on legal questions that are to be resolved by another entity. *E.g.*, *Tex. Citizens*, 336 S.W.3d at 631 (holding that it was not error for agency to disregard additional considerations that were overseen by a different governmental agency).

b. The challenge to the preamble of the adoption order fails because it ignores the rest of the order.

Plaintiffs do attempt to sketch a proper section 2001.033 claim by attacking the order's preamble, in isolation, for asserting that "some regulation is better than no regulation." CR.3059-3062 (invoking *R.R. Comm'n v. ARCO*, 876 S.W.2d 473, 480 (Tex. App.—Austin 1994, writ dism'd)). But the rule is not to be judged on its preamble alone, but on the order as a whole. And the court is not to engage in policy analysis, but only an inquiry into whether the order gives notice of the Board's reasoning and intent. Under that standard, the rule withstands scrutiny.

No court has ever reversed a rule based only on its preamble when reasoned justification for each policy justification was contained in the portions of the order addressing the comments received. *See Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins*, 925 S.W.2d 667, 670 (Tex. 1996) (the board "fails to explain *anywhere* in the order" (emphasis added)). But the preamble succinctly states a rational reason for the rule: it is better for the Department to regulate these facilities and give children the additional protections afforded by licensure, than to leave the facilities unregulated. CR.1523 ("Requiring [the facilities] to comply with all requirements for GROs will be more protective of children than taking no action regarding the provision of child care without a license."); CR.1524 ("The section will function by enhancing the quality of care for children housed in [the facilities]"). Plaintiffs' focus on the preamble alone ignores much of the rule-adoption order, including the answers to comments. *See* CR.1524 (stating that further reasons for the rule are set

out in the responses to comments); CR.1531 (explaining the rationale for adoption in a separate response to comments).

The answers set out in the remainder of the adoption order provide ample support for the rule. The rule's factual basis is that "it appears that the mothers . . . are divested of some or even all of their parental authority." CR.1528. And its policy basis was articulated in the responses to comments. *E.g.*, CR.1525 (agreeing with commenters who stated that "by providing oversight . . . [the Department] would be able to ensure the children's safety and pass on its institutional knowledge of child safety and wellbeing and "play a vital role in identifying and providing services to children and families that are at high risk of human trafficking."). As to the need for regulation despite the presence of mothers in the facility, the order states: "by virtue of being divested of some or all of their authority to direct the daily activities, place of residence, and other aspects of their children's lives, the mothers cannot be considered the sole caregivers as they would be outside the setting." CR.1527. In short, the order articulates that: "licensure is not merely an endorsement of the status quo . . . but would be required to provide evidence of compliance." CR.1525. Licensure, thus, "will be more protective of children than taking no action regarding the provision of child care without a license." CR.1531-32.

The Department's adoption order disagrees with various comments, primarily on the ground that it is irrelevant to the Department's analysis of the scope of its regulatory authority that the federal government has detained people for immigration offenses and that whether to detain people for immigration purposes is outside of the Department's jurisdiction. But that disagreement cannot be the basis

of a section 2001.033 challenge, so long as the Department addressed and rejected the comments in a manner that was neither arbitrary nor capricious.

2. The work group requirement does not apply.

Plaintiffs raise the separate procedural complaint that the Department has not convened a work group to adopt minimum standards for these particular GROs. CR.3056 (citing TEX. HUM. RES. CODE § 42.042(i)). Plaintiffs misunderstand the statute when they argue that section 748.7 "alters the minimum standards applicable to family residential standards." *Id.* Section 42.042 requires a work group when the state-wide minimum standards are imposed. It does not apply when the Department creates case-specific exceptions to the minimum standards. TEX. HUM RES. CODE § 42.042(j).

C. Section 54.011 of the Family Code Does Not Apply.

The Department's statutory authority to regulate these facilities is not impacted by section 54.011, which applies only when a state agency is charged with children alleged to have committed state-law crimes—it does not apply to the federal government's exercise of immigration authority.

