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.[1]

Appellees.

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

APPELLANTS' REPLY BRIEF

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To the Honorable Eighth Court of Appeals:

The State is not detaining these children, and the length of their detention cannot be resolved in these proceedings. The *Flores* decision is not part of state law, the State is not a party to it—and this Court's order cannot change those facts. There is no claim redressable by this Court related to the residents' claims based on the fact of their confinement as such, or to the tenuous interests of Valenzuela or Grassroots, Inc.

Assuming there is a justiciable case, the issue presented is whether the Texas entity responsible for watching out for children in residential care situations can do its job. The district court found that regulation helped children by placing the facilities on notice that they had to meet state licensing requirements. Because the Human Resources Code plainly allows the Department to act as it has in this case, the Court should reverse the judgment of the trial court. In the alternative, plaintiffs do not even attempt to defend the district court's injunction requiring the Department to continue protecting children even though, the district court held, it has no statutory authority to do so. It will be *this Court's* order that removes significant protection from the children in these facilities.

Argument

The Department's argument is based on statutory plain text: the word "care" defines the type of "childcare facility" that serves as a GRO, not the other way around. Had the Legislature intended to define "care" as "child care," it would have drafted a different provision. Because plaintiffs' argument requires the Court to invert the two terms, it fails as a matter of plain text.

The Department's argument is, further, based on well-established administrative procedure: the Department's order adopting the rule deals with all of the comments addressed to it. Plaintiffs cite to now-superseded precedent according courts much broader discretion to review the substance of administrative rules than is allowed by the text of the Administrative Procedure Act. It would be a significant change to administrative law if a plaintiff could overturn an administrative rule merely because of its *policy disagreement* with an agency's resolution of a policy dispute. In rejecting and otherwise limiting the precedent on which plaintiffs rely, the Austin Court and the Supreme Court have made clear that reasoned-justification review is not based on policy concerns, but only on text and procedural compliance with the APA.

I. PLAINTIFFS LACK STANDING.

The Court need not address plaintiffs' various meritless arguments because plaintiffs cannot establish standing under Texas law. As the Department's opening brief established, (1) release from a facility deprives a plaintiff of the opportunity to complain about the conditions of confinement, and all of plaintiffs' evidence establishes alleged harm based on the fact of confinement (which is controlled by the federal government) not the difference between confinement in an unregulated facility and confinement in a facility overseen by the Department, State Appellant's Br. at 26-28; (2) Valenzuela lacks standing because she does not establish a direct impact on an economic interest tied up in her childcare license, *id.* at 28-30; and (3) Grassroots lacks standing because it claims injury only to its advocacy activities, an approach that no court currently applies to constitutional standing because it would

erode the standing requirement to a mere policy interest in the outcome of a case, *id.* at 19-26. Plaintiffs' arguments—that (1) the released detainees have standing to challenge the admitted benefit to them of being protected by the State's licensing oversight and federal case law addressing the fact, rather than the conditions, of confinement prevents the claims from being moot, Appellees' Br. at 21-23; (2) Valenzuela essentially need allege no harm to her license, only that she disagrees with the licensing agency's actions, to establish standing, *id.* at 24-25; and (3) Grassroots has standing because it has to spend its advocacy funding on this lawsuit, *id.* at 26-28—all fail.

If what plaintiffs really complain about is the mere fact of detention, or its length, they must bring suit in a forum that can cure the injury they assert. A state court, however, cannot order the federal government to change its immigration policies. All technicalities aside, the standing issue boils down to the fact that this lawsuit is an indirect strike at the federal government, targeted at a program that the district court found—as a matter of fact supporting issuance of injunctive relief, *e.g.*, CR.4217—benefits these children. Because the Court cannot issue direct relief that cures the asserted injuries, there is no justiciable claim.

A. The Relationship Between the Department's Licensing of the Facilities and the Potential Length of Future Detention Is Insufficient to Trigger Standing.

While plaintiffs are correct that standing does not require a momentous disputed interest, *see* Appellees' Br. at 21-22, they are incorrect that there is standing to sue a state when the sole party responsible for the alleged harm is the federal government.

