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SUPREME COURT OF TEXAS
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No. 19-0092

IN THE SUPREME COURT OF TEXAS

GRASSROOTS LEADERSHIP, INC., ET AL.,
Petitioners,

v.

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ET AL.,
Respondents.

On Petition for Review from the
Third Court of Appeals at Austin
No. 03-18-00261-CV

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	Rule challenge under Administrative Procedure Act, Uniform Declaratory Judgments Act suit against state agency, and ultra vires action against state official.
Trial Court:	Hon. Karin Crump, 353rd District Court, Travis County
Parties in the Trial Court:	*Plaintiffs*: 22 detainees (*see supra*, at iii) ("Detainee Plaintiffs"), Gloria Valenzuela, Grassroots Leadership, Inc. *Defendants*: Texas Department of Family and Protective Services ("DFPS"); Henry Whitman, Commissioner, and Charles Smith, Executive Commissioner, Texas Health and Human Services, in their official capacities (collectively, "State") *Intervenors*: GEO Group, and Corrections Corporation of America[1] ("Private Prison Companies")
Trial Court's Disposition:	Granted Defendants' plea to the jurisdiction regarding UDJA claims; denied plea in all other respects. Granted Plaintiffs' motion for summary judgment regarding validity of DFPS's rule, denied Defendants' and Intervenors' cross-motions for summary judgment.
Court of Appeals:	Third Court of Appeals at Austin
Court of Appeals' Disposition	Reversed for lack of standing. Opinion by Puryear, J., joined by Rose, C.J., and Goodwin, J. *Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433 (Tex. App.—Austin Nov. 28, 2018, pet. filed). Dissent to denial of en banc reconsideration by Justice Triana, joined by Justices Kelly and Smith. *Tex. Dep't of Fam. & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2019 WL 6608700 (Tex. App.—Austin Dec. 5, 2019) ("Dissent").

[1] Corrections Corporation of America is now called CoreCivic.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code §22.001(a).

ISSUES PRESENTED

1. Does a parent have standing to challenge an administrative rule that affects the length and conditions of her child's confinement at an immigration detention center, and threatens the child's health and safety?

2. Does an organization have standing to challenge a rule that has caused the organization to divert funds from other initiatives and impaired its ability to provide services and accomplish its mission? (unbriefed)

3. Does an operator of a child-care center have standing to challenge a rule that would devalue and disparage her child-care license by granting the same license to a detention center? (unbriefed)

REASONS TO GRANT REVIEW

Few issues have captured the public's attention as intensely as the fate of immigrant children detained by the federal government with the help of private prison companies in Texas. The parties here are those very children, their mothers, and the prison operators who held the children—and could do so again at any time. The issues here exclusively concern Texas law.

Frustrated by the strict limits it agreed to in a consent decree known as *Flores*,[2] the federal government attempted to create a loophole to allow for longer—even indefinite—detention of children and their mothers. *Flores* allows longer detention only in licensed child-care facilities—not in detention centers. Rather than seek out bona-fide child-care facilities, the federal government decided that existing family-***detention*** centers should become licensed as child-care facilities.

Child-care licensing is the ***states***' province; the federal government has no role. Thus, the federal government turned to Texas—the only state with significant family-detention capacity. Texas became the federal government's necessary accomplice in its effort to keep children and their mothers detained for months or years—much longer than the days or weeks *Flores* allowed.

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[2] *See Flores v. Johnson*, 212 F.Supp.3d 864, 877 n.8 (C.D. Cal. 2015), *aff'd in part sub nom. Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

The mothers and children challenge a Texas state agency's attempt to issue child-care licenses to detention facilities without statutory authority. But the court of appeals held, incorrectly, that mothers and children have no standing to bring a suit in which both the length and the conditions of their confinement are at stake.

To reach this breathtaking conclusion, the court of appeals:

- construed the DFPS regulation at issue in a way that no party ever advanced and that is contrary to its plain text; and
- contorted settled standing doctrine, holding incorrectly that the challenged regulation must be the sole, proximate, or primary cause of longer detention, when the law requires only that the regulation be one of multiple contributing, but-for causes.

Three justices disagreed with this analysis, dissenting from denial of en banc reconsideration.

The dissent is correct. Texas jurisprudence has no room for a rule that denies parents the right to petition the courts to prevent direct harm to their children. The court of appeals' opinion also sets a dangerous precedent for administrative law because it establishes a new category of government action that is illegal, yet beyond challenge. This Court should grant review, hold that the mothers and children have standing, and remand for the court of appeals to decide the merits.

STATEMENT OF FACTS

The merits of this appeal exclusively involve the validity of a Texas state agency's rule. DFPS issued a rule in response to a federal court's ruling that limited the ability of U.S. Immigration and Customs Enforcement to detain children who are subject to civil immigration proceedings. Background on ICE's detention policy and a governing consent decree is critical to understanding the court of appeals' holding on standing—the issue presented in this petition for review.

I. The *Flores* consent decree set strict limits on detention of children in ICE custody.

In 1997, a class-action settlement between detained minors and the federal government "set[] out nationwide policy for the detention, release, and treatment of minors in the custody of the [Immigration and Naturalization Service, now ICE]." *Flores*, 828 F.3d at 901. The *Flores* consent decree "creates a presumption in favor of release and favors family reunification." *Id*. at 903. Unless detention is necessary to secure a minor's appearance in court or ensure safety, ICE must, within 72 hours, release the minor to an adult family member or other suitable individual or entity. *Id*. at 902-03. To keep minors in custody longer, the government must place them in a facility "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." *Id*. at 903.

Minimizing child detention serves important policy goals. In both *Flores* and this case, extensive unrebutted testimony established the particular harm that

detention inflicts on children. *See Flores*, 212 F.Supp.3d at 880. One witness summarized the research:

> [A]fter talking with the Texas Pediatric Society, we knew the position of the American Academy of Pediatrics that—and many other human rights experts. There's very clear and longstanding documentation about the harms of detaining children in detention centers, really worldwide, and the research reaches the pretty unanimous consensus that detention is very harmful for children.

CR3605-06.

As a prominent expert explained to the trial court, detention harms children by depriving them of freedom of action and forcing them to observe the disempowerment of their parents. The resulting surge of stress hormones damages children's brains, affecting their socioemotional development and executive function. CR3580-81. The stress of detention is greater than what children experience in normal life—or even in an institution. CR3580. It leads to chronic diseases such as asthma, diabetes, and hypertension, CR3580-81, 3584, and causes psychological harm, including suicidal ideation and behavior, and developmental regression (*e.g.*, return to breastfeeding and bed-wetting), CR3583. The longer a child is detained, the greater the harm. CR3584.

II. In 2014, ICE adopts a policy to detain all female-headed families.

Before 2014, ICE generally released families that were neither a significant flight nor safety risk. *Flores*, 212 F.Supp.3d at 874. But in June 2014, ICE dramatically increased family detention.

