NO. 08-16-00334-CV

IN THE COURT OF APPEALS FOR THE EIGHTH DISTRICT

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *et al.*,
Appellants,

v.

GRASSROOTS LEADERSHIP, INC., *et al.*,
Appellees.

On Appeal from Cause No. D-1-GN-15-004336
In the 250th District Court of Travis County, Texas

REPLY BRIEF OF APPELLANT CORECIVIC

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ORAL ARGUMENT REQUESTED

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REPLY

I. Appellees fail to argue for affirmance of the trial court's rulings.

Appellees did not file a notice of cross-appeal. However, Appellees appear to disagree with the rulings actually made by the trial court and, instead, argue against the trial court's judgment. In doing so, Appellees ask this Court to go beyond affirming the trial court's judgment and, instead, to issue a new decree that not even the trial court would adopt.

In short, while the trial court's ruling was a limited determination that *only* the Department of Family Protective Services's ("DFPS's") Rule 748.7(c) contravenes the general residential operation ("GRO") statute (TEX. HUM. RES. CODE § 42.004(4)), Appellees ask this Court to radically expand that judgment to mean that DFPS may not issue *any* Rule concerning the family residential centers ("FRCs"), irrespective of the substance of *any* potential Rule. Indeed, by generally recognizing DFPS's authority to regulate the FRCs as GROs but questioning the wisdom of the exemptions to the Rule, the trial court implicitly held that the Rule would not have contravened § 42.004(4) if the Rule did not include those exemptions. Despite Appellees' argument to the contrary,

the trial court did *not* rule that DFPS cannot regulate FRCs because FRCs do not engage in "childcare." Indeed, the trial court ordered DFPS to regulate the FRCs under its "childcare" standards.

A notice of appeal is necessary when a party seeks to alter all or some portion of the judgment. TEX. R. APP. P. 25.1(c) ("A party who seeks to alter the trial court's judgment . . . must file a notice of appeal."); *see Texas Comm'n on Envtl. Quality v. Bonser-Lain*, 438 S.W.3d 887, 892 (Tex. App.—Austin 2014, no pet.) (explaining that generally, party "who obtains a favorable judgment in the lower court may not appeal that judgment merely for the purpose of striking findings and conclusions with which it does not agree"). "The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause." *See City of Austin v. Whittington*, 384 S.W.3d 766, 789 (Tex. 2012) (citing TEX. R. APP. P. 25.1(c)).

Here, the trial court held that "DFPS has legislative authority to issue a license to Dilley as a general residential operation (GRO)" and "DFPS has the ability to provide state oversight over Dilley and provides benefits to children presently housed at those facilities . . . ."

(CR 1111.) The trial court also held that children at the FRCs have "statutory rights to protection that the Legislature has afforded children in the state minimum standards" and "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 . . . ." (CR 4216.)

In contrast, Appellees argue that "DFPS lacks statutory authority to issue the FRC Rule and license immigration detention facilities as child care centers." (Appellees' Brief p. 18.) Appellees also argue *against* DFPS oversight of the FRCs based on Appellees' political stance that the FRCs promote "harmful detention" with undesirable conditions. (*See id.*)

Thus, the trial court recognized the statutory authority and benefits of DFPS's regulation of the FRCs, but Appellees argue that the trial court was wrong. The trial court's judgment questioned DFPS's ability to grant the limited exemptions in Rule 748.7(c), but Appellees argue that DFPS has no authority to regulate the FRCs in *any* context and irrespective of the existence or lack of exemptions.

Indeed, the trial court went on to order DFPS to continue to regulate the FRCs, albeit outside the "licensing program" required by statute. In doing so, the trial court did not hold that DFPS could not regulate FRCs. Instead, the trial court simply disagreed with DFPS's policy decision to issue the three exemptions in Rule 748.7(c) and declared that Rule (and only that Rule) invalid, leaving all other DFPS "state minimum standards" applicable to the FRCs. In contrast, Appellees argue that DFPS has no authority to regulate the FRCs in any context.