All of the supposed harms plaintiffs charge are tied to the *fact* of detention, in any form, not the specific *conditions* of detention addressed by the Department's rules. *See id.* at 23 (accepting distinction between fact and conditions of detention); 22-23 (asserting psychological injury and risk of injury tied to confinement of children as such, rather than to conditions tied to Department's regulations). The Department's intervention in the conditions at the facilities has done nothing but benefit the individual plaintiffs, so much so that the district court found it necessary to issue a procedurally-improper injunction to maintain Department oversight over the facilities.

This is a jurisdictional defect because it goes to "traceability" and "redressability." To invoke the courts' jurisdiction, a 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 Cty.*, 369 S.W.3d 137, 154 (Tex. 2012). Under the United States Constitution, no order of this Court can bind the federal government, which is entitled to be sued only in federal court. U.S. CONST. art. III, § 2. The fact of detention, and the length of those detentions,[2] is a discretionary function of the executive department of the United States government, carried out in part pursuant to a federal district-court judgment. None of these injuries can be traced back to the Department within this Court's proper jurisdiction without going back to the *Flores* court and getting a separate order.

[2] Plaintiffs cite no authority for the proposition that the Department has actually lengthened any person's period of federal immigration detention. And the record evidence they cite for psychological damage stems from the mere fact of detention. *See* CR.3605-06.

A case is not redressable if the alleged injury can't be resolved without going to a separate tribunal to seek result against yet another defendant. *E.g.*, *City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 148 (Tex. App.—El Paso 2016, no pet.) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (injury must be caused by defendant, not a third party)). Likewise, the point of traceability is to ensure that the right defendant is in court: if the court's order will not issue against the creator of the alleged injury, it isn't proper to issue judgment. *Id.*; *see also Morath v. La Marque Indep. Sch. Dist.*, No. 03-16-00062-CV, 2016 WL 3517955, at *6 (holding that plaintiff's waiver of administrative relief in alternative forum rendered injury non-traceable to government). Finally, the United States Constitution makes it problematic to urge that a case is redressable in state court when the party actually causing the alleged injury is the federal government—the fact that the responsible defendant is categorically outside the Court's jurisdiction ought to be a strong factor in determining justiciability of the claims addressed.

Nor does the Department concede that the issue is redressable. *See* Appellees' Br. at 23-24. The Department has always maintained that this claim is not redressable in state court, because no order of the Court can directly impact the fact of detention, or its length. State Appellant's Br. at 27. There is no factual evidence tying the State's oversight to the length of confinement as a causal matter.[3] And

[3] Plaintiffs' citation for the supposed factual nexus between the length of stay and the fact of regulation is to the license applications filed by the facilities. Appellees' Br. at 49 ("The Private Prison Companies believe that DFPS licensure is necessary to give ICE discretion to prolong detention at Dilley and Karnes."). But this framing betrays the hypothetical nature of the assertion: whether longer stays resulted would depend on a discretionary act of the federal government. There is no direct, causal relationship between the GRO licenses and the length of stay that is not

there is no legal power in the Court to change federal immigration policy. There is thus no justiciable claim based on the allegations of harm found in the petition. *See* CR.1145-46.

B. Residents' Claims Are Moot under Texas precedent, and Plaintiffs cite no Texas authority for their Position that the Circumstances of Detention Can Be Challenged By Former Detainees.

Rather than engage with Texas law establishing that released persons lack standing to challenge the conditions of confinement after they are released, *see* Appellants' Br. at 27-28 (explaining application of *Williams v. Lara*, 52 S.W.3d 171, 184-85 (Tex. 2000)), plaintiffs cite federal case law allowing persons who are released in the same circumstances to challenge the *fact* of their detention.[4] *See* Appellees' Br. at 29 (citing *Clark v. Martinez*, 543 U.S. 371, 378-79 (2005)). Claims

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within the discretionary power of the federal government. And a court lacks the power to redress an injury that is within the discretion of a coordinate governmental entity. *See Tex. Nat. Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377 (Tex. 2005) (distinguishing between power to impose administrative penalties and authority to ask court to impose penalties).

Plaintiffs also refer to the Department's explanation of the need for an emergency rule, an issue governed by the separate standard for invoking an emergency exception to the APA's procedural requirements for adopting a rule, *see* Appellees' Br. at 26; CR.1137 ¶¶ 29, 31. But the validity of the emergency rulemaking is a moot issue, because a formal rule has been enacted. *E.g.*, *Tex. Dep't of Transp. v. Tex. Weekly Advocate*, No. 03-09-00159-CV, 2010 WL 323075, at *2 (Tex. App.—Austin 2010, no pet.) (mem. op.). The mooted discussion of the emergency underlying the emergency rule is simply inapplicable to the reasoned justification for the final rule, which is based on notice-and-comment rulemaking.

