No. 08-16-00334-CV

In The Court Of Appeals
For The Eighth Court Of Appeals 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, AND THE GEO GROUP, INC.,

Appellants

V.

GRASSROOTS LEADERSHIP, INC., GLORIA VALENZUELA, E.G.S., FOR HERSELF AND AS NEXT FRIEND FOR A.E.S.G., F.D.G., FOR HERSELF AND AS NEXT FRIEND FOR N.R.C.D., Y.E.M.A., FOR HERSELF AND AS NEXT FRIEND FOR A.S.A., ET AL.,

Appellees.

FROM THE 353RD DISTRICT COURT, TRAVIS COUNTY, TEXAS
CAUSE NO. D-1-GN-15-004336, HONORABLE KARIN CRUMP, PRESIDING

REPLY BRIEF OF APPELLANT THE GEO GROUP, INC.

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INTRODUCTION [1]

GEO operates the Karnes County Family Residential Center ("Karnes"), which houses mothers with minor children who are seeking asylum after crossing the U.S. border. CR 1774. The minors agreed in the *Flores* Settlement that state agencies could license facilities where they reside if those agencies typically regulate residential care for children. CR 205, 217. In Texas, the agency that regulates such care is the Department of Family and Protective Services ("DFPS"). Tex. Hum. Res. Code § 42.001. DFPS issued "the FRC Rule," through which DFPS licensed Karnes. CR 730, 1729-38.

According to Plaintiffs, their challenge to the FRC Rule has little to do with their admitted desire to change the federal government's immigration policy. Appellee's Brief at 1. Instead, they insist the issues here "are the length and conditions of children's detention." *Id.* But the length of detention is uniquely within the control of the federal government and entirely dependent on the federal government's immigration policy.

While it may seem harsh, Plaintiffs are not entitled to like the conditions under which they live; no Texas law gives them the privilege of dictating their residential conditions when confined pursuant to federal law. As DFPS noted when adopting the FRC Rule, some regulation is better than no regulation. CR 472-73.

[1] For a full list of abbreviations, see GEO's glossary in its opening brief.

Plaintiffs conceded as much when they acquiesced to state licensure in the *Flores* Settlement without putting conditions on that licensure.

Much of Plaintiffs' brief is based on emotionally laden facts, facts that were controverted in the court below and that are therefore insufficient to support summary judgment in Plaintiffs' favor. Additionally, Plaintiffs have no explanation for the internally conflicting judgment. The trial court declared the FRC Rule to be invalid and incapable of supporting licensure. 1SCR 7, 8. Yet the trial court granted an injunction compelling DFPS to regulate the Karnes and Dilley facilities as if they were in fact licensed pursuant to the FRC Rule. 1SCR 8. The judgment cannot stand and must be reversed and rendered in favor of DFPS and the FRCs.

ARGUMENT

I. PLAINTIFFS LACK STANDING.

To have standing, Plaintiffs must have a concrete injury related to the FRC Rule, but none of the Plaintiffs do so.

A. Gloria Valenzuela has no standing.

On appeal, Gloria Valenzuela relies on her pleaded allegations to satisfy the standing requirement. Appellees' Brief at 24. Her allegations, however, were insufficient to prove standing at the time of the summary judgment. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("[A]llegations of possible future injury do not satisfy the requirements of Art. III."); *Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000) (illustrating that pleading allegations

must be proven at the time of trial); *Wright v. Sydow*, 173 S.W.3d 534, 554 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (describing summary judgment as a summary trial).

Additionally, Valenzuela's testimony regarding reputational injury is conclusory, hypothetical, and insufficient to support standing. *Compare* CR 551, 2426 *with Okonite Co., Inc. v. Dallas Area Rapid Transit Auth.*, 05-95-00692-CV, 1996 WL 429306, at *4 (Tex. App.—Dallas July 24, 1996, no writ) (finding no standing when reputational injury is merely conjectural). Because Valenzuela has ***no*** impaired legal right or privilege here, she has no standing.