Therefore, while Appellees generally ask this Court to "affirm" the judgment, Appellees actually request a ruling from this Court that is much more extreme than the trial court's, which is impermissible because Appellees did not file a notice of appeal. Ultimately, in doing so, Appellees ask this Court to reach public policy determinations that radically exceed the scope of the trial court's judgment.

II. Courts cannot second-guess executive branch policy determinations.

Appellees could not get past the first sentence of their Brief without inviting this Court to engage in the same "policy" writing that they asked the trial court to do. (Appellees' Brief p. 1.) They lament

the "policy matter" of the "length and conditions of children's detention." (*Id*.) They ask this Court to tell the executive branch how its policymaking "goal could have been accomplished" in a different manner. (*See id*. at 50.) The only ongoing injury claimed in this lawsuit is purely political: the "threat to [Grassroots's] core advocacy mission." (*Id*. at 26.)

Appellees even ask this Court to attempt to delve inside the minds of the policymakers in the executive branch, expressly inviting the Court to determine DFPS's "motivations" and "agenda;" to examine whether DFPS "seriously consider[ed]" Grassroots's political objections; and to decide what DFPS really "believed" when it passed the Rule. (*Id*. at 1, 2, 27, 49.)

The Texas Supreme Court has directly rejected such judicial branch invasions of executive branch policy-making. Texas law recognizes a strict separation of powers among the branches of government. *State v. Rhine*, 297 S.W.3d 301, 315-318 (Tex. 2009). A trial court may not invalidate a rule on the basis that it disagrees with the policy decisions underlying the rule's issuance. *Gulf Coast Coal. of Cities v. PUC,* 161 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.) ("This

Court does not decide matters of policy; we are limited to evaluating whether the Commission acted contrary to the statute."). Thus, while a trial court may disagree with an agency's analysis, a rule challenge is not a process to "decide matters of policy"; and a court cannot invalidate a rule because it disagrees with the policy decisions underlying the rule's issuance. *Id.* "The rule need not be wise, desirable, or even necessary." *McCarty v. Tex. Parks & Wildlife Dep't*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ).

Here, Appellees do not like the federal government's policy decision to house undocumented immigrants at the FRCs. They believe that this policy decision resulted in undesirable "conditions" at the facilities and ask this Court to make policy determinations about the minutia of the federal government's activities at these facilities, such as whether the federal government should be able to count the residents three times per day. (*See* Appellees' Brief p. 15.)

Perhaps Grassroots's political position is correct, or perhaps Grassroots's political position is wrong. The parties and their able counsel could likely fill endless pages of briefing discussing the political philosophies and wisdom behind DFPS's policy determination to

regulate the children's safety at the FRCs through its licensing program. But this is beside the point. The Texas court system is not the venue to determine such matters of federal or state public policy. *Gulf Coast Coal. of Cities*, 161 S.W.3d at 712.

Appellees admit that their only legal basis to bring this lawsuit is under a "rule challenge" (Appellees' Brief p. xv.), and the judicial branch's power to invalidate rules in a rule challenge is very narrow and limited. Specifically, the scope of judicial review under Texas Government Code § 2001.033 is limited to the face of the order adopting the Rule. *Gulf Coast Coal. of Cities*, 161 S.W.3d at 713. When examining the face of the order, the only inquiry is whether it provides the statutory basis for the rule, a rational basis for the rule, and a summary of the comments received and the agency's response. *Id.* All of these elements are met here.

III. DFPS provided a reasoned justification for Rule 748.7.

A court must uphold the Rule as long as the order shows in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective. *Id.* To declare the Rule invalid, the Court would have to find that it was adopted in a completely arbitrary and

capricious manner. *Id.* An agency's action is arbitrary only if the face of the order shows that the agency did not consider a factor that the Legislature intended the agency to consider in the circumstances, considered an irrelevant factor, or reached a completely unreasonable result after weighing only relevant factors. *Id.* Because the only inquiry is limited to statutory construction and the four corners of the adopting rule, a challenge of an agency rule is a matter of law for the court. *Id.*

A. DFPS provided a clear, logical explanation of the reasons for adopting the Rule.

Here, the Court's inquiry is limited to the face of 41 Texas Register 1493. The face of the DFPS order here clearly shows a sufficiently reasonable justification for Rule 748.7. Indeed, the order provides nearly nine (9) pages of reasoned justification for adopting the Rule. 41 TEX. REG. 1493 (Feb. 26, 2016). This includes a discussion of the nearly 3,000 comments DFPS received concerning the Rule as well as the media interest regarding the same. *Id.* Notably, DFPS specifically noted Grassroots's comments in its reasoned justification. (CR 1525.)