[4] Plaintiffs also cite a district court order. *See* Appellees' Br. at 28-29. District court orders and opinions are non-precedential. *Barstow v. State*, 742 S.W.2d 495, 501 n.2 (Tex. App.—Austin 1987, writ denied) (explaining why only United States Supreme Court jurisprudence is precedential in proceedings before this Court). Indeed, even within the federal system a district court opinion published in the Federal Supplement would be non-precedential. *E.g.*, *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005) ("a district court decision does not have stare decisis effect").

about continuing legal status are different from claims about the conditions of confinement: *Clark* does not speak to that issue. Under Texas law, it is impermissible to prognosticate about future arrests in order to prevent a claim about detention from becoming moot.

Plaintiffs also attempt to invoke the "public importance" exception to mootness. Appellees' Br. at 32-33. As the opening brief pointed out, no Texas court has ever applied the classic form of the supposed "public interest" exception, and this Court cannot do so without making new law. State Appellant's Br. at 30.

C. Gloria Valenzuela Has Not Established Standing Under Third Court Precedent.

As the Department has pointed out, Valenzuela's claim of license dilution is based on the supposed attribution of bad motives to her as a business owner. It does not trigger Third Court precedent governing business disparagement. Plaintiffs' only response is to reiterate their position, taken in the trial court, that there need not be a direct economic harm to trigger standing based on impairment of license. *See* Appellees' Br. at 24-25. There is no meaningful limitation to this supposed basis for standing; all of the case law on the matter in Texas depends on the fact that the persons who previously owned an exclusive license are now subject to competition that their license had previously foreclosed. *E.g.*, *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.). Valenzuela is not in that position.[5]

In a footnote, plaintiffs also suggest that Valenzuela could be harmed because parents would choose to keep their children at home or with relatives, rather than placing them in licensed child care. Appellees' Br. at 25 n.6. But that is not a harm to the value of Valenzuela's *license*: under that theory, any licensed person would have standing to challenge any governmental decision, on the grounds that being licensed by the government makes that person vicariously responsible for the governments' decision-making process.

D. Grassroots Inc. Simply Ignores the Limitations On Advocacy Standing Set Out in the Cases on Which it Relied in the Trial Court.

Unaccountably, plaintiffs suggest that the Department argues that Grassroots lacks standing because it is a corporate entity. *See* Appellees' Br. at 27 & n.7. Not so. The Department's argument is that standing cannot extend to an advocacy entity that relies only on damages to its advocacy activities to bootstrap a standing claim,

[5] Plaintiffs cite cases for the proposition that dignitary harm based on other types of interest can support standing based on Valenzuela's concern about her license. *See* Appellees' Br. at 25 (citing *Zapata Corp. v. Zapata Trading Int'l, Inc.*, 841 S.W.2d 45, 50 (Tex. App.—Houston [14th Dist.] 1992, no writ), and *Gonzales v. Zamora*, 791 S.W.2d 258, 266 (Tex. App.—Corpus Christi 1990, no writ)). It is beyond cavil that reputational interests can be the basis for standing. And neither case actually helps plaintiffs. *Zapata* involved a common-law trademark claim under state law, under a statute that had to be construed to let any interested party sue over the trademark, 841 S.W.2d at 51 (construing scope of then-current provisions of Business Corporations Act). And *Gonzales* had to do with specific allegations of lost business and income stemming from the defendant's actions, 791 S.W.2d at 266.

and it bases that argument on cases reversing and limiting the authority on which plaintiffs continue to rely.

Plaintiffs simply ignore that the precedent on which they relied in the district court prevents an advocacy entity from relying on injuries to its advocacy in a standing challenge. *See* Appellees' Br. at 26-27 (relying upon *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) even though that case has been subsequently limited to a zone-of-interest, rather than a constitutional, analysis of standing). Because plaintiffs fully embrace the position that Grassroots' "core advocacy mission" is the basis of its injury to trigger standing, *see* Appellees' Br. at 26, the evidence and allegations fail to establish advocacy-entity standing as a matter of law.[6]

II. PLAINTIFFS MISINTERPRET THE HUMAN RESOURCES CODE AND MISUNDERSTAND THE SUBSTANTIVE EFFECT OF DIFFERENT TYPES OF AGENCY DETERMINATION.