In response to increased numbers of Central Americans arriving at the border, ICE adopted a policy of detaining all female-headed families. *Id.* at 869. Detention would last for the duration of the asylum proceedings that determine if the mothers and children are entitled to remain in the United States. *Id*. Notwithstanding the *Flores* Settlement, ICE would detain them in unlicensed facilities. *Id*.

ICE opened three family detention facilities: two in Texas and one in Artesia, New Mexico, which closed later that year. *Flores*, 828 F.3d at 904. The Texas facilities are operated by private-prison companies under contract with ICE. CoreCivic operates the South Texas Family Residential Center near Dilley, Texas. Known as "Dilley," this facility has 2400 beds. The GEO Group, Inc., operates Karnes County Residential Center near Karnes City, Texas. Known as "Karnes," this facility has 830 beds.

Most of the women and children detained at Karnes and Dilley are from Honduras, El Salvador, and Guatemala and either presented themselves to border patrol agents at a port of entry or crossed the border after fleeing persecution in their home countries. Karnes and Dilley operate as civil, not criminal, detention facilities for people who may be subject to deportation. 3SCR895, 1390, 1412; CR3318-19. Women and children are detained at Karnes and Dilley while they seek asylum as allowed by U.S. law, which is a defense to deportation. CR3319-20.

III. Federal courts hold that ICE's 2014 detention policy violates the *Flores* Settlement.

In 2015, a court held that ICE's family detention policy violated the *Flores* Settlement. *Flores*, 212 F.Supp.3d at 873. Detention longer than 72 hours at Karnes and Dilley violated the licensing provision: "Defendants cannot be in substantial compliance with the Agreement because the facilities are secure and non-licensed." *Id*. at 879.

The *Flores* court issued its order in July 2015—after Karnes and Dilley had already been operating for months. Pursuant to the order, if the federal government detained children more than a few days, it had to place them in non-secure, licensed facilities. *See Flores*, 828 F.3d at 902-03. The Ninth Circuit affirmed the district court's order in all relevant respects. *Id*. at 908-10.

IV. DFPS disclaims jurisdiction over family detention centers.

Perhaps foreseeing the federal courts' rulings, in Spring 2014, ICE asked the Texas Department of Family and Protective Services to license Karnes and Dilley as childcare centers. Darla Jean Shaw, Director for Residential Child Care Licensing and Acting Interim Commissioner for Child Care Licensing, evaluated ICE's request. 3SCR323, 479-80. After a comprehensive review by DFPS lawyers and staff, Ms. Shaw notified ICE that "these facilities would not qualify to be licensed as a general residential operation ["GRO"]"—the childcare classification that ICE sought. 3SCR480.

Ms. Shaw's decision conformed to DFPS's longstanding position that it had no authority to license facilities where children reside with a parent or guardian. Indeed, DFPS specifically disclaimed jurisdiction over a different family detention facility in 2006. CR3136-37, 3980. Over the next decade, DFPS consistently determined that it lacked statutory authority to issue residential child-care licenses to secure immigrant-family-detention facilities, including Dilley and Karnes. 7RR:Ex. 11; 3SCR481, 721, 766.

On the last occasion, in May 2015, Judge John J. Specia Jr., then-DFPS Commissioner, responded to a request that the agency take action to shut down Dilley. *See* 7RR:Ex.11. Explaining in detail the agency's statutory authority, Commissioner Specia declined to act. *Id*. In this, he followed the agency's longstanding judgment: "[C]hildren reside at this facility with their parents. It is for this reason that DFPS has neither jurisdiction nor standing." 7RR:Ex.11 at 1.

Only a few months later, the agency did an about-face.

V. DFPS reverses course and moves to license Karnes and Dilley as "child-care" centers where children may share bedrooms with strangers.

In their quest to detain children indefinitely after the July 2015 *Flores* decision, ICE and the Private Prison Companies aggressively sought DFPS childcare licenses. Even though the Texas Legislature had not modified DFPS's licensing authority, ICE repeatedly urged DFPS to determine that the Texas agency had the very jurisdiction it had always disavowed. 3SCR479-81.

DFPS eventually bowed to ICE's pressure. Despite forceful, unanimous opposition from physicians and child-welfare advocates, CR466, DFPS issued a rule under which family detention centers may be licensed as child-care centers. The new rule christens family-detention facilities as "family residential centers" ("FRC"). 26 TEX. ADMIN. CODE §748.7 ("FRC Rule"). Under the FRC Rule, an FRC can be licensed when "[t]he center is operated to enforce federal immigration laws" and "[e]ach child at the center is detained with a parent or other adult family member, who remains with the child at the center." *Id*. Karnes and Dilley are the only facilities in Texas that fit the Rule's definition of an FRC. CR465.

While the Rule requires FRCs to get childcare licenses, it absolves them of providing childcare. At FRCs, "*parents* reside with and are responsible for their children." 26 TEX. ADMIN. CODE §748.7(a)(4) (emphasis added). The Private Prison Companies recognize that the mothers retain all legal rights over their children. 3SCR:Ex.17 at 256.

Although all other licensed facilities must comply with DFPS's minimum standards, family detention centers obtained exceptions. The FRC rule provided that FRCs would be licensed as general residential operations, or GROs, as defined in §42.002(4) of the Texas Human Resources Code. 26 TEX. ADMIN. CODE §748.7(b). GROs are subject to "bedroom" requirements, limiting how many children can share a bedroom and with whom. *Id.* §§748.1937, 1939, 3357.

The Private Prison Companies and ICE requested waivers of the bedroom requirements. DFPS again acquiesced, waiving rules prohibiting: (1) more than 4 children from sharing a bedroom, (2) adults from sharing a bedroom with a child, and (3) children of the opposite sex sharing a bedroom. *Id.* §748.7(c). An exception to the latter two rules was necessary to keep families together, but DFPS's waiver went much further, allowing any adult—even a stranger—to sleep in the same bedroom as a child. This allowed the Private Prison Companies to avoid having to modify their facilities. *See* CR3905-06.

VI. Dilley and Karnes are prisons, not child-care facilities.

The Private Prison Companies tout the amenities they offer to detainees, whom they call "residents." CoreCivic Br. at 3-4; GEO Br. at 26. But a playground and snacks do not convert a detention facility into a child-care facility. An expert said of Karnes: "I would describe it as prison-like." CR3151. He continued:

> [M]ost childcare or child welfare facilities do much more to provide a less restrictive environment. They look for the best interest of the child, emotionally, psychologically, socially, educationally, physically, spiritually and so on. There's nothing to indicate that a prison-like setting is allowing for that. We can also add to that the family context. These are not mothers living in what we would prefer to see them living in, in more of an apartment setting, where they can cook their children's dinner, they can put them to bed at night, they can wash their clothes and things like that. It is a group of families, two, sometimes more families in one cell. That's very different from any child welfare facility I've ever visited.

CR3152. When asked whether Karnes employees conduct themselves as childcare workers, the expert responded: "they seem to be guards." *Id*. "[I]t's very different from anything I've ever seen outside of a criminal facility." CR3151-52.