Section 54.011 is part of the Texas Juvenile Justice Code. *See* TEX. FAM. CODE tit. 3. That Code applies to cases involving delinquent conduct or proceedings over which the juvenile court of each county has original jurisdiction. *Id.* §§ 51.02(6), .04. There are strict conditions on when a child may be taken into custody. *Id.* § 52.01. The Code does not purport to give the federal government power to take custody of children for immigration purposes—the custody contemplated by the Code applies to state or local law.

Once a juvenile is in state custody, the Code requires an initial detention hearing. *Id.* §§ 51.02(5), 54.01. Section 54.011 governs the hearing procedures for two categories of juveniles in detention: "status offenders" and "nonoffenders." *Id.* § 54.011; *see id.* § 51.02 (defining both terms). Those two categories of child must be released unless certain exceptions are met. *Id.* § 54.011(a). Section 54.011(f) makes clear that a nonoffender, including a child held solely for the purpose of deportation, may not be held "in a secure detention facility or a secure correctional facility." *Id.* § 54.011(f).[17]

Thus, the prohibition invoked by plaintiffs is not on the detention of children generally, but on the continued detention of children who have been released from custody under the presumption of release set out in section 54.01(a). Because the children in the facilities have been not been detained and then released under section 54.01, the prohibition on further detention in section 54.011(f) cannot apply.[18]

And even if section 54.011(f) of the Juvenile Justice Code applied in this general context, the centers facilities would not be "secure" within the meaning of the statute. "Secure" is a defined statutory term, and is not subject to an ordinary-

[17] When immigration status becomes an issue in a juvenile-justice case, the Texas Juvenile Justice Department will not detain an undocumented foreign national but will instead transfer custody to the federal government. 37 TEX. ADMIN. CODE § 380.8535.

[18] Plaintiffs' position is also logically incoherent. Under it, Dilley and Karnes could house children under 10 years old, because the prohibition in section 54.011 applies only to "nonoffenders," TEX. FAM. CODE § 54.011(f), and the Juvenile Justice Code applies only to children who are between 10 and 17 years old, *id.* § 51.02(2)(A). Given that plaintiffs' articulated injury is the fact of federal detention, a statutory argument that there is authority to detain children under 10, but not over 10, makes no sense.

language construction. The term "secure detention facility" means any public or private residential facility that (1) includes fixtures designed to physically restrict the movements and activities of juveniles and is used for the temporary placement of any juvenile accused of having committed an offense, any nonoffender, or any other individual accused of having committed a criminal offense. *Id.* § 51.02(14). And the term "secure correctional facility" includes construction fixtures designed to physically restrict the movements and activities of juveniles within the facility or other individuals held in lawful custody in the facility and is used for the placement of a juvenile adjudicated as having committed an offense." *Id.* § 51.02(13). While there are controls over who enters and who exits at these facilities, controlled access and departure from a facility is a common practice at GROs. CR.1598:14-1599:12. And rightly so, given the need to protect children from kidnapping and abuse generally. Apart from the controlled entrance and exit, however, the children in the detention facility are not "controlled" by construction features, as they are allowed to play freely and engage in the activities provided by the facilities. CR.1544:15-21, CR.1551:1-15. And no one disputes that the majority of children are released from the centers to pursue their asylum cases free from confinement. CR.1535:5-25.

* * *

At heart, plaintiffs' case is that children accompanied by their mothers should not be detained for immigration violations . . . period. But that is a determination beyond the scope of either this Court or the Department to make. The only pertinent legal question is whether the rule comports with the various statutes. And because it

does, the district court's order invalidating section 748.7 should be reversed and the Court should render judgment that section 748.7 is valid.

III. Even If Section 748.7 Were Invalid, the District Court's Issuance of an Injunction Requiring the Department To Violate the District Court's Own Construction of the Statute Was Error.