Plaintiffs' argument depends upon using the term "child care facility" to circumscribe the scope of the definition of the term "care." But Supreme Court precedent requires the contrary result: the Legislature used the term "care" in section 42.002(3) as the definitional word, not the term "child care." TEX. HUM. RES. CODE § 42.002(3); *see*, *e.g.*, *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d

[6] Grassroots suggests that it has standing merely because, as an advocacy entity, it made comments on the proposed rules. Appellees' Br. at 27. But the APA does not extend the scope of constitutional standing. *E.g.*, *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 582 n.83 (Tex. 2013). The Department has preserved for ultimately Supreme Court review its understanding that *Norwood* does not extend the scope of the APA to all claims over which the plaintiffs have constitutional standing. *See* State Appellant's Br. at 25 n.9.

432, (Tex. 2011) ("We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose").

Plaintiffs' various thought exercises cannot change the statute's manifest meaning.

A. The Statutory Definition of Childcare Includes The Activities that Take Place at these Facilities.

As the opening brief explained, Chapter 42 of the Human Resources Code defines a GRO as a facility that "provides care for more than [12] children for 24 hours a day." TEX. HUM. RES. CODE § 42.002(4).[7] The term "care" is defined in section 42.002(3), to include a list of activities that constitute "care." None of those activities implies that care must be provided directly, in place of a parent. And, as the Department has already explained, the broad term "care" controls the meaning of the word "childcare" in Chapter 42 of the Human Resources Code, not the other way around. State Appellant's Br. at 35-36.

Plaintiffs' main argument is that, if the term "care" is defined as set out in section 42.002(3), it would extend to too many situations. Appellees' Br. at 35-38. And if the requirement to have a license was dependent *only* on providing some form of "care" to children, there might be force to that argument. But that is not how Chapter 42 functions. A GRO, like the facilities at issue in this case, is regulated only if 12 or more children are cared for more than 24 hours a day. TEX. HUM. RES. CODE

[7] The provision was amended in the last session to reduce the minimum number of children from 12 to 7. Act of May 26, 2017, 85th Leg., R.S., ch. 317, §44, 2017 Tex. Gen. Laws 612, 626. Because the version of the statute relevant to the rules in question used a minimum number of 12 children, this brief will continue to use the number 12.

§ 42.002(4). Likewise, other forms of regulated business are defined in terms of how many children are kept for what period. *E.g.*, *id.* § 42.002(7) ("Day care center" means a child-care facility that provides care at a location other than the residence of the director, owner, or operator . . . for seven or more children under 14 years of age for less than 24 hours a day, but at least two hours a day, three or more days a week"); *id.* § 42.002(8) (defining "family home" to be a home "that provides regular care in the caretaker's own residence for not more than six children under 14 years of age, excluding children who are related to the caretaker."). These additional parameters narrow the scope of the Department's regulatory authority to the care of certain numbers of children for particular periods of time.

No one is regulated simply because they provide "care."[8] Plaintiffs' *reductio ad absurdum* argument simply ignores the fact that licenses are not required for each and every act of "care" as defined in Chapter 42 of the Human Resources Code. Moreover, the Legislature clearly knew that the scope of the term "childcare facility" was broad, because it adopted a number of very specific exceptions to the Department's regulatory authority. TEX. HUM. RES. CODE § 42.041(b) (exempting, for example, state-operated facilities, facilities run by businesses and religious organizations where children are cared for during short periods, various schools and

[8] This distinction does not apply only to hospitals. All the examples raised by plaintiffs are subject to separate licensing regimes and, therefore, are exempt from Department regulation under section 42.041(b)(6). Pediatricians and dentists are licensed by the state. TEX. OCC. CODE chs. 151-168 (physicians); TEX. OCC. CODE ch. 251 (dentistry). Restaurants and grocery stores are licensed and certified by local health departments or by the State. TEX. HEALTH & SAFETY CODE ch. 437 (food establishments and retail foodstores). And hotels are under a separate regulatory regime. TEX. OCC. CODE ch. 2155 (hotels and boarding houses).

camps.) To that end, it specifically exempted any facility "licensed, operated, certified, or registered by another state agency" from the scope of the Department's oversight. *Id.* § 42.041(b)(6). This removes whatever remaining force plaintiffs' arguments regarding, for example, entities like hospitals might have. While hospitals undeniably meet the definition of "care" in section 42.002(3), they are not regulated by the Department because they are subject to the separate licensing regime that governs hospitals. *See* TEX. HEALTH AND SAFETY CODE ch. 241 ("The Texas Hospital Licensing Law.").