Almost all detained families consist of one mother and one child. *See* CR3592, 3932, 3934; 3SCR1654. One detainee testified:

> We live in a room with 10 other people. . . . We are 6 adult women and 6 girls. . . . My daughter is being exposed to inappropriate adult behavior. My daughter is not just living with me in this jail, she is also residing with 10 other unknown unrelated people. Neither of us feel safe or comfortable.

CR1001, 1286, 3048.

Children have already been harmed because DFPS allowed unrelated adults to share bedrooms with children. At Karnes, an adult detainee groped an unrelated 12-year-old girl with whom she was sharing a bedroom. CR3386. As an expert testified: "We typically, in life, don't let our children sleep in bedrooms with other people, adults." CR3157. It is "[a] grave concern to have children sleeping in rooms with adults other than their parents." *Id*.

VII. The trial court invalidates the FRC Rule.

Twenty-two mothers and children detained at Karnes and Dilley, joined by Grassroots Leadership, Inc., and child-care licensee Gloria Valenzuela, challenged the FRC Rule under the Administrative Procedure Act. CR867. The Private Prison Companies intervened to help defend the Rule. CR720, 756.

The trial court granted a temporary injunction, preventing DFPS from issuing a license to Dilley (the Karnes license had already been issued). CR1112. The State filed a plea to the jurisdiction based on sovereign immunity and standing, CR740, and the parties filed cross-motions for summary judgment.

The trial court dismissed Plaintiffs' UDJA claims but otherwise denied the plea to the jurisdiction. CR4213-14. The court then granted the Plaintiffs' summary-judgment motion, denied the State's and the Private Prison Companies' cross-motions, and held the FRC Rule invalid. *Id*.

The court of appeals reversed, holding that none of the Plaintiffs had standing to challenge the Rule. Three justices dissented from the denial of en banc reconsideration.

SUMMARY OF THE ARGUMENT

The court of appeals misconstrued the FRC Rule and ignored settled standing doctrine in holding that the Detainees' alleged harm was not traceable to the Rule.

The Detainees allege that licensing through the Rule harms them in two ways:

- worsening the conditions of confinement by allowing unrelated adults to share bedrooms with children, which invades the children's privacy and places them at risk of sexual assault, and

- lengthening the period of confinement by nominally satisfying one of the conditions of the *Flores* settlement.

Both of these harms are traceable to the Rule, and each, alone, establishes the Detainees' standing to challenge it.

The court of appeals reached a contrary conclusion regarding the conditions of confinement only by inventing a new construction of the Rule—one never advanced by the State or the Private Prison Companies and directly at odds with both the trial court's construction and the Rule's plain text. According to the court of appeals, the harm is not traceable to the Rule because the Rule prohibits, rather than allows, unrelated adults to share a room with a child. The Rule, on its face, repudiates the court of appeals' conclusion. The harm is traceable.

The court of appeals also held that any lengthening of the period of confinement was not traceable to the Rule because the federal government makes the ultimate decision about the length of detention. But the Rule need not be the sole, proximate, or primary cause of longer detention. Established standing jurisprudence

requires only that the Rule be one of multiple contributing, but-for causes. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 523 (2007); *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997); *Heckman v. Williamson County*, 369 S.W.3d 137, 157 (Tex. 2012) (concluding that deprivation of plaintiff's constitutional right to counsel was traceable to county because it, among others, contributed to cause the injury). The record shows, and no one disputes, that licensing is a contributing, but-for cause of the children's lengthened detention.

As the dissenting justices explain, the Detainee mothers and children have standing to challenge the Rule. This Court should reverse the court of appeals' judgment and remand to that court to decide the merits of the appeal.

ARGUMENT

I. The court of appeals' opinion renders the FRC Rule unchallengeable.

Under the court of appeals' reasoning, ***no one*** has standing to challenge the FRC Rule except the regulated entities—private, for-profit prison companies that favor the Rule, proposed it in the first place, and intervened in this proceeding to defend it. DFPS conceded that point at oral argument. Oral argument at 3:15 http://www.txcourts.gov/media/1442273/03-18-00261-cv.mp3.

Ordinarily, if a state agency adopts an invalid rule, the people or entities regulated by the rule can and will seek relief in the courts. *See, e.g., Patel v. Texas Dep't of Licensing & Reg*, 469 S.W.3d 69, 78 (Tex. 2015) (eyebrow threaders challenged statute and rule establishing licensing scheme as to their profession); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (those who are the object of government action generally have standing to challenge it).

This accountability is missing when, as here, the state agency and the regulated industry act in concert, with the industry seeking—rather than resisting—state regulation. When such concerted action harms individuals or businesses, standing cannot rest exclusively with the regulated industry. It must also extend to other citizens directly affected by the regulation. *See, e.g., Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 582–83 (Tex. 2013) (holding that homeowners had standing to challenge administrative rules directed at lenders). By shutting the

courthouse doors, the court of appeals severs state agencies from the Legislature's control and empowers them to ignore legislative directives. Indeed, non-reviewability is a disfavored result. *Atascosa County v. Atascosa Cty. Appraisal Dist.*, 990 S.W.2d 255, 259-60 (Tex. 1999).

The court of appeals' opinion gives a state agency a green light to act unlawfully, and in the gravest of contexts—not a dispute over money, but the physical and psychological well-being of children. The Detainees—mothers and children threatened with physical and psychological harm—must have standing to hail the agency into court.

II. The court of appeals' standing analysis misreads the FRC Rule and controlling standing jurisprudence.

The Detainees asserted that the FRC Rule injured them in two distinct ways:

- **Worsening the conditions of confinement**. The Rule lowered the minimum standards for child-care facilities by allowing unrelated adults to share bedrooms with children, invading their privacy and exposing them to a risk of sexual assault—which has actually occurred. *See* Slip. Op. at 13; CR3386.

- **Lengthening the period of confinement**. By nominally satisfying one of the conditions of the *Flores* settlement, licensure under the Rule will allow ICE to detain children indefinitely, rather than the days or weeks allowed under *Flores*.

The court of appeals erroneously held that because neither injury was traceable to the Rule, the Detainees lacked standing.

A. The Court interpreted the FRC Rule in a manner that contradicts its plain text and all parties' contentions.

The trial court's Amended Final Judgment concluded that the Rule "[p]ermit[s] children to share bedrooms with an unrelated adult." CR4215. The State and the Private Prison Companies appealed this judgment, but no one argued that the trial court's construction of the Rule was wrong.

Nonetheless, the court of appeals adopted a new reading of the FRC Rule and used it to defeat Detainees' standing. That court held that the Rule "explicitly forbids" an unrelated adult from sharing a bedroom with a child—one of the harms the Detainees allege. Slip Op. at 13. In their briefs on rehearing, the State and Private Prison Companies reasserted their own previous standing arguments but tellingly ***declined*** to defend the court of appeals' new construction of the Rule or its application to defeat the Detainees' standing.

The court of appeals' construction of the Rule is unreasonable on its face. As the dissent observes, the Rule's text does not forbid an unrelated adult from sharing a bedroom with a child. Dissent at *3 n.3. Although the Rule's stated *intent* was to allow parents to sleep with their children, 41 TEX. REG. 1493, the Rule's *text* sweeps much more broadly, allowing unrelated adults in the bedroom as well.