B. Grassroots has no standing.

On appeal, Grassroots claims organizational standing based on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), and its progeny. Appellees' Brief at 26. *Havens* involved standing under the Fair Housing Act. 455 U.S. at 379. No Texas court has applied *Havens*' theory of organizational standing to any Texas statute, much less the Administrative Procedure Act applicable to the FRC Rule's adoption.

The Supreme Court's interpretation of a federal statute's standing requirements does ***not*** determine the scope of standing provided by a Texas statute. "Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." *Midpeninsula Citizens for Fair Hous. v. Westwood Inv'rs*, 271 Cal. Rptr. 99, 104

(Ct. App. 1990) (rejecting *Havens* standing); *see also Schecter v. Wildwood Developers, L.L.C.*, 214 S.W.3d 117, 121 (Tex. App.—El Paso 2006, no pet.) (holding that the statute at issue provides the framework for standing). There is no organizational standing under the APA. *See* Tex. Gov't Code § 2001.038(a).

The standing of Grassroots simply cannot be based on funds spent on this litigation or on Grassroots' contention that its advocacy was frustrated. *See, e.g.*, *Assoc. for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr.*, 19 F.3d 241, 244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."); *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 24-25 (D.C. Cir. 2011) (explaining that neither impact on advocacy or self-inflicted budgetary choices are sufficient to confer standing).

Grassroots also claims that standing arises from DFPS's alleged failure to give an "adequate justification" for rejecting Grassroots' objections. Appellees' Brief at 27. The objections are not part of the record, but the rule itself responds to the comments from Grassroots. 41 Tex. Reg. 1493, 1495-1502 (Feb. 26, 2016).

Grassroots has no legal right to what it considers a perfect response. *See, e.g., Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 131 S.W.3d 314, 330 (Tex. App.—Austin 2004, pet. denied) (illustrating that an agency offers a reasoned justification even if it "did not present [objector's] comments as fully as it might

have"); Tex. Gov't Code § 2001.033(a)(1); *see also McCarty v. Texas Parks & Wildlife Dept.*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ) (holding that the "rule need not be wise, desirable, or even necessary").

Besides, Grassroots' purported basis for standing would allow anyone to complain about the FRC Rule, contrary to the plain terms of the APA. *See* Tex. Gov't Code § 2001.038(a) (requiring the rule to impair "a legal right or privilege of the plaintiff"); *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 174-75 (Tex. App.—Austin 2013, no pet.) (explaining that citizens generally lack standing to challenge the lawfulness of government action). Grassroots itself must show injury arising from the rule, and it cannot do so.

C. Immigrant Plaintiffs have no standing.

The mothers and minor children claim standing based on their belief that the "FRC Rule affects the length and conditions" of confinement. Appellees' Brief at 21. This belief is mistaken, even if length and condition of confinement were a right or privilege to which Immigrant Plaintiffs were entitled.

In the trial court, Plaintiffs conceded the average length of stay at Karnes has decreased under the FRC license. CR 3032 (chart). On appeal, Plaintiffs cite *Flores v. Lynch*, 828 F.3d 898, 903 (9th Cir. 2016), for their supposition that a FRC "license opens the door to longer detention periods for minors." Appellees' Brief at 21, 23.

The *Flores* court noted that the federal government should transfer minors to a licensed program within five days or, in event of an emergency or influx of minors, "as expeditiously as possible." *Flores*, 828 F.3d at 902-03. The court did ***not*** say that minors must be immediately released in the absence of a licensed facility. That issue has not been litigated, and cannot be litigated in this APA case. Ultimately, the length of detention is determined not by licensure but by decisions of the federal government. *See id.*; 8 C.F.R. § 236.3 (release policy).