Section 42.002 is a definition section. The common meaning of the word "define" is to "state precisely the meaning of (words, terms, etc)." COLLINS ENGLISH DICTIONARY (12th ed. 2014). In this case, "care" defines "childcare," not the other way around. Nothing in the statute supports a narrowing of the definition of "care" as it is set out in Chapter 42.[9]

Finally, when the Legislature felt it necessary to limit the scope of the Department's authority to facilities where the parents are not present, it specifically did so. TEX. HUM. RES. CODE § 42.201(2)(C) (specifying that a "shelter care" permit applies only while an adult who is related to the child by blood or who is the

[9] Plaintiffs are wrong to suggest in their statement of facts that the rule absolves the facilities of the obligation to provide childcare, a legal statement that is contrary to the plain text of the statute. Appellees' Br. at 12 (discussing 40 TEX. ADMIN. CODE § 748.7(a)(4)). This statement ignores the distinction between "care" and "direct care" set out in the Department's opening brief. *See* State Appellant's Br. at 34-35 (explaining that plaintiffs misunderstood the term "care" to be the same as "direct care."). While the resident parents provide "direct care," they are not in control of major decision-making powers regarding the scope and nature of the "care" provided to the children. The terms are different in the rule. The "direct care" argument raised in the trial court and the "child care" argument raised in this brief, thus, suffer from the identical logical defect.

child's managing conservator is not at the facility). Given that section 42.201(2)(C) has to expressly invoke the absence of a parent, the Department's statutory conclusion that the general definition of a GRO encompasses facilities where the parents are present but do not have autonomous care of their children can be regulated as child care facilities.[10] *See* State Appellant's Br. at 34 & n. 14.

B. The Department Does Not Ask for the Type of Deference Plaintiffs Suggest Does Not Apply.

While plaintiffs blithely suggest that the Department has taken a formal position on this matter that could be subject to deference, *see* Appellees' Br. at 38-48, this is a misstatement of Texas deference law and a misunderstanding of the legal nature of the statements on which plaintiffs rely. There is no legal requirement that an agency's hands be tied by a previous, inaccurate interpretation of the scope of its authority under its own enabling act. Indeed, the case law is clear that deference does not apply to state agency determinations of their own authority. *E.g.*, *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 498 (Tex. 2013) (holding that deference does not apply to agency statements regarding the scope of agency authority).[11]

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[10] Plaintiffs fundamentally misunderstand the nature of the Department's licensing power. Contrary to plaintiffs' suggestion, Appellees' Br. at 43, the Department lacks investigative authority over claims of harm to children that are not subject to regulation under Chapter 42 of the Human Resources Code. The Department investigates such facilities only to insure they do not need to be licensed, TEX. HUM. RES. CODE § 42.04412(d); 40 TEX. ADMIN. CODE § 745.8413, not to investigate wrongdoing, which is handled by a separate governmental body, Child Protective Services. *See* TEX. HUM. RES. CODE § 42.021(a).

[11] Plaintiffs also rely upon *post hoc* legislative history involving an effort by the residential facility companies to change the relevant statutes. Appellees' Br. at 47-48. But *post hoc* legislative history is a contradiction in terms and must be used sparingly, if at all. Later legislative activity is of little, or no, value in determining the meaning of a legislative enactment. *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000); *see also Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 429-431 (Tex. 2011) (describing

1. The Department does not broadly invoke deference.

The Department does not rely upon a broad theory of deference, but asks only that the Court apply the "serious consideration" doctrine favored by the Texas Supreme Court. *See, e.g.*, *Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 118 (Tex. 2017) (in judicial review of formal executive act interpreting statute, agency's exercise of discretion is entitled to "serious consideration"). And its brief asks the Court to do so in a limited aspect of the case. One of plaintiffs' summary-judgment grounds was that the facilities could not be licensed because they were too big to qualify as GROs. The Department asked that the Court defer to the textually-sound argument that there is no upper limit on the number of children that can be housed in a GRO, because the text of section 42.002(4) only places a bottom limit on the number of children housed. That is not an argument for expanding the Department's authority; it is simply a request that the Court give serious consideration to the Department's decision not to place an upper boundary on the number of children that can be housed in a GRO, given that the statute creates only a minimum threshold.