In discussing the concerns raised by the comments, the order divided them into 11 categories and addressed each in kind—including DFPS's authority to the pass the Rule; how licensure protects the children; how licensure will improve conditions; the policy rationale behind detention at the FRCs in general; how the Rule and licensure of the FRCs coincides with DFPS's mission; the conditions at the Dilley FRC; and the proposed exceptions, waivers, and variances. *Id*.

The order complies with all prerequisites of Texas Government Code § 2001.033. It is clear and logical, and it shows that applying GRO standards with limited exemptions is a reasonable means to achieve the legitimate objective of providing protection to the children at the FRCs.

B. Appellees apply the wrong standard.

Notably, Appellees apply the wrong legal standard when discussing what is required for a reasoned justification under § 2001.033. Appellees incorrectly cite to *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667 (Tex. 1996) for the standards concerning a reasoned justification under § 2001.033. However, in 1999, three years after the issuance of the *Nat'l Ass'n of Indep. Insurers*

opinion, the Texas legislature amended § 2001.033 to make the standard for a reasoned justification less strict. *See Lower Laguna Madre Found. v. Texas Nat. Res. Conservation Comm'n*, 4 S.W.3d 419, 425 (Tex. App.—Austin 1999, no pet.) ("The legislature, in its most recent session, revised section 2001.033 of the APA to make the standard for reasoned justification less strict.")

In doing so, the Texas legislature superseded the stricter standard for a reasoned justification developed before the 1999 amendment by Texas courts, including the stricter standards set forth in *Nat'l Ass'n of Indep. Insurers*. *Id.* Specifically, the 1999 amendment of § 2001.033 supercedes case law that previously required the reasoned justification not be "phrased in conclusory terms" and include a "penetrating analysis of the alternatives," among other strict requirements. *Id.* at 425-426. Dispensing with these onerous requirements, § 2001.033 instead now merely requires that the reasoned justification include, "a summary of the factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted." TEX. GOV'T CODE § 2001.033(a)(1)(B).

Here, DFPS provided an extremely thorough explanation of its authority to adopt Rule 748.7, the factual basis behind its policy decisions to adopt the rule, and its policy responses to the various concerns raised by advocacy groups, including Grassroots. 41 TEX. REG. 1493. This more than met the limited requirements for a reasoned justification under § 2001.033, precluding any basis to declare the Rule invalid.

IV. DFPS has a clear statutory mandate to protect "all children" through its "licensing program."

The Legislature has not left the broad scope of DFPS's rule-making authority a mystery. Rather, the Legislature has expressed a clear public policy purpose of the DFPS to "ensure the protection of all children" by "regulating the facilities through a licensing program," and the Legislature gave express authority to DFPS to adopt rules to accomplish that purpose. *See* TEX. HUM. RES. CODE § 42.042(a); TEX. GOV'T CODE § 531.0055. DFPS's decision to ensure that children housed in the FRCs are in a safe, controlled environment meets its mandate to "ensure the protection of *all* children" as soon as they cross the Texas border.

A. The FRCs are "child-care" facilities.

Appellees' primary challenge to DFPS's statutory authority to regulate the FRCs is to incorrectly argue an extremely narrow reading of "care." Without offering what "care" is, Appellees assert in conclusory fashion that the FRCs do not provide care and pontificate unrealistic scenarios in which other types of facilities could be deemed a GRO with a broader reading.