While GEO may have initially speculated about the length of detention under the federal government's control, the program at Karnes did ***not*** prolong the length of stay while licensed under the FRC Rule. CR 1137, 1689-91; 3CR 92. Thus, the existence of the FRC Rule did not make longer periods of detention possible. If Plaintiffs are harmed, they are harmed by federal immigration policy, not by DFPS's action in adopting the FRC Rule. *Southwest Pharmacy Sols., Inc. v. Tex. Health & Hum. Servs. Comm'n*, 408 S.W.3d 549, 565 (Tex. App.—Austin 2013, pet. denied) (holding that appellees did not have standing to assert a rule challenge because their losses resulted from legislative changes).

Plaintiffs also contend that the FRC Rule affects the conditions under which they live, citing an alleged case of sexual assault. Appellees' Brief at 21 (citing CR 3386). Officials could not confirm the allegations. RR2:220; 3CR 1472. The fact of licensure actually allowed DFPS to investigate where otherwise it would not have jurisdiction. RR2:220. Significantly, the family involved was released

long before judgment was rendered, and there was no evidence the event would likely occur again.[2] *See id.*; CR 4132.

At its core, Plaintiffs' complaint about conditions made possible by the FRC Rule is an attempted end run around the *Flores* Settlement, where the minor plaintiffs sought and received state licensure. CR 1143. Their settlement does not include any specific conditions of licensure, although they reasonably should have known each state would have unique requirements and might adopt requirements tailored for future circumstances like the FRCs.

II. PLAINTIFFS' CLAIMS ARE MOOT.

The Immigrant Plaintiffs admit they were "released," but insist they were paroled. Appellees' Brief at 28. But there is no evidence (as opposed to mere pleading) that they were paroled or released on bond. *See, e.g.*, CR 1133, 1553; 3CR 34, 228. They may have been released to legal status. 3CR 303. If Immigrant Plaintiffs were subject to re-detention, there is no evidence they would be sent to the Texas FRCs as opposed to those located elsewhere. CR 3591; 3CR 270.

Additionally, adoption of the FRC Rule was a one-time event and cannot be the subject of an exception to the mootness doctrine, either capable of repetition or public interest. *See, e.g., Coburn v. Moreland*, 433 S.W.3d 809, 826 (Tex. App.—Austin 2014, no pet.) (rejecting the capable of repetition exception when there was

[2] Ironically, Plaintiffs complain that "bedroom rules" at Karnes put them in danger while security measures transform Karnes into a "prison." *Compare* Appellees' Brief at 21 *with id.* at 13 & 51. The evidence (and common sense) dictate that locks and other common security measures do no such thing. *See* CR 1772.

only a theoretical possibility that the same action would be repeated); *Hutto Citizens Group v. Cty. of Williamson*, 03-08-00578-CV, 2009 WL 2195582, at *3 (Tex. App.—Austin July 23, 2009, no pet.) (rejecting application of the public interest exception when contracts were isolated incidents). Plaintiffs do not identify any detainee who has been returned to Karnes after release while this lawsuit has been pending. Thus, the claims of Immigrant Plaintiffs are also moot.

III. ESTOPPEL BARS THE PLAINTIFFS' CLAIMS.

Plaintiffs contend it is paradoxical that GEO sought a state license when its contract with ICE required compliance with regulations for residential care programs. *See, e.g.,* Appellees' Brief at 43. First, Plaintiffs have no evidence concerning the terms of GEO's contract. *See* 3CR 893, CR 4055-57; RR4:160-62. Second, it is Plaintiffs' pursuit of this APA litigation that is paradoxical.

Plaintiffs are admittedly members of the *Flores* Settlement class that agreed immigration facilities should be state licensed. CR 1143. To avoid their agreement, they now argue that the *Flores* litigation does not require them to accept an "*illegally* licensed facility." Appellees' Brief at 58 (emphasis original). But Plaintiffs are not simply challenging the ***method*** of the FRC Rule's adoption. Instead, they more broadly argue that "DFPS has ***no*** authority to license facilities where children reside with their parents." Appellees' Brief at 18 (emphasis added); *see also id.* at 33-48.