The court of appeals relied on the following italicized phrase in the Rule allowing the Private Prison Companies to ignore a customary restriction on children and adults sharing a bedroom:

> the limitation on a child sharing a bedroom with an adult in §748.3361 of this title (relating to May a child in care share a bedroom with an adult?), *if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member*.

Slip Op. at 6 (quoting 26 TEX. ADMIN. CODE §748.7(c)(2)).

Nothing in that phrase forbids a child from being placed in a bedroom with her parent ***and*** other, ***un***related adults. In other words, as long as a child's parent also sleeps in the bedroom, the Rule permits a facility to assign a child to the same bedroom as an unrelated adult.

By lowering the state minimum standards to allow children to be placed in bedrooms with adult strangers in addition to a parent, the Rule threatens tangible, substantial harm to the Detainee Children, exposing them to invasion of privacy and risk of sexual assault. As even the court of appeals recognized, this harm is not speculative; it has already occurred. Slip. Op. at 13.

This, alone, is sufficient to confer standing.

B. The Opinion adopts a traceability analysis that is at odds with Supreme Court precedent.

The traceability element of standing recognizes that an injury may have multiple causes—just as multiple tortfeasors may combine to cause a single injury. Traceability asks whether a defendant's action is a cause-in-fact of the injury; it does not require sole, proximate, or primary cause. *See Massachusetts*, 549 U.S. at 523 (holding that a state's injury from global warming was traceable to the EPA's failure

to regulate greenhouse-gas emissions, even though the emissions themselves were the primary cause). An injury is traceable to an agency if its actions "contribute[]" to the injury. *Id*.

The Detainees contend that the Rule, if permitted to take effect, would permit ICE to detain children for longer periods. The court of appeals rejected that contention, concluding that "the length of detention is determined by ICE policy and is solely within ICE's discretion." Slip. Op. at 14. As the dissent pointed out, the court of appeals applied an incorrect, proximate-cause standard to determine standing. Dissent at *4.

The United States Supreme Court rejected a similar argument by the federal government in *Bennett*. Ranchers and irrigation districts who feared loss of water sued the Secretary of the Interior and the Fish and Wildlife Service, alleging violations of the Endangered Species Act in connection with the Service's "biological opinion" regarding the Bureau of Reclamation's operation of an irrigation project. *Bennett*, 520 U.S. at 157. The Service challenged the plaintiffs' standing, arguing that "the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to [plaintiffs], not the biological opinion itself." *Id*. at 168-69. Justice Scalia, writing for a unanimous Court, explained that this argument:

> wrongly equates injury "fairly traceable" to the defendant with injury as to which the defendant's actions are the very last step in the chain of

> causation. While, as we have said, it does not suffice if the injury complained of is "th[e] result [of] the *independent* action of some third party not before the court," that does not exclude injury produced by determinative or coercive effect upon the action of someone else.

Id. (internal citations omitted).

The Service's biological opinion produced "determinative" effect because it "alter[ed] the legal regime to which the action agency [the Bureau] is subject." *Id*. at 169. The opinion "constitute[d] a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions.'" *Id*. at 170. Accordingly, the plaintiffs' injury was traceable to the opinion, and they had standing. *Id*. at 170-71.

The FRC Rule is analogous. Like *Bennett*'s biological opinion, the FRC Rule "alters the legal regime to which the action agency [*i.e.*, ICE] is subject." *See id.* at 169. Although ICE decides how long families are detained, ICE is constrained by *Flores*—as the court of appeals recognized and no party disputes. Slip. Op. at 14. *Flores* forbids detention of immigrant children except in extraordinary circumstances, and then only in licensed facilities. ICE may detain children in unlicensed facilities for only a few days or weeks.

Licensing the Texas facilities would free ICE from *Flores*'s limitation, allowing it to detain children longer in arguable compliance with *Flores*. This is why ICE and the private prison companies so desperately urged Texas to promulgate the FRC Rule: Without it, ICE *cannot* legally detain children for longer periods.

The FRC Rule thus "alters the legal regime to which [ICE] is subject," exercising "determinative" effect. *Bennett*, 520 U.S. at 168-69. Like the opinion in *Bennett*, the FRC Rule acts as a "permit," satisfying *Flores*'s condition and allowing ICE to do what *Flores* would otherwise prohibit. This harm satisfies the test for constitutional injury and provides the requisite standing.[3]

Finally, the court of appeals concludes that increased detention is "too speculative to meet the concrete-injury requirement" because "ICE . . . determines where detainees will be detained," and the court "cannot predict" where that will be. Slip. Op. at 14. This analysis is misdirected. ICE's decision where to place the Detainees is not speculative at all. It has already been made: each Detainee was detained at Karnes or Dilley when suit was filed, which—as the court recognized—is the time at which standing is determined. Slip. Op. at 7. The Court's conclusion that the Detainees fail the concrete-injury requirement lacks legal or factual basis.

PRAYER

Petitioners respectfully request that this Court reverse the court of appeals' judgment and remand for the court of appeals to decide the merits.

[3] Petitioners never conceded, as the court of appeals suggests, that detention periods decreased at Karnes *as a result of licensure*. *See* Slip. Op. at 14 n.8. Tellingly, the Private Prison Companies freely acknowledge that licensure would increase the length of detention. CR772; 3SCR829.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 4,482 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ *Amy Warr*
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, a true and correct copy of this petition, including any and all attachments, is served via electronic service through eFile.TXCourts.gov on parties through counsel of record, listed below:

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APPENDIX 1

Filed in The District Court
of Travis County, Texas

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

No. D-1-GN-15-004336

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

AMENDED FINAL JUDGMENT

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

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

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

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

I. Factual Background.

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

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

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

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

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

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

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

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

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

II. Defendants' Third Amended Plea to the Jurisdiction.

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

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

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

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

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

III. Parties' Cross-Motions for Summary Judgment.

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

A. Plaintiffs' Motion for Summary Judgment;

B. Defendants' Motion for Summary Judgment;

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

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

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

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

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

C. Defendants' Motion for Summary Judgment is DENIED;

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

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

IV. Injunctive Relief and Denial of Automatic Supersedeas.

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

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

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

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

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

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

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

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

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

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

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

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

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

All costs are assessed against each party incurring the same.

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

SIGNED on this the 16th day of December 2016.