If a court strikes down an administrative rule whose adoption is a predicate to enforcement of the law, the default rule is that the rule remains in effect until the procedural defects are cured. TEX. GOV'T CODE § 2001.040. It was precisely because such instantaneous invalidation could cause disorder that the Legislature expressly allows procedurally-invalid rules to remain in place even if they are struck down in a lawsuit. *See, e.g.*, *All Saints Health Sys. v. Tex. Workers' Comp. Comm'n*, 125 S.W.3d 96, 100 (Tex. App.—Austin 2003, pet. denied) (describing predecessor statute to § 2001.040 as providing court power to render rule inoperable immediately). Allowing injunctive relief following a rule invalidation would be contrary to the plain text of the APA. There is no need for injunctive relief, and it is not mentioned as a form of relief available under the APA.[19]

There is an easier defect to address. Under Third Court precedent, an injunction following a final judgment must be specifically pleaded and cannot properly be entered following a general prayer. *E.g.*, *Shields v. State*, 27 S.W.3d 267, 271 (Tex. App.—Austin 2000, no pet.) ("Persons seeking a permanent injunction must be

[19] While the Third Court has allowed some injunctive relief to issue in APA cases, it has never allowed such relief outside the temporary-injunctive context. Given that section 2001.038 is a waiver of sovereign immunity and must be strictly construed, *Kidd*, 481 S.W.3d 388, 394, it stands to reason that equitable relief would not be available after a final judgment declaring a rule invalid.

specific in pleading the relief sought . . . ."); *Gause v. Gause*, 430 S.W.2d 409, 413 (Tex. Civ. App.—Austin 1968, no writ) (permanent injunction must be sought in special prayer). Plaintiffs did not seek the injunction the district court issued. *See* CR.3064-65 (seeking to enjoin future licensing of facilities, rather than an injunction requiring the Department to regulate). Therefore, it is improper.

But putting aside the easy procedural answer, the district court's mandatory injunction is an attempt to exercise a law-making power that runs contrary to its own determination that the Department lacks statutory authority to adopt section 748.7. If, as the District Court determined, it was improper to adopt the rule at all, then there is no statutory basis for the Department to continue the oversight activities it performs for facilities to which it issues licenses. Agencies lack authority not granted them by statute. The Department has authority to investigate and oversee the facilities if, but only if, it is statutorily authorized to issue them licenses.

In short, the district court ordered the Department to violate the District Court's own construction of the relevant statutes. That makes no sense.

Nor does the scope of section 2001.038 contemplate prospective orders setting policy. It is limited to the "applicability" of a rule and does not extend to that rule's application. TEX. GOV'T CODE § 2001.038; *see LMV-AL*, 2017 WL 1315384, at *5-*6. Because a particular application of a rule is outside the scope of the court's authority under section 2001.038's waiver of sovereign immunity, it makes no sense that the court could fashion a remedy that sought to control particular behavior outside the scope of a rule the Court has already held to be invalid.

* * *

Much has been made to this point about whether section 748.7 comports with the ultimate purpose of Chapter 42 of the Human Resources Code. That question already has an answer: by concluding that regulatory oversight was so beneficial that it had to continue after the declaration that the Department lacked authority to regulate, the district court has twice confirmed that the Department's actions fulfill the ultimate goal of keeping children safe through the regulation and monitoring of facilities charged with their care.

Prayer

The Court should reverse the judgment of the district court and render judgment that the challenged rules are valid. It should vacate the injunction.

Respectfully submitted.

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No. 08-16-00334-CV

In the Court of Appeals for the Eighth Judicial District El Paso, Texas

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; HENRY WHITMAN, IN HIS OFFICIAL CAPACITY AS DFPS COMMISSIONER; TEXAS HEALTH AND HUMAN SERVICES; AND CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS HHSC EXECUTIVE COMMISSIONER; CORRECTIONS CORP. OF AMERICA; THE GEO GROUP

Appellants,

v.

GRASSROOTS LEADERSHIP, INC., GLORIA VALENZUELA, E.G.S., FOR HERSELF AND AS NEXT FRIEND FOR A.E.S.G.,

Appellees.