Again, the Legislature did not leave this a mystery. The Legislature defined a "child-care" facility very broadly with a long list of activities: "assessment, care, training, education, custody, treatment, or supervision." TEX. HUM. RES. CODE § 42.002(3). A GRO is a "child-care" facility that operates 24 hours a day. *Id.* § 42.002(4). The Legislature even provided examples of GROs such as "children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps." *Id.*

Here, the FRCs provide comprehensive, around-the-clock care to the residents at the facilities, including personal safety, shelter, food, clothing, hygiene, medical care, education, access to legal advice, access to technology such as internet cafes and video games, and orderly daily

activity management. (*See* CR 1812-1821; CR 2077-2078; CR 2013-2052, ¶¶ 15-23; CR 1564-1565.) This is well beyond the level of care provided at a typical daycare or even a children's home.

Appellees argue that DFPS reads this definition of "child-care" facility and the examples of GROs too broadly, identifying various unrealistic scenarios in which other facilities would be considered GROs. Appellees' hyper-focus on a single *type* of activity that occurs in a child-care facility ("care") to the exclusion of all others ("assessment . . . training, education, custody, treatment, or supervision") is another example of Appellees failing to read a statute as a whole and give meaning to all of its provisions. *See Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000).

To be clear, the definitions of "child-care" facility and GROs are very broad. This is why the statute lists several exceptions to the broad definitions (because many types of facilities do fall under the definition of "child-care" facility). *See* TEX. HUM. RES. CODE § 42.041(b). For example, Texas Human Resources Code § 42.041(b)(6) provides that the DFPS licensing requirements do not apply to "a facility licensed, operated, certified, or registered by another state agency." Thus, the

Legislature has determined that facilities that are regulated by a another state agency are not subject to regulation by the DFPS.

For instance, hospitals are highly regulated and licensed by the Texas Department of State Health Services. *See* TEX. HEALTH & SAFETY CODE Ch. 241; TEX. ADMIN. CODE Title 25. Under the Texas Hospital Licensing Rules, hospitals must obtain a license prior to admitting patients. 25 TEX. ADMIN. CODE § 133.21. Those hospital licensing rules have specific regulations pertaining to minors and their patient rights, their criteria for admission, and the structure of their patient rooms where they stay. *See, e.g., id.* §§ 133.42(b), 133.41(c)(6), 133.163(w). "Inpatients" are those that are admitted to the hospital for 24 hours or greater. *Id*. § 133.2(24). Because these matters are handled under the Texas Hospital Licensing Rules, Texas Human Resources Code § 42.041(b)(6) excepts them from the licensing requirements of DFPS.

Here, the FRCs' around-the-clock life management for the children clearly falls under the broad definition of "child-care" facilities and, thus, is subject to DFPS rule-making. Because these child-care facilities operate 24 hours per day, the DFPS properly designated them as GROs.

B. The 2015 onsite inspections revealed DFPS's need to regulate the FRCs.

Appellees make much of DFPS's prior statements concerning its ability to license FRCs provided in response to an advocacy group's inquiry. As is the case when considering Appellees' flawed statutory interpretation, one cannot examine this evidence in vacuum and reach a sound conclusion.

In 2015, after the letters cited by Appellees were sent, DFPS inspected the FRCs and determined that the care being provided at the FRCs fell within DFPS's purview. (CR 1812-1821, 2097-2102, 2106.) For example, DFPS learned that the FRCs provided 24-hour care, including providing all shelter, meals (including any special dietary or allergy needs), clothing, and medical attention to the children at the FRCs. *Id.* DFPS also learned that the mothers did not always have exclusive or direct decision-making capacity for their children's care and were not always with the children, sometimes being separated for over 24 hours due to medical or legal situations. *Id.* This all led DFPS to conclude that the FRCs were, in fact, "child-care facilities" and required oversight. *Id.*

Appellees may disagree with DFPS's renewed assessment in 2015; but again, a judicial branch proceeding is not the proper venue to address policy and political differences of opinion.