JUDGE PRESIDING
KARIN CRUMP

APPENDIX 2

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00261-CV

Texas Department of Family and Protective Services; Henry Whitman, in His Official Capacity as DFPS Commissioner; Texas Health and Human Services Commission; Charles Smith, in his Official Capacity as HHSC Executive Commissioner; Corrections Corporation 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.; Y. R. F., for herself and as next friend for C. R. R.; S. J. M. G., for herself and as next friend for J. C. M.; K. G. R. M., for herself and as next friend for A. V. R.; C. R. P., for herself and as next friend for A. N. C. P.; B. E. F. R., for herself and as next friend for N. S. V.; S. E. G. E., for herself and as next friend for G. E. A.; Leser Julieta Lopez Herrera, for herself and as next friend for A. B.; and Rose Guzman de Marquez, for herself and as next friend for D. R., Appellees

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

M E M O R A N D U M O P I N I O N

This appeal concerns several parties' challenges to the validity of a rule promulgated by the Texas Department of Family and Protective Services (DFPS). The challenged rule requires "family residential centers" (FRCs)—which serve as detention centers for immigrants and their minor children who are subject to federal civil-immigration proceedings—to be licensed as "general residential operations" (GROs) and, thus, subject to the State's minimum standards for such

facilities.[1] As they did below in a plea to the jurisdiction, appellants DFPS and its Commissioner and the Texas Health and Human Services Commission (HHSC) and its Executive Commissioner contend that the trial court should not have reached the merits of the rule challenge because each plaintiff below lacked standing to confer jurisdiction on the trial court. We agree with appellants and, for the following reasons, reverse the trial court's judgment and render judgment granting appellants' plea to the jurisdiction and dismissing appellees' rule-challenge claims with prejudice.

BACKGROUND[2]

In 1985 a class of plaintiffs initiated a lawsuit against U.S. Immigration and Customs Enforcement (ICE) and other defendants in the District Court of Central California; many years later, the parties entered into a court-approved settlement of the lawsuit (the "*Flores* Settlement Agreement"). *See Flores v. Lynch*, 828 F.3d 898, 901–03 (9th Cir. 2016). The *Flores* Settlement Agreement "set[] out nationwide policy for the detention, release, and treatment of minors in the custody of [ICE]." *Id.* at 901. Under the *Flores* Settlement Agreement, unless detention is necessary

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[1] The Providers sued the Texas Department of Family and Protective Services (DFPS) and its Commissioner, Henry Whitman, because DFPS was at the time the agency that handled licensing of child-care facilities. Effective September 1, 2017, appellant Texas Health and Human Services Commission (HHSC) assumed responsibility for child-care licensing as a result of legislation directing that DFPS become a stand-alone agency that is separate from HHSC and will regulate child-care operations only to the extent of investigating child abuse, neglect, and exploitation. *See* Act of May 22, 2017, 85th Leg., R.S., ch. 316, §§ 22, 24, 38, 2017 Tex. Gen. Laws 601, 607, 612. In accordance with this transfer of responsibility, the relevant rules have been transferred to Title 26 of the Texas Administrative Code. *See* 43 Tex. Reg. 909 (2018) (announcing transfer of rules that contain minimum standards for child-care operations from DFPS to HHSC); *see also, e.g.*, 26 Tex. Admin. Code § 748.7 (2018) (Health & Human Servs. Comm'n, How are these regulations applied to family residential centers?).

[2] The facts in this section are derived from recitations in the trial court's Amended Final Judgment.

to secure a minor's appearance in court or to ensure safety, ICE must promptly release the minor to an adult family member or other suitable individual or entity. *Id.* at 902–03. Also, ICE must temporarily place all unreleased minors in an unsecure and "licensed program"—i.e., a facility that is "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." *Id.* at 903.

In response to increased numbers of Central Americans arriving at the U.S.-Mexico border during the summer of 2014, and to deter further arrivals, ICE adopted a policy of detaining all female-headed immigrant families. *Flores v. Johnson*, 212 F. Supp. 3d 864, 869 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded sub nom. Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016). Detention under ICE's new policy would last for the duration of the deportation proceedings that determine if the mothers and children are entitled to remain in the United States. *Id.* Notwithstanding the *Flores* Settlement Agreement, ICE's new policy provided that the immigrants would be detained in secure, unlicensed facilities. *Id.* In federal court, the new ICE policy was held to violate the *Flores* Settlement Agreement. *See id.* at 879 ("Defendants cannot be in substantial compliance with the Agreement because the facilities are secure and non-licensed."), *aff'd in relevant part*, 828 F.3d at 908–10.

ICE opened three new family detention facilities, two in south Texas—known as "Dilley" and "Karnes" due to their locations—and one in New Mexico, which was closed shortly thereafter. *Flores*, 828 F.3d at 904. This lawsuit concerns the Dilley and Karnes facilities, which are operated by private prison companies under contract with ICE. Appellant Corrections Corporation of America (currently known as CoreCivic) operates the Dilley facility; appellant GEO Group, Inc.,

operates the Karnes facility. The Karnes and Dilley facilities began detaining immigrant women and children in 2014.

DFPS did not attempt to regulate FRCs in Texas until it adopted an emergency rule on September 2, 2015. Before that time, DFPS had historically and consistently acknowledged that it lacked authority to license FRCs and declined to do so based upon that lack of authority. Shortly after the emergency rule was adopted, Grassroots Leadership initiated this lawsuit to challenge the emergency rule. The trial court issued a temporary injunction prohibiting DFPS from implementing the emergency rule but expressly permitting it to proceed through the traditional rulemaking procedures outlined in the Texas Government Code. *See* Tex. Gov't Code §§ 2001.023–.029. DFPS followed the procedures for rulemaking and subsequently adopted Rule 748.7 (referred to by the parties and in the trial court's judgment as the "FRC Rule"). *See* 26 Tex. Admin. Code § 748.7 (2018) (Health & Human Servs. Comm'n, How are these regulations applied to family residential centers?) (formerly codified at 40 Tex. Admin. Code § 748.7).

Grassroots Leadership amended its petition several times while the cause was pending below, adding additional plaintiffs: Gloria Valenzuela, who operates a day-care facility in El Paso, and several detainees, on behalf of themselves and their minor children. CoreCivic and GEO Group intervened as defendants. Appellees' live petition asserts the following causes of action against appellants: (1) a challenge to the FRC Rule as allegedly exceeding DFPS's statutory authority in contravention of the Human Resources Code, *see* Tex. Gov't Code § 2001.038; (2) a request for declaratory relief under the Uniform Declaratory Judgments Act (UDJA), *see* Tex. Civ. Prac. &

Rem. Code §§ 37.001–.011; and (3) and a claim that DFPS's attempts to issue licenses to Karnes and Dilley constitute ultra vires acts.[3]

Appellees' live petition outlines their primary contentions for challenging the validity of the FRC Rule: the rule exceeds DFPS's statutory authority; DFPS did not provide a reasoned justification, *see* Tex. Gov't Code 2001.033(a)(1); the rule's provisions prolong the detention of minors; the rule allows for the detention of minors in violation of Family Code section 54.011(f), *see* Tex. Fam. Code § 54.011(f) ("[A] nonoffender, including a person who has been taken into custody and is being held solely for deportation out of the United States, may not be detained for any period of time in a secure detention facility . . . ."); and the rule "authoriz[es] conditions of detention for mothers and children . . . by permitting exceptions to minimum child safety standards established by DFPS itself . . . that increase their risk of physical harm and fear for their physical safety." Plaintiffs below sought a declaration invalidating the rule and declaring that DFPS has no authority to issue licenses to Dilley and Karnes.