2. Even assuming deference doctrine could apply, the Department has never made a binding formal determination that *could* be subject to deference in this proceeding.

Plaintiffs ask the Court to treat various letter communications signed by a former Commissioner as being entitled to deference. *See* Appellees' Br. at 44-45. However,

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extremely narrow circumstance in which legislatively-mandated post-enactment report could be used in statutory construction).

those statements were not made in a form that would be subject to deference in any event, even if they did not go to the scope of the Department's regulatory authority.

In Texas the rule is that courts interpret statutes *de novo* in reviewing administrative action, giving agency determinations "serious consideration," rather than deference as such. *Harris Cty. Appraisal Dist.*, 519 S.W.3d at 118 (stating current form of that doctrine). The strong form of deference—which the Texas Supreme Court has never completely adopted—does not apply to statements that are not adopted through formal processes. *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("[D]eference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved."). And while it is true that a consistent determination over multiple statements from an agency might be given deference if it makes sense and complies with statutory requirements, *e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, (1944), no court has ever foreclosed a governmental agency from changing its mind on a policy matter merely because it had incorrectly made the opposite determination under a prior administration.

As the record shows, the prior denials were based on a different understanding of the particular facts of the prior facilities. 3.SCR.469-470. Once Department officials realized the degree to which the parents were not in charge of their children, and lacked autonomous decision making power over their care, the Department determined to act. *See* State Appellant's Br. at 5-6. The deference doctrine—even assuming it applied to an agency's statements regarding the scope of its own jurisdiction—has never been construed to foreclose a governmental entity from

making a different later determination following a change in administration or based on different facts.

C. Section 54.011(f) Is a Red Herring.

Apparently because they choose to engage with the facilities' arguments regarding the nature of the facilities as secure or not, plaintiffs argue that section 54.011 applies because the facilities are, in some sense, 'secure.' *See* Appellees' Br. at 51-56. Plaintiffs make no response to the Department's explanation that the provision does not apply in the first instance because that section only applies when a State agency is detaining a child under the provisions of the Texas Juvenile Justice Code. State Appellant's Br. at 47-49.

Only two categories of children, "status offenders" and "nonoffenders" qualify for the prohibition on detention. TEX. FAM. CODE §§ 54.011(a); 51.02(8); 51.02(15). A nonoffender may not be held in a secure detention facility or secure correctional facility. *Id.* § 54.011(f). But that status applies only if a child has been detained and determined not to be responsible for a violation of state law. Plaintiffs, moreover, fail to grapple with the fact that a "nonoffender" is defined by statute as being between 10 and 17 years old, *see id.* § 51.02(2)(A), which means that under plaintiffs' view of the law there would be no legal impediment to detaining children under the age of 10.

Moreover, the mere fact of controlled access cannot make these facilities illegal under section 54.011(f), even if it applied. GROs are commonly "secure" in this fashion to prevent children from running away or being kidnapped. CR.1598:14-1599:12.

III. THERE IS NO DEFECT IN THE RULEMAKING.

A. The Rule Withstands Reasoned-Justification Review.

The Department's opening brief explained that plaintiffs had failed, for the most part, to articulate proper substantial-compliance claims. State Appellant's Br. at 43-45. Now, plaintiffs cite superseded case law affording the courts policy discretion to review the substance of administrative rules. The cases on which plaintiffs rely have been disapproved by both the Supreme Court and the Legislature.