C. DFPS has broad discretion to grant the FRCs three exemptions to the hundreds of rules.

The crux of this case is that Appellees believe that DFPS's "goal" of allowing children to remain with their mothers "could have been accomplished" through different policy means. (Appellees' Brief p. 50.) Because Appellees know that this Court cannot second-guess this executive agency's policy decision, Appellees take the extreme position that DFPS had no authority to attempt to accomplish that policy goal in the first place.

However, both the Legislature's statutory scheme and DFPS's Rules expressly envision that the DFPS may provide for exemptions and variances to fit a particular circumstance. *See* TEX. HUM. RES. CODE § 42.048(c); 40 TEX. ADMIN. CODE §§ 745.8301-.8319. Thus, because every facility is different, the Legislature grants DFPS the authority to exempt its standards to meet a particular situation; and DFPS has adopted procedures to evaluate whether to grant an exemption.

Through its rule-making authority, DFPS has issued thousands of standards that apply to various types of child-care facilities. Here, by incorporating the GRO standards into Rule 748.7, DFPS applied hundreds of its standards specific to GROs under 40 Texas Administrative Code Chapter 748 as well as hundreds of licensing regulations under 40 Texas Administrative Code Chapter 745.

Accordingly, all the DFPS GRO protections apply to the FRCs; and DFPS had the statutory authority to allow the three, limited exemptions in subsection 748.7(c). Appellees disagree with DFPS's policy decisions in crafting 748.7(c) and believe "that goal could have been accomplished with a more limited waiver," but that policy debate has no place in a Texas court.

V. No statute prohibits Rule 748.7.

A. Subsection 54.011(f) of the Texas Juvenile Justice Code simply does not apply here.

Appellees continue to cite § 54.011(f) of the Texas Juvenile Justice Code as a ground to invalidate Rule 748.7, even though the trial court did not adopt this argument from Appellees at the summary judgment stage. This subsection has no bearing on DFPS's activities or the FRCs (or any other non-Juvenile Justice Department facility).

1. Section 54.011(f) only applies to local, county-run juvenile justice facilities.

In construing statutory provisions, a Court determines legislative intent from "the statute as a whole and not from isolated portions of it." *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 641 (Tex. 2009). Section 54.011(f) of the Family Code is a procedural statute in the Texas Juvenile Justice Code that only applies to local, county-operated facilities, not an FRC under federal ICE power

Section 54.011(f) is found in Title III of the Family Code, which is the Juvenile Justice Code. The Juvenile Justice Code undergirds an entire system under Texas state law for the prosecution, adjudication, sentencing, and detention of juvenile offenders, completely separate from the criminal justice system for adults. *See* TEX. FAM. CODE § 51.01. The Juvenile Justice Code is the state law that applies to proceedings in a Texas state county's juvenile court, which is designated by the local county's juvenile board. *See* TEX. FAM. CODE § 51.04.

Here, the FRCs are federal immigration facilities under contract with ICE, not a county or state-run Texas Juvenile Justice Department facility. The residents do not arrive at the FRCs through the Texas state juvenile justice system, and no local county juvenile board is

involved in the process. Thus, the regulation envisioned in Texas Family Code § 54.011(f) simply does not apply to the FRCs. Rather, § 54.011(f) applies exclusively to local county facilities under the Juvenile Justice Code, not to FRCs under ICE control.

2. Reading the statute as a whole refutes Appellees' argument.

Ignoring this context, Appellees contend that § 54.011(f) applies to FRCs simply because § 54.011(f) does not explicitly state that it does not apply to FRCs. This myopic reading, which relies on taking a few applicable-sounding words wholly out of context, fails to take account the broader statutory context that § 54.011(f) fits within and, in doing so, employs improper statutory construction.

Texas law requires courts interpreting statutes to consider the entire statute, not simply the disputed portions. *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000) (citing *State v. Terrell*, 588 S.W.2d 784, 786 (Tex. 1979)). Each provision must be construed in the context of the entire statute of which it is a part. *Cont'l Cas.*, 19 S.W.3d at 398 (citing *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994) ("Only in the context of the remainder of the statute can the true meaning of a single provision be

made clear.")). When interpreting a statute, Texas courts must "look at the entire act, and not a single section in isolation." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). And Texas courts must consider the "nature and object" of the entire act. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001). Courts should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone. *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978).