Appellants filed pleas to the jurisdiction claiming that appellees lack standing to assert their claims. In its Final Amended Judgment, the trial court denied the pleas to the jurisdiction as to appellees' rule challenge and declared the FRC Rule invalid because it "contravenes" Human Resources Code section 42.002(4) and "runs counter to the general objectives of the [] Human

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[3] Only the appellees' rule challenge is before us on appeal, as the trial court dismissed appellees' UDJA claim when granting appellants' plea to the jurisdiction, and the trial court's Amended Final Judgment, while not specifically ruling on the ultra vires claims, "dispose[d] of all parties and claims." *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (noting that judgment issued without conventional trial is final if it actually disposes of all claims and parties). Appellees have not cross-appealed the trial court's judgment with respect to their declaratory-judgment and ultra vires claims.

Resources Code." The Final Amended Judgment also ordered DFPS and HHSC to "refrain from issuing licenses under the FRC Rule until the Court of Appeals issues a decision on appeal or further Order of the Court" but to "continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation(s) of rule of law at Karnes and Dilley during the pendency of any appeal."

DISCUSSION

Appellants contend that, before we address the merits of appellees' rule challenge, we must determine whether any of the appellees has standing. Because standing is a component of subject-matter jurisdiction, we agree that we must first consider the issue. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993) (noting that appellate courts consider plaintiff's standing under same standard by which they review subject-matter jurisdiction generally, which requires plaintiff to allege facts that affirmatively demonstrate court's jurisdiction to hear cause). Standing requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (Tex. 2012); *see Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 739 (Tex. App.—Austin 2014, pet. dism'd).

To satisfy the supreme court's standing test, 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*, 369 S.W.3d at 154 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The standing inquiry "begins with the plaintiff's alleged injury." *Id.* at 155. That is, the plaintiff must plead that she is *personally* injured, demonstrating facts that she, herself (rather than a third

party or the public at large) suffered the injury. *Id.* As for the injury itself, it "must be concrete and particularized, actual or imminent, not hypothetical." *Id.* (quoting *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008)). Standing is determined at the time suit is filed in the trial court, and subsequent events do not deprive the court of subject-matter jurisdiction. *Texas Ass'n of Bus.*, 852 S.W.2d at 446 n.9. We review the denial of a plea to the jurisdiction de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

We now consider whether each appellee has standing—that is, whether each has a concrete and particularized injury fairly traceable to the FRC Rule that is likely to be redressed by the requested relief.

Whether Grassroots Leadership has standing

Per the testimony of its Executive Director, Grassroots Leadership is a non-profit association focused on "advocating for policies that reduce reliance on incarceration and detention." Grassroots Leadership has alleged that it opposes the FRC Rule because it would allow Karnes and Dilley to detain children for longer periods of time under lower standards of care than are provided to children in all other Texas GROs and that the association has been forced to "divert resources to opposing the FRC Rule's adoption and the licensure of private prisons as childcare facilities."

An associational plaintiff can sue on behalf of its members, in which case it must demonstrate standing based on at least one freestanding claim by a member. *Texas Ass'n of Bus.*, 852 S.W.2d at 446–47. However, Grassroots Leadership has not asserted that it has any members and, therefore, cannot meet the requirements of the associational test for standing. *See id.* (adopting U.S. Supreme Court's associational-standing test requiring, relevantly, that association's members

would otherwise have standing to sue in their own right and citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); *see also Texas Soc'y of Prof'l Eng'rs v. Texas Bd. of Architectural Exam'rs*, No. 03-08-00288-CV, 2008 WL 4682446, at *3–4 (Tex. App.—Austin Oct. 24, 2008, no pet.) (mem. op.) (declining to find standing where plaintiff association could not meet associational-standing test). Accordingly, Grassroots Leadership is required to establish standing based on "concrete and particularized" injury to itself, as an entity. *See Heckman*, 369 S.W.3d at 155; *City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 549–50 (Tex. App.—San Antonio 2012, pet. denied) (concluding that nonprofit corporation that owned land immediately upstream from city's proposed drainage project had standing to bring injunction suit because it showed it would suffer particularized injury distinct from that suffered by general public).

Grassroots Leadership alleges that its injury here is that it was required to "divert volunteer and financial resources from its other work, including . . . starting visitation programs to detained migrants at immigration detention centers around Texas, an advocacy campaign to end the immigration detention bed quota, and producing a research report on federal-court prosecution of migrants at the border." In other words, Grassroots Leadership asserts that it spent money on its advocacy activities related to opposing the private detention facilities. However, these activities are not sufficient to meet the test for individualized standing, as the injury it claims to have suffered—the expenditure of advocacy resources—is too attenuated from any legally protected interest it could possibly have in the FRC Rule, not itself being subject to the rule or directly affected by its provisions. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) ("[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way") (citing *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560 & n.1 (1992)); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001) (plaintiff must be "personally aggrieved" to establish standing). Furthermore, Grassroots Leadership's choice to expend advocacy resources to challenge the FRC Rule and the detention centers generally—assuming that such "injury" were sufficiently concrete and particularized—cannot reasonably be considered "fairly traceable" to DFPS's or HHSC's conduct in promulgating or enforcing the rule.

While Grassroots Leadership cites *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982), for its contention that its advocacy expenditure creates standing, we note that the standing test outlined in *Havens* (requiring the plaintiff to have a "personal stake" in the outcome of the controversy, which was met by the organization's allegation that it was required to spend money to counteract governmental policy) applies specifically to claims brought under the federal Fair Housing Act.[4] *See id.* at 378; *see also Midpeninsula Citizens for Fair Hous. v. Westwood Inv'rs*, 221 Cal. App. 3d 1377, 1385 (Cal. Ct. App. 1990) (declining to expand *Havens* beyond Fair Housing Act damages claims because it did not address constitutional standing). This is not a Fair Housing

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[4] Grassroots Leadership also asserts that it has standing to redress the violation of its "statutory rights" under the Administrative Procedure Act (APA) in that DFPS allegedly did not "seriously consider" Grassroots Leadership's objections and comments or give adequate justification for disregarding them when promulgating the final rule. *See* Tex. Gov't Code §§ 2001.029, .030; *Planned Parenthood v. Gee*, 862 F.3d 445, 455 (5th Cir. 2017) ("[V]iolation of a statutory right, even standing alone, may be sufficient to satisfy the injury requirement . . . ."). We reject this argument because the supreme court has held that the APA does not extend the scope of constitutional standing. *See Finance Comm'n v. Norwoood*, 418 S.W.3d 566, 582 n.83 (Tex. 2013) ("The [APA] does not purport to set a higher standard than that set by the general doctrine of standing, and it cannot be lower, since courts' constitutional jurisdiction cannot be enlarged by statute."). Morever, the case on which Grassroots Leadership relies speaks to the alleged deprivation of a "statutory right of entitlement" as the basis of standing, *see Gee*, 862 F.3d at 455; here, Grassroots Leadership has no statutory right under the APA that rises to the level of an entitlement.

Act case, and we decline to expand *Havens* beyond such claims. Therefore, plaintiffs must meet the particularized injury test adopted by the Texas Supreme Court and the United States Supreme Court since *Havens*. *See Brown*, 53 S.W.3d at 305. Because Grassroots Leadership has not pleaded a particularized injury, we conclude that it lacks standing to bring this rule challenge.