On Appeal from the
353rd Judicial District Court, Austin County

APPENDIX

Tab

1. Amended Final Judgment .... A
2. Statutes and Administrative Rules .... B

Tab A: Amended Final Judgment

Filed in The District Court
of Travis County, Texas

DEC 16 2016 55
At 4:15 P M.
Velva L. Price, District Clerk

No. D-1-GN-15-004336

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

AMENDED FINAL JUDGMENT

This case involves a challenge under TEX. GOV'T CODE § 2001.038, also known as the Administrative Procedure Act (APA), to the regulation adopted by the Texas Department of Family and Protective Services and published in the Texas Register at Title 40, Part 19, Chapter 748, Subchapter A, Rule § 748.7 (effective March 1, 2016), 41 Tex. Reg. 1493-1502 (Feb 26, 2016) (hereinafter referred to as the "FRC Rule"). On December 2, 2016, the Court signed a Final Judgment in this cause. On December 5, 2016, the Court considered Plaintiffs' Motion to Prevent Automatic Suspension of Judgment Pending Appeal (the "Motion to Prevent").

At the hearing on Plaintiffs' Motion to Prevent, Defendants notified the Court of their intent to: (1) perfect an appeal and automatically supersede the Court's Final Judgment; (2) issue a license under the FRC Rule to The South Texas Family Residential Center in Dilley, Texas ("Dilley") operated by Intervenor CCA; and (3) give full force and effect to the license

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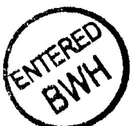

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previously issued under the FRC Rule to the Karnes County Residential Center in Karnes City, Texas ("Karnes") operated by Intervenor GEO Group.

After reviewing Plaintiffs' Motion to Prevent, the arguments and supplemental briefing of the parties, and the applicable law, the Court ORDERS that the Final Judgment of December 2, 2016 is vacated and substituted by this Amended Final Judgment.

I. Factual Background.

On July 11, 1985, a class of plaintiffs initiated a lawsuit against U.S. Immigration and Customs Enforcement (ICE) and other defendants in the District Court of Central California. *Flores v. Johnson*, CV 85-4544 DMG (C.D. Cal). On January 28, 1997, the parties entered into a court-approved settlement of the lawsuit (the "*Flores* Settlement Agreement"). The *Flores* Settlement Agreement provided that, if a minor is not released, the minor shall be placed temporarily in an unsecure and licensed program. The *Flores* Settlement Agreement defines a "licensed program" as a "program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children . . . ." The *Flores* Settlement Agreement further required that the licensed program:

- treat all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors;
- place each detained minor in the least restrictive setting appropriate to the minor's age and special needs;
- provide safe and sanitary facilities; and
- segregate unaccompanied minors from unrelated adults.

In 2014, ICE began detaining immigrant women and children in the Karnes and Dilley facilities. Both facilities are secure detention facilities. Unlike daycares, foster homes, domestic

violence shelters, residential treatment centers or Office of Refugee Resettlement contracted shelters for unaccompanied minors, Karnes and Dilley are designed to hold women and children in secure custody in order to execute federal immigration law enforcement purposes. The women and children held at Karnes and Dilley, including several individual Plaintiffs who testified before this Court, arrived at the family detention centers under final deportation orders by the United States Government.

Defendant DFPS did not attempt to regulate family residential centers in Texas until it adopted an emergency rule (the "Emergency Rule") on September 2, 2015. Before that time, Defendant DFPS had historically and consistently acknowledged that it lacked authority to license family detention centers and declined to do so based upon that lack of authority.

On September 30, 2015, Plaintiff Grassroots Leadership, Inc. initiated this lawsuit to challenge the Emergency Rule. On November 20, 2015, the Court issued a Temporary Injunction prohibiting Defendant DFPS from implementing the Emergency Rule. In the Temporary Injunction, this Court cited its concerns with the Emergency Rule, namely that the Emergency Rule removed the FRC's obligations to comply with the following current Minimum Standards for General Residential Operations that pertain to the safety and welfare of children: (i) limitations on room occupants; (ii) children sharing a room with an adult that may be unrelated; and (iii) children sharing a room with children of the opposite gender. However, the Court expressly permitted DFPS to proceed through the traditional rulemaking procedures outlined in TEX. GOV'T CODE §§ 2001.023 and 2001.029.

DFPS followed the procedures for rulemaking and the FRC Rule was subsequently adopted by the Texas Department of Family and Protective Services and published in the Texas Register on Feb 26, 2016. DFPS promptly licensed Intervenor The GEO Group's license for

Karnes under the FRC Rule in March of 2016. Intervenor CCA's application for the Dilley license under the FRC Rule is currently pending. On May 3, 2016, Plaintiffs filed their Second Amended Petition to challenges the FRC Rule under the APA.