For example, in *Cont'l Cas.* the Texas Supreme Court interpreted Texas Labor Code § 410.255 by looking at the structure and substance of the entire Chapter 410 of the Labor Code and the placement of § 410.255 within that chapter. *Cont'l Cas.*, 19 S.W.3d at 398-399. Similarly, the Texas Supreme Court in *Fitzgerald* interpreted Civil Practice and Remedies Code § 82.002 by looking at the substance and context of all of Chapter 82 of the Civil Practice and Remedies Code. *Fitzgerald*, 996 S.W.2d at 866-868.

The Texas Supreme Court also utilized this approach in its *Bridgestone/Firestone*, *Helena Chemical*, and *Jones* decisions. *See*

Bridgestone/Firestone, 878 S.W.2d at 133-136 (interpreting Revised Civil Statute art. 6701d § 108C(j) by examining its broader statutory context); *Helena Chem. Co.*, 47 S.W.3d at 493-498 (employing the same method to interpret Agriculture Code § 64.004); *Jones v. Fowler*, 969 S.W.2d 429, 431-433 (Tex. 1999) (employing same method to interpret Family Code § 102.003(9)).

By arguing about the meaning of Family Code § 54.011(f) in a vacuum, without considering the purpose and scope of the Juvenile Justice Code, Appellees ignore Texas law requiring that statutory construction employ a method of considering a statute with the context, purpose, and meaning of the broader chapter and act within which it exists. Appellees ignore these cannons of construction and simply argue that Family Code § 54.011(f) must apply to these federal ICE facilities because the Legislature failed to except them from that specific statute. Of course, no such exception is necessary because the entire Code in which § 54.011(f) is found only applies to local county-run juvenile justice facilities.

When Family Code § 54.011(f) is interpreted by examining its purpose within the broader context and purpose of the Texas Juvenile

Justice Code, as is required under Texas rules of statutory construction, it is plainly apparent that, as the trial court determined, § 54.011(f) applies exclusively to proceedings in the Texas juvenile justice system and, accordingly, has no bearing on FRCs operated under the authority of the federal government. Therefore, Appellees' strained interpretation of § 54.011(f) should be disregarded by this Court.

B. No statute prohibits children residing with their mothers at DFPS facilities.

Appellees also argue against DFPS's policy decision to allow children to remain with their mothers while at the FRCs. However, Appellees fail to cite any legal authority to take this policy discretion away from DFPS's broad grant of authority. Rather, Appellees engage in laborious efforts to question the wisdom of DFPS's policy decision. As already discussed, such policy determinations are not made in the courts.

Regardless, when an adult is also in care at a DFPS facility, as is the case at the FRCs, the existing GRO standards already permit an adult to share a bedroom with an unrelated child in certain circumstances. (CR 1578-1579, CR 1599-1600; *see, e.g.,* 40 TEX. ADMIN. CODE § 748.1937.) Further, the Legislature's statutory scheme and

DFPS's Rules expressly envision that the DFPS will provide for exemptions and variances to fit a particular circumstance. See TEX. HUM. RES. CODE § 42.048(c); 40 TEX. ADMIN. CODE §§ 745.8301-.8319. No statute forbids DFPS from issuing rules or exemptions concerning how it regulates bedroom assignments.

Thus, Appellees' argument simply boils down to noting that this situation is slightly different. However, such arguments have long been rejected in Texas. In delegating authority to an administrative agency, the Legislature is not expected to provide for every specific detail or anticipate every unforeseen circumstance. *Tex. Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 654 (Tex. 2004). Rather, the administrative agency generally has implied authority to accomplish a delegated purpose. *Tex. Dep't of Human Servs. v. Christian Care Ctrs., Inc.*, 826 S.W.2d 715, 719 (Tex. App.—Austin 1992, writ denied) (citing *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. Civ. App.—Austin 1986, writ ref'd n.r.e.)).