Whether Valenzuela has standing

Valenzuela operates a small day-care facility in El Paso and asserts standing based on "license disparagement," contending that the licensing of the FRCs as GROs will affect parents' perceptions of her day-care license, perhaps causing them to choose unlicensed child care based on their negative perceptions of the "jail-like" FRCs. *See Texas State Bd. of Podiatric Med. Exam'rs v. Texas Orthopaedic Ass'n*, No. 03-04-00253-CV, 2004 WL 2556917, at *1 n.3 (Tex. App.—Austin Nov. 12, 2004, no pet.) (mem. op.) (holding that association of orthopedists met injury prong of standing test to challenge rule granting podiatrists right to perform procedures that otherwise would be considered practice of medicine based on association's allegation that privilege of practicing medicine would be diminished because podiatrists are neither licensed nor trained to practice medicine); *see also Intercontinental Terminals Co. v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (in case where standing was not at issue, court concluded that where one business competitor alleged loss of reputation and goodwill as injury in dispute with another competitor about use of shared rail line, complaining competitor sufficiently alleged threatened injury to support temporary injunction).

However, the case on which Valenzuela relies does not support standing under her circumstances, as it involved the expansion of an exception to medical licensure, which would put

a previous license holder (orthopedists) in direct economic competition with new license holders (podiatrists). *See Texas State Bd. of Podiatric Med. Exam'rs*, 2004 WL 2556917, at *2. Here, Valenzuela holds a State license to operate a small day-care facility; Dilley and Karnes, located in south Texas over 500 miles away, are twenty-four-hour GROs each with hundreds of residents and subject to a completely different type of licensing. Dilley and Karnes are not and could not be in any direct economic competition with Valenzuela's facility. Valenzuela has not pleaded that she has ever been personally detained at any FRC or that she operates one. Her speculative scenario about parents choosing unlicensed day care due to potentially negative perceptions of day-care licenses such as hers is far too attenuated and speculative to support standing requirements. Simply put, Valenzuela has not pleaded any concrete and particularized injury to herself or her day-care facility as a result of the FRC Rule. *See Brown*, 53 S.W.3d at 305. Accordingly, we conclude that Valenzuela lacks standing to bring this rule challenge.

Whether the detainees have standing

The detainees, none of whom still reside in the detention centers,[5] assert standing based on alleged harm to their minor children, whom they claim will be detained for longer periods of time—which itself causes "grievous harm to children"[6]—and in "dangerous conditions" due to

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[5] Appellants also assert that the detainees' claims are moot based on the fact that none of them reside any longer in the facilities at issue. Because mootness is a question separate from standing, *see, e.g.*, *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012), we address the issue of the detainees' standing first and then, if necessary, appellants' mootness argument.

[6] There was evidence adduced at the temporary-injunction hearing from appellees' expert about the psychological effect of detention on children, specifically about how the negative effects—including stress, trauma, and hypervigilance—increase the longer the children remain in detention.

the challenged rule's "bedroom-rule waivers" that allegedly "force children to sleep in the same bedroom as adult strangers, exposing them to invasion of privacy and risk of sexual assault." Essentially, the detainees' alleged injury is the harm that they contend will result from lengthier detention and the danger that the bedroom-rule waivers pose—they assert that these "risks to safety suffice to prove Detainee Plaintiffs' standing."[7] *See Texas Ass'n of Bus.*, 852 S.W.2d at 447 (holding that "[a] substantial risk of injury is sufficient" to confer standing). They further contend that the fact the FRC Rule and licensing thereunder will also incrementally benefit them and their children in the form of more rigorous background checks and inspections of facilities does not obviate their standing because the standing test does not require a balancing between alleged harm and benefit; it requires only a showing of harm, even simply "an identifiable trifle." *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (noting that "injury in fact" element of standing test "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem"); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (holding that injury requirement of standing inquiry is "qualitative, not quantitative").

While the detainees concede that the *fact* of detention is traceable to the federal government and to ICE (and thus not redressable in this lawsuit against appellants), they maintain

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[7] The FRC Rule provides that FRCs must comply with the same "minimum standards" applicable to GROs generally, except that FRCs need not comply with the following minimum standards: (1) the maximum of four occupants per bedroom, (2) the prohibition against a child sharing a bedroom with an adult *if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member*, and (3) the prohibition against children of opposite genders sharing a bedroom as long as the children are members of the same family and under the age of six. *See* 26 Tex. Admin. Code § 748.7(c).

that the *length* and *conditions* of detention—which the detainees explicitly challenge—are traceable to the State, which has the authority to issue the FRC licenses and waive the GRO minimum standards, as alleged here. As to the conditions of detention—the alleged danger from "forcing children to share bedrooms with adult strangers"—appellees contend in their brief that the FRC Rule's waiver of bedroom minimum requirements "allows any adult—even a stranger—to sleep in the same bedroom with an unrelated child." Appellees cite to testimony in the record from detainees who claim to have had to share a bedroom with their children in addition to other, unrelated adults at Dilley and Karnes. They also cite to testimony of a twelve-year-old girl who was allegedly groped by an unrelated female adult detainee with whom she was sharing a bedroom.

However, a review of the text of the challenged rule belies appellees' contention that the rule "allows children to share bedrooms with unrelated adults." To the contrary, the FRC Rule explicitly forbids adults to share a bedroom with unrelated children: "A family residential center is not required to comply with all terms of the following Minimum Standards: . . . the limitation on a child sharing a bedroom with an adult in § 748.3361 of this title (relating to May a child in care share a bedroom with an adult?), *if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member*." 26 Tex. Admin. Code § 748.7(c)(2) (emphasis added). That is, the FRC Rule allows for a minor to share a bedroom with the child's parent or adult family member; on its face, it does not allow a minor to share a bedroom with an *unrelated* adult. Simply put, the FRC Rule does not allow for the alleged harmful conditions about which appellees complain and, therefore, appellees have not asserted an injury that is fairly traceable to the FRC Rule's bedroom-rule waiver that is sufficient to confer standing.

We further conclude that the length a child is detained—and the alleged harm resulting from longer detention periods allegedly made possible by licensure of the FRCs—is not fairly traceable to the FRC Rule and appellants. Rather, the length of detention is traceable to federal immigration policy and the *Flores* Settlement Agreement's requirement that state facilities detaining minors be licensed. The FRC Rule and DFPS's promulgation thereof are not what permits the allegedly longer detention periods about which appellees complain; rather, the length of detention is determined by ICE policy and is solely within ICE's discretion. *See Southwest Pharmacy Sols., Inc. v. Texas Health & Human Servs. Comm'n*, 408 S.W.3d 549, 565 (Tex. App.—Austin 2013, pet. denied) (concluding that economic losses alleged by plaintiff resulted from legislative changes to Medicaid program, not from properly implemented rules effecting those changes). Length of detention is solely the province of ICE; implementation of the FRC Rule cannot determine how long detainees are detained.