1. Plaintiffs Misstate the Standard of Review for Reasoned Justification.

Plaintiffs' citation of *Methodist Hosps. Of Dallas v. Tex. Indus. Accident Bd.*, 708 S.W.2d 651, 657 n.9 (Tex. App.—Austin 1990, writ dism'd w.o.j.), for the proposition that the reasoned justification requirement is meant to lead to "better rules," is a naked attempt to place policy considerations in the rule review process. Such an approach violates the separation of powers. *See* Appellees' Br. at 59. But courts have since disavowed the *Methodist Hospitals* approach to reasoned-justification analysis based on subsequent amendments to the APA. *E.g.*, *Lower Laguna Madre Foundation, Inc. v. Tex. Nat. Res. Conservation Comm'n*, 4 S.W.3d 419, 425-26 (Tex. App.—Austin 1999, no pet.) (recognizing legislative and judicial abrogation of the searching level of scrutiny applied in *Methodist Hospitals*).[12]

[12] Similarly, plaintiffs' reliance on *Railroad Commission v. ARCO Oil & Gas Co.*, 876 S.W.2d 473, 494 (Tex. App.—Austin 1994, writ denied), for the proposition that the reasoned-justification inquiry is substantive is wrong. *See Lower Laguna Madre*, 4 S.W.3d at 425-26 (disavowing *ARCO* as superseded by amended language of section 2001.033).

An order demonstrating "in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective" substantially complies with the reasoned justification requirement. TEX. GOV'T CODE § 2001.035(c); *see Lambright v. Tex. Parks & Wildlife Dep't*, 157 S.W.3d 499, 504-05 (Tex. App.—Austin 2005, no pet.) (collecting cases, including *Lower Laguna Madre*). The purpose of reasoned-justification analysis is "to give notice of factual, policy, and legal bases for the rule adopted by the agency in light of all the evidence it gathered. *Lambright*, 157 S.W.3d at 504. The standard in a reasoned-justification review is arbitrary and capricious, but does not presume facts to support the order. *Id.* at 505. An agency acts arbitrarily if in making a decision it: (1) omits from its consideration a factor that the legislature intended the agency consider in the circumstances; (2) includes in its consideration an irrelevant factor; or (3) reaches a completely unreasonable result after weighing only relevant factors. *Id.* Plaintiffs make no argument regarding the omission of a factor or the consideration of an irrelevant factor, and they cannot argue that the rule is completely unreasonable given the district court's conclusion that the fact of regulation helps children in the facilities.

2. Because Plaintiffs fail to state current reasoned-justification case law, their argument based on the general purposes of Chapter 42 fails as a matter of law.

Plaintiffs argue that the rule is invalid because it violates the general objectives of Chapter 42. Appellees' Br. at 48 (citing *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992)). But, as the Department has already explained, it is categorically improper to ignore the plain text of the remainder of the statute

merely to advance a court's policy preference regarding the statute's generally stated goals. State Appellant's Br. at 42 (citing the governing standard as set out in *Reliant Energy, Inc. v. Pub. Util Comm'n of Tex.*, 62 S.W.3d 833, 840 (Tex. App.—Austin 2001, no pet.).

Plaintiffs' view of the substantial-compliance standard has been discredited. Just as the Third Court no longer applies *Methodist Hospitals*, the Supreme Court has narrowed the scope of the *Lone Star* inquiry to make absolutely clear that plain-text analysis of specific provisions of a statute is required, not mere reference to the statute's general requirements. *Tex. State Bd. of Exam'rs of Marriage and Family Therapists v. Tex. Medical Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017) ("We discern those 'general objectives' from the plain text of the statutes that grant or limit the agency's authority." (citing *Pruett v. Harris Cty. Bail Bond Bd.*, 249 S.W.3d 447, 454 (Tex. 2008)). In short, it is improper to look at the general precatory opening provisions of a statute to ignore the plain text of the provisions that grant or restrain an agency's authority. The "general objectives" analysis does not free a plaintiff from the bounds of statutory-construction analysis.

Plaintiffs' argument now appears to be that the rule is invalid because the stated purpose in the adoption statement for the emergency rule (which is not now in place) and that the adoption rationale for the rule somehow violates the statute. But, as the opening brief explained, that is not the correct standard for reviewing the validity of an administrative rule adoption. The only question is whether the Department addressed all the concerns. There is no provision in the Administrative Procedure Act for invalidating an administrative rule based on the substance of the

Department's enacting language. Plaintiffs' argument that the regulatory requirements are invalid because they are, in some way, weaker than the statute is likewise an invalid argument under the Administrative Procedure Act. *See* Appellees' Br. at 50. In short, plaintiffs attempt to use an out-of-date standard for reasoned justification to bolster their procedurally improper substantial-compliance claims, which were never properly pleaded. *See* State Appellant's Br. at 43-45 (explaining that plaintiffs' policy claims do not fall within the scope of the APA's exception to sovereign immunity).