The FRC Rule, like the Emergency Rule, removes the family residential centers' obligation to comply with the legislatively mandated General Residential Operations ("GRO") Minimum Standards regarding the safety and welfare of minors. Accordingly, on June 3, 2016, the Court issued a Temporary Injunction enjoining Defendants' implementation of the FRC Rule but requiring Defendant DFPS to continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation of rule of law at Dilley and Karnes during the pendency of the Temporary Injunction.

II. Defendants' Third Amended Plea to the Jurisdiction.

After considering Defendants Texas Department of Family and Protective Services ("DFPS"), Texas Health and Human Services Commission ("HHSC"), and their Commissioners' (collectively "Defendants") Third Amended Plea to the Jurisdiction (the "Plea to the Jurisdiction"), the Court is of the opinion that the Plea to the Jurisdiction should be GRANTED in part and DENIED in part as follows:

A. IT IS ORDERED that Defendants' Plea to the Jurisdiction is GRANTED as to Plaintiffs' claims under the Uniform Declaratory Judgment Act and for the recovery of attorney's fees under the Uniform Declaratory Judgment Act and TEX. CIV. PRAC. & REM. CODE § 37.009;

B. IT IS THEREFORE ORDERED Plaintiffs' claims under the Uniform Declaratory Judgment Act and for the recovery of attorney's fees under the Uniform Declaratory

Judgment Act and TEX. CIV. PRAC. & REM. CODE § 37.009 are DISMISSED with prejudice; and

C. IT IS ORDERED that Defendant's Plea to the Jurisdiction is DENIED as to all remaining grounds.

III. Parties' Cross-Motions for Summary Judgment.

By agreement of the parties, the Court accepted the following Cross-Motions for Summary Judgment regarding the validity of the FRC Rule by submission:

A. Plaintiffs' Motion for Summary Judgment;

B. Defendants' Motion for Summary Judgment;

C. Intervenor Corrections Corporation of America's ("CCA") Motion for Summary Judgment; and

D. Intervenor The GEO Group's ("GEO") Motion for Summary.

After reviewing the parties' Cross-Motions for Summary Judgment and responses thereto, the evidence presented and objections thereto, the pleadings on file, and the applicable law, IT IS ORDERED, ADJUDGED, AND DECLARED that:

A. Plaintiffs' Motion for Summary Judgment on Plaintiffs' claim for declaratory relief under the APA is GRANTED;

B. The FRC Rule contravenes TEX. HUM. RES. CODE § 42.002(4) and runs counter to the general objectives of the Texas Human Resources Code and is, therefore, invalid;

C. Defendants' Motion for Summary Judgment is DENIED;

D. Intervenor GEO Group's Motion for Summary Judgment is DENIED; and

E. Intervenor Correction Corporation of America's Motion for Summary Judgment is DENIED.

IV. Injunctive Relief and Denial of Automatic Supersedeas.

The Court FINDS that allowing Defendants to automatically supersede the Court's ruling that the FRC Rule is invalid would render the relief granted by this Amended Final Judgment ineffective and Plaintiffs would suffer imminent and irreparable harm because money damages are unavailable against the state agency and, unless the *status quo* is maintained during the pendency of the appeal, Plaintiffs will be deprived of their statutory rights to protection that the Legislature has afforded children in the state minimum standards as follows:

A. Licensure under the FRC Rule would permit variances or exceptions to the legislatively mandated GRO requirements. The variances or exceptions substantially endanger children by:

1. Permitting children to share a bedroom with others at a number that exceeds maximum standards;
2. Permitting children to share bedrooms with an unrelated adult;
3. Permitting children over the age of three to share a bedroom with an unrelated adult; and
4. Permitting unrelated children of different genders to share a bedroom;

B. Licensure under the FRC Rule will facilitate longer periods of detention of the mothers and children detained at Karnes and Dilley, which hurts children by subjecting them to psychological and/or physiological trauma and deprivation of freedom of action.