In making this broad argument about the authority of DFPS, Plaintiffs seek more relief than they received in the trial court's judgment. The judgment acknowledges that DFPS has the authority to license FRCs. 1SCR 8-9 (finding the FRC Rule invalid because it contains exceptions to state-wide rules for general residential operations). Because Plaintiffs did not file a notice of appeal, they have waived their broad argument that DFPS lacks any authority to regulate FRCs. Tex. R. App. P. 25.1(c).

Moreover, Plaintiffs already conceded that DFPS is the "State agency to provide residential, group, or foster care services for dependent children;" that is, the exact state agency required by the *Flores* Settlement to license the FRCs. CR 88, 1133 (¶ 5). Plaintiffs' broad position in this case (to the extent it can be raised at all) is completely at odds with their settlement agreement and is therefore barred by judicial estoppel. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000); *Bexar Metro. Water Dist. v. City of San Antonio*, 228 S.W.3d 887, 895-96 (Tex. App.—Austin 2007, no pet.). Accordingly, the district court's judgment should be reversed and rendered in favor of DFPS and the FRCs.

IV. PLAINTIFFS MISCONSTRUE THE MEANING OF CHILD CARE.

Plaintiffs concede that DFPS has authority to license child care, but they insist child care can only be provided to children in the complete absence of their parents. *See, e.g.,* Appellees' Brief at 34-38. That may be true under typical

circumstances, but mothers crossing the U.S. border to seek asylum based on credible fears in their own countries are not living in typical circumstances.

While the mothers are detained pursuant to federal immigration policy, they are not able to exercise the full range of parental rights and are reliant on others to provide for their own basic needs and those of their children. CR 1543; 3CR 150, 468-69, 476-77, 502-03. The situation cannot be compared to parents who are shopping at the grocery or visiting at a hospital, which the Plaintiffs make the subject of hypotheticals.[3] *See* Appellees' Brief at 42-43. The immigrant mothers are more like those mothers enrolled in prison nursery programs where detainees live with their minor children.

It is hardly surprising that, in light of the minors' request for licensure and the existence of the *Flores* Settlement, DFPS would find that Karnes is a child care facility. *See Wilder v. Bernstein*, 848 F.2d 1338, 1348 (2d Cir. 1988) (observing that, in "the child care context," "the state has a responsibility to act for the parents when the parents are unable to discharge their own responsibilities"); Op. Tex. Att'y Gen. No. GA-0649 (2008) (recognizing that "child care facility" is broadly defined); Ohio Rev. Stat. § 5120.656 (allowing the department of family services

[3] For example, Plaintiffs ignore that healthcare is separately licensed and regulated by the Texas Department of State Health Services, and therefore would not be regulated by DFPS. *See* Tex. Hum. Res. Code § 42.041(b)(6) (providing that Section 42.041's licensing requirements do not apply to "a facility licensed, operated, certified, or registered by another state agency"); Tex. Health & Safety Code § 241.021 ("A person or governmental unit, acting severally or jointly with any other person or governmental unit, may not establish, conduct, or maintain a hospital in this state without a license issued under this chapter.").

to regulate a prison nursery program with consent from the department of corrections); 3CR 481 (Pennsylvania licensed a FRC before enactment of the FRC Rule). The trial court's judgment should be reversed.

CONCLUSION AND PRAYER FOR RELIEF

While Plaintiffs attempted to focus on the length and conditions of their detention, their true protest is with the federal government and its immigration policies. It makes no sense to invalidate a state administrative rule on the discretionary acts of a federal agency that determines the length of detention. It also makes no sense to complain about the conditions of that detention when the Plaintiffs claim to be fleeing tragic circumstances. The FRC Rule allows the State of Texas to regulate conditions, just as Plaintiffs themselves envisioned. The FRC Rule should stand.

For the foregoing reasons, GEO seeks the relief outlined in its opening brief, including a judgment reversing the trial court's judgment and declaring that 40 Tex. Admin. Code § 748.7 is valid.

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this brief complies with type-face and type-volume requirements. The document contains 2,932 words in total, which is less than the 7,500 word limit for select portions of the brief.

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