3. The Reasoned Justification is Adequate.

As discussed above, plaintiffs improperly shoehorn their policy arguments into their statutory authority argument. But that approach ignores the strictures of the APA: the Court must accept an executive department body's policy determinations, even if it disagrees with them, so long as there is some evidence in the record to support the executive department's action. *E.g.*, *Lambright*, 157 S.W.3d at 504-05.

Plaintiffs argue that the waiver to allow mothers and children to share a room is insufficient as a matter of policy to support that exception. Appellees' Br. at 50. They argue that the justification is factually incorrect. But the very nature of administrative rulemaking requires that the Department be given rulemaking authority to make determinations within its grant of authority. The Department justified the exception to the adults/children rule for the logical reason that it allowed parents to be roomed with children and children to be housed with siblings. CR.1524; CR.3666:16-3667:7; *see* State Appellant's Br. at 7-8, 43-45. Plaintiffs now ask the court to weigh a different consideration and hold that it outweighs the Department's

resolution of the policy matter. That result would be at odds with the standard of review articulated by the Third Court in *Lambright*: a rule can be struck down only if it is completely unreasonable. And the need to keep families together makes provides adequate justification for the rule's adoption.

Plaintiffs further argue that the rule justification is inadequate, generally. Appellees' Br. at 60. As the Department has already explained, the test for reasoned justification is not a plenary policy review of the rule, but rather requires specific analysis of the enactment order to be sure that the administrative agency has dealt with all the comments. State Appellant's Br. at 45-47.[13] A generalized complaint about the justification for a rule is, in effect, no challenge at all.

B. The Work Group Requirement Does Not Apply.

As the opening brief explains, the work group requirement applies only to the statewide GRO rules, not to the separate power to create exceptions. Appellant's Br. at 47. Plaintiffs' only argument is that the new rule is "unprecedented." But the statutory language doesn't differentiate between run-of-the-mill and unprecedented rules. It requires a work group for the *state wide standard* and is not mentioned with

[13] Plaintiffs mischaracterize the rule-adoption order when they suggest that the Department lacked knowledge of the residents' lack of child-care autonomy at the time it adopted the rules. *See* Appellees' Br. at 60 (discussing CR.465). That statement clearly indicates that, to qualify for one of these licenses, the applicant must document the lack of parental autonomy. This is not a statement regarding the need for knowledge to carry out rulemaking, but instead a discussion of the requirement for issuing future licenses. *See* CR.465 (discussing need for knowledge of each facility's "unique characteristics, which requires any documentation DFPS deems necessary to clarify the division of caretaking responsibility . . . [DFPS] must also approve [this documentation] during the application process").

regard to the Department's power to issue specific exceptions to those standards. TEX. HUM. RES. CODE § 42.042(j).

IV. THE COURT CANNOT GIVE PLAINTIFFS MORE RELIEF THAN THEY OBTAINED IN THE TRIAL COURT.

Under the Rules of Appellate Procedure, any party seeking a more favorable judgment is required to file a notice of appeal and seek appellate relief. TEX. R. APP. P. 25.1(c). The Court should, thus, be careful not to award plaintiffs greater relief than they obtained in the district court. *E.g.*, *Tex. Comm'n on Envtl. Quality v. Bonser-Lain*, 438 S.W.3d 887, 892 (Tex. App.—Austin 2014, no pet.). The district court struck down this particular rule, based on the existence of the variances, not based on a reading of the Human Resources Code that forecloses regulation. CR.4215-16 ("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 invalid."). The district court's judgment, thus, holds strikes down the rule based on its view that the exceptions to the statewide minimum requirements render the rule invalid. (This legal statement is, as the Department has already explained, incorrect because there is specific statutory authority to create exceptions, as necessary, on a case-by-case basis. *See* State Appellant's Br. at 36-37 (discussing, *e.g.*, TEX. HUM. RES. CODE §§ 42.048(c), .042(j)).

Plaintiffs' appellate briefing, however, at some points suggests that plaintiffs obtained a declaratory judgment that the Department could never regulate the facilities. *E.g.*, Appellees' Br. at 18. Because an appellate judgment to that effect would give more relief than the trial court provided—a general declaratory judgment on statutory authority in place of a determination that a particular rule is invalid—the Court cannot broaden the scope of the district court's judgment so far, in the event it rejects Appellants' arguments.

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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