The FRC Rule provides for exemptions to our State Minimum Standards that run counter to the objectives of the Texas Legislature, as well as the *Flores* Settlement Agreement, and does

not require the facilities to comply with the State's Minimum Standards for residential operations.

As outlined above, this Court has declared the FRC Rule is invalid. During the pendency of any appeal of this Court's ruling, the Court FINDS it is in the best interest of the children detained by the federal government and housed at Karnes and Dilley that the State of Texas continue to provide regular and comprehensive oversight consistent with the minimum standards required by the State of Texas through: (i) unannounced state inspections to ensure the facility complies with existing state minimum standards; (ii) mandatory background checks on all employees working at the facility; (iii) public hearings; (iv) staff training; and (v) investigation of claims of abuse and neglect.

Accordingly, Defendants, and all of their officials, agents, servants, employees, and attorneys be and hereby are ORDERED to refrain from issuing licenses under the FRC Rule until the Court of Appeals issues a decision on appeal or further Order of the Court.

Defendants are FURTHER ORDERED to continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation(s) of rule of law at Karnes and Dilley during the pendency of any appeal of this Court's ruling.

IT IS ORDERED that Intervenor CCA and Intervenor GEO Group shall cooperate with Defendants and shall not impede Defendants' efforts to conduct its investigative and regulatory functions at Dilley and Karnes through: (i) scheduled and/or unannounced state inspections to ensure that the facilities comply with existing state minimum standards; (ii) background checks on all employees working at the facilities; (iii) staff training; and (iv) investigation of claims of abuse of the children and mothers and/or neglect of children.

The injunction is necessary to preserve the *status quo* and to allow Defendants the ability to continue regulatory and protective functions for the benefit of children detained at Karnes and Dilley until the challenge to the FRC Rule proceeds through appeal.

IT IS FURTHER ORDERED, in accord with Texas Rule of Appellate Procedure 24.2(a)(3), that the Court DECLINES to permit the Amended Final Judgment to be superseded, and that Plaintiffs shall deposit $500.00 into this Court's registry, which shall serve as security for this Court's Order declining to permit the Amended Final Judgment to be superseded. This bond is sufficient because Defendants will not suffer any loss or damage as a result of the relief granted in this Amended Final Judgment.

IT IS FURTHER ORDERED that the $100.00 bond that Plaintiffs previously deposited as security for this Court's Temporary Orders may be applied to the $500.00 security.

All costs are assessed against each party incurring the same.

This Final Judgment disposes of all parties and claims and is a final and appealable judgment.

SIGNED on this the 16th day of December 2016.

JUDGE PRESIDING
KARIN CRUMP

Tab B: Statutes and Administrative Rules

Texas Human Resources Code

§ 42.002 Definitions

(3) "Child-care facility" means a facility licensed, certified, or registered by the department to provide assessment, care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit or charges for the services it offers.

(4) "General residential operation" means a child-care facility that provides care for more than 12 children for 24 hours a day, including facilities known as children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps.

Texas Family Code

§ 51.02 Definitions

(8) "Nonoffender" means a child who:

> (A) is subject to jurisdiction of a court under abuse, dependency, or neglect statutes under Title 52 for reasons other than legally prohibited conduct of the child; or
>
> (B) has been taken into custody and is being held solely for deportation out of the United States.

(14) "Secure detention facility" means any public or private residential facility that:

> (A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility; and
>
> (B) is used for the temporary placement of any juvenile who is accused of having committed an offense, any nonoffender, or any other individual accused of having committed a criminal offense.

(15) "Status offender" means a child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult, including:
  (A) running away from home under Section 51.03(b)(2);
  (B) a fineable only offense under Section 51.03(b)(1) transferred to the juvenile court under Section 51.08(b), but only if the conduct constituting the offense would not have been criminal if engaged in by an adult;
  (C) a violation of standards of student conduct as described by Section 51.03(b)(4);
  (D) a violation of a juvenile curfew ordinance or order;
  (E) a violation of a provision of the Alcoholic Beverage Code applicable to minors only; or
  (F) a violation of any other fineable only offense under Section 8.07(a)(4) or (5), Penal Code, but only if the conduct constituting the offense would not have been criminal if engaged in by an adult.