VI. DFPS's analysis and conclusions are reasonable.

At a minimum, it was not patently unreasonable for DFPS to conclude that the FRC's are "child-care facilities" and that it is

desirable for children to remain with their mothers. When an agency applies a reasonable interpretation, the Texas Supreme Court has directed courts to generally defer to that interpretation. "If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation," the Texas Supreme Court will "defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). While such deference to an agency's interpretation is not conclusive, a reasonable interpretation by the agency charged with enforcing the statutory framework "is therefore entitled to serious consideration." *Id.*

Thus, in a close call, the tie goes to the runner (the agency). Outside of Appellees' tortured reasoning, this case does not involve a close call. But even if it were close, DFPS's rationale for adopting Rule 748.7 is clear and logical, and it furthers DFPS's mission to protect "all" children. Therefore, there is no basis to invalidate this Rule.

VII. A single rule does not require an entire work group.

Rule 748.7 applies the existing GRO standards to the FRCs with three limited exemptions. The single DFPS Rule at issue here, 748.7, is

just one of hundreds of standards in Chapter 748, and just one of thousands of DFPS Rules found in Part 19 of Title 40. The DFPS's Rules, like any other agency's rules, are reviewed, revised, altered, repealed, and corrected on a consistent basis. *See generally* the Texas Register.

Appellees would have a Texas agency convene a group from all over the State every time it proposes a single rule revision, repeal, typo correction, etc., no matter how minor. However, § 42.042(i) does not require that DFPS convene a temporary work group any time an individual Rule is touched. Rather, it requires the group when new standards as a whole are adopted. *See, e.g.,* Senate Comm. on Hum. Servs., Bill Analysis, Tex. S.B. 68, 81st Leg., R.S. (2009) (discussing addition of 42.042(i) temporary work group for promulgating standards for newly created school-age program regulations).

Indeed, if an agency were required to gather a group from all over the State every time it proposed a single rule revision, repeal, typo correction, etc., it would bring the agency's activities to a grinding halt. Instead, DFPS is advised of concerns with individual rules in the notice and comment process. *See generally* TEX. GOV'T CODE §§ 2001.023-.029.

VIII. Appellees do not have standing.

Despite Appellees' arduous efforts to conjure a live controversy, none exists here. Grassroots's only identified injury is its choice to "divert resources" and spend political capital on this "core advocacy mission" (Appellees' Brief p. 26), which is not a legally compensable injury. Ms. Valenzuela's only purported injury is her own private concern that some theoretical patron would view her non-GRO license in an unfavorable light because of the FRCs over 500 miles away. There is no evidence in the record that this has ever or will ever occur.

Similarly, all former residents have left the FRCs, and Appellees fail to cite any evidence that the same former residents would be housed at the FRCs ever again, thus mooting any potential controversy. *Kingdomware Techs., Inc. v. U.S.*, __ U.S. __, 195 L.Ed. 334, 343 (2016) (requiring a showing that "the same complaining party [will] be subject to the same action again"). While Appellees surmise that Appellees are "subject to re-detention," Appellees do not cite any evidence that any of these Appellees would ever be brought back to the Dilley or Karnes FRCs. Appellees' citation to CR 3591 and 3375 merely discuss initial processing from border patrol to the Dilley and Karnes ICE facilities,

not any evidence that a former resident would return to Dilley or Karnes after release from one of the FRCs. Appellees' citation to the different evidence in the *Hutto* case is not precedential in this state law rule change and provides no reason to find standing here.

Because Appellees do not have standing, their final retreat is to a doctrine never adopted by the Texas Supreme Court: the public interest exception. Appellees admit that Texas has not adopted this doctrine (Appellees' Brief p. 32), and this Court should not create new law where the Texas Supreme Court has been unwilling to venture.

CONCLUSION AND PRAYER

Accordingly, Appellant CoreCivic (formerly known as Corrections Corporation of America) prays that this Court reverse the trial court's judgment and render judgment in Defendants', CoreCivic's, and GEO's favor, allowing DFPS to license the FRCs, and for other and further relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of November, 2017, a true and correct copy of the above and foregoing instrument was served on all counsel of record as follows:

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CERTIFICATE OF COMPLIANCE

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