§ 54.011. Detention Hearings for Status Offenders and Nonoffenders; Penalty

(a) The detention hearing for a status offender or nonoffender who has not been released administratively under Section 53.02 shall be held before the 24th hour after the time the child arrived at a detention facility, excluding hours of a weekend or a holiday. Except as otherwise provided by this section, the judge or referee conducting the detention hearing shall release the status offender or nonoffender from secure detention.

(b) The judge or referee may order a child in detention accused of the violation of a valid court order as defined by Section 51.02 detained not longer than 72 hours after the time the detention order was entered, excluding weekends and holidays, if:

  (1) the judge or referee finds at the detention hearing that there is probable cause to believe the child violated the valid court order; and

  (2) the detention of the child is justified under Section 54.01(e)(1), (2), or (3).

(c) Except as provided by Subsection (d), a detention order entered under Subsection (b) may be extended for one additional 72-hour period, excluding weekends and holidays, only on a finding of good cause by the juvenile court.

(d) A detention order for a child under this section may be extended on the demand of the child's attorney only to allow the time that is necessary to comply with the requirements of Section 51.10(h), entitling the attorney to 10 days to prepare for an adjudication hearing.

(e) A status offender may be detained for a necessary period, not to exceed the period allowed under the Interstate Compact for Juveniles, to enable the child's return to the child's home in another state under Chapter 60.

(f) Except as provided by Subsection (a), a nonoffender, including a person 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. A nonoffender who is detained in violation of this subsection is entitled to immediate release from the facility and may bring a civil action for compensation for the illegal detention against any person responsible for the detention. A person commits an offense if the person knowingly detains or assists in detaining a nonoffender in a secure detention facility or secure correctiional facility in violation of this subsection. An offense under this subsection is a Class B misdemeanor.

40 Tex. Admin. Code

§ 748.7 How are these regulations applied to family residential centers?

(a) Definition. A family residential center is one that meets all of the following requirements:

(1) The center is operated by or under a contract with United States Immigration and Customs Enforcement;
(2) The center is operated to enforce federal immigration laws;
(3) Each child at the center is detained with a parent or other adult family member, who remains with the child at the center; and

(4) 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.

(b) Classification. A family residential center is a general residential operation (GRO) and must comply with all associated requirements for GROs, unless the family residential center is approved for an individual waiver or variance or an exception is provided in this section. The department is responsible for regulating the provision of childcare as authorized by Chapters 40 and 42, Texas Human Resources Code and Chapter 261, Texas Human Resources Code. 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.

(c) Exceptions. A family residential center is not required to comply with all terms of the following Minimum Standards:

(1) the limitation of room occupants to four in §748.3357 of this title (relating to What are the requirements for floor space in a bedroom used by a child?), except that nothing in this exception shall be construed to require fewer than 60 square feet per child;
(2) the limitation on a child sharing a bedroom with an adult in §748.3361 of this title (relating to May a child in care share a bedroom with an adult?), if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member; and
(3) the limitations on children of the opposite gender sharing a room in §748.3363 of this title (relating to May children of opposite genders share a bedroom?), except that nothing in this exception shall be construed to permit children from different families who are over the age of six and members of the opposite gender to share a bedroom.

(d) Limitation of exception. Notwithstanding subsection (c) of this section, and as further described in §745.8313 of this title (relating to Is a waiver or variance unconditional?), the department retains the authority for placing conditions on the scope of the exceptions authorized for a family residential center, including conditions related to limiting occupancy in accordance with fire safety standards, limitations related to allowing children and adults of the

opposite gender to occupy the same room only if they are part of the same family, and any other limitation determined by the department to be necessary to the health, safety, or welfare of children in care.

(e) Division of responsibility. In addition to the application materials described in §745.243(6) of this title (relating to What does a completed application for a permit include?), an applicant for a license under this section must submit the policies, procedures, and any other documentation that the department deems necessary to clarify the division of supervisory and caretaking responsibility between employees of the facility and the parents and other adult family members who are housed with the children. The department must approve the documentation during the application process and any subsequent amendments to the policies and procedures.