Appellees' alleged injury of lengthier detention caused by the FRC Rule is also too speculative to meet the concrete-injury requirement of the standing analysis.[8] *See DaimlerChrysler Corp.*, 252 S.W.3d at 307 ("[I]f injury is only hypothetical, there is no real controversy."). It is ICE that determines where detainees will be detained, not the FRC Rule or the State; were Dilley and Karnes not licensed, we cannot predict whether the detainees would be detained in a facility licensed by another state, whether they would be detained in unlicensed facilities, or whether they would be released. We conclude that the detainees' alleged injury in the form of possible prolonged detention

[8] Moreover, appellees conceded in their motion for summary judgment that the average length of stay at Karnes has actually decreased since the facility became licensed under the FRC Rule.

of their minor children is neither concrete and particularized nor fairly traceable to DFPS or HHSC and is, therefore, insufficient to confer standing.

CONCLUSION

Because none of the appellees has standing to challenge the FRC Rule, the trial court did not have subject-matter jurisdiction over the cause, and the trial court erred in denying appellants' plea to the jurisdiction. Accordingly, we reverse the trial court's judgment and render judgment granting appellants' plea to the jurisdiction and dismissing appellees' rule-challenge claims with prejudice.

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David Puryear, Justice

Before Justices Puryear, Goodwin, and Bourland

Reversed and Rendered

Filed: November 28, 2018

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED NOVEMBER 28, 2018

NO. 03-18-00261-CV

Texas Department of Family and Protective Services; Henry Whitman, in His Official Capacity as DFPS Commissioner; Texas Health and Human Services Commission; Charles Smith, in his Official Capacity as HHSC Executive Commissioner; Corrections Corporation 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.; Y. R. F., for herself and as next friend for C. R. R.; S. J. M. G., for herself and as next friend for J. C. M.; K. G. R. M., for herself and as next friend for A. V. R.; C. R. P., for herself and as next friend for A. N. C. P.; B. E. F. R., for herself and as next friend for N. S. V.; S. E. G. E., for herself and as next friend for G. E. A.; Leser Julieta Lopez Herrera, for herself and as next friend for A. B.; and Rose Guzman de Marquez, for herself and as next friend for D. R., Appellees

APPEAL FROM THE 353RD DISTRICT COURT OF TRAVIS COUNTY
BEFORE JUSTICES PURYEAR, GOODWIN, AND BOURLAND
REVERSED AND RENDERED -- OPINION BY JUSTICE PURYEAR

This is an appeal from the amended final judgment rendered by the trial court on December 16, 2016. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the judgment. Therefore, the Court reverses the trial court's amended final judgment and renders judgment granting appellants' plea to the jurisdiction and dismissing appellees' rule-challenge claims with prejudice. Appellees shall pay all costs relating to this appeal, both in this Court and the court below.

APPENDIX 3

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00261-CV

Texas Department of Family and Protective Services; Henry Whitman, in His Official Capacity as DFPS Commissioner; Texas Health and Human Services Commission; Charles Smith, in his Official Capacity as HHSC Executive Commissioner; Corrections Corporation 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.; Y. R. F., for herself and as next friend for C. R. R.; S. J. M. G., for herself and as next friend for J. C. M.; K. G. R. M., for herself and as next friend for A. V. R.; C. R. P., for herself and as next friend for A. N. C. P.; B. E. F. R., for herself and as next friend for N. S. V.; S. E. G. E., for herself and as next friend for G. E. A.; Leser Julieta Lopez Herrera, for herself and as next friend for A. B.; and Rose Guzman de Marquez, for herself and as next friend for D. R., Appellees

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

DISSENTING OPINION

TO DENIAL OF EN BANC RECONSIDERATION

This case involves a challenge to a rule adopted by the Texas Department of Family and Protective Services (DFPS) that authorizes the State to issue child-care-center licenses to immigrant detention facilities in Texas known as "family residential centers" (FRCs). The FRCs are operated by private prison companies under contract with the federal government, specifically U.S. Immigration and Customs Enforcement (ICE). Appellees, who were plaintiffs

in the court below (Plaintiffs), challenged the validity of the rule on several grounds, including that the rule exceeded DFPS's statutory authority, prolonged the amount of time that children may be detained in the facilities, and allowed children to be detained in conditions that endangered their safety. Appellants, who were defendants in the court below (Defendants), filed pleas to the jurisdiction asserting that Plaintiffs lacked standing to assert their claims. The district court denied the pleas to the jurisdiction and declared the rule invalid. Defendants appealed the district court's judgment.

On September 5, 2018, the appeal was submitted on oral argument to this Court. On November 28, 2018, the Court reversed the district court's judgment and rendered judgment granting Defendants' pleas to the jurisdiction, concluding that all Plaintiffs lacked standing to assert their claims. *See Texas Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 Tex. App. LEXIS 9643, at *18 (Tex. App.—Austin Nov. 28, 2018, no pet. h.) (mem. op.). On December 14, 2018, the Court overruled Plaintiffs' motion for rehearing.

On January 11, 2019, Plaintiffs filed a motion for en banc reconsideration. Today, three of the six justices on this Court have voted to grant that motion and three have voted to deny that motion, resulting in the denial of en banc reconsideration. *See* Tex. R. App. P. 49.7 (requiring approval of majority of court before appeal may be reconsidered en banc). Because I would grant the motion, I respectfully dissent from that denial.

"En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration." Tex. R. App. P. 41.2(c). The rules do not define what constitutes "extraordinary circumstances," and courts have discretion to determine whether

such circumstances exist in a given case. *See Chakrabarty v. Ganguly*, 573 S.W.3d 413, 415–16 & n.4 (Tex. App.—Dallas 2019, no pet.) ("The standard set forth in Rule 41 is sufficiently broad to afford the Court the discretion to consider a case en banc 'if the circumstances require and the court votes to do so.'" (quoting *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 708 n.1 (Tex. 2003)). I agree with former Chief Justice Woodie Jones that "extraordinary circumstances" would include "addressing issues that are highly significant to the public or in which the public has a high level of interest." *Twigland Fashions, Ltd. v. Miller*, 335 S.W.3d 206, 226 (Tex. App.—Austin 2010, no pet.) (Jones, C.J., concurring in denial of en banc reh'g).

Granting en banc reconsideration based on "extraordinary circumstances" is rare but not unprecedented. For example, in *Lawrence v. State*, 41 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd), *rev'd*, 539 U.S. 558, 579 (2003), the Houston Fourteenth Court of Appeals granted en banc reconsideration to determine whether a Texas statute criminalizing certain sexual conduct between consenting adults was facially unconstitutional. In *Rodriguez v. Cuellar*, 143 S.W.3d 251 (Tex. App.—San Antonio 2004, pet. dism'd), the San Antonio Court of Appeals, in an opinion authored by current Texas Supreme Court Justice Paul Green, granted en banc reconsideration to determine whether the trial court had jurisdiction to determine the merits of a contentious federal election contest. Both cases addressed issues of statewide and arguably national importance that were "highly significant to the public or in which the public ha[d] a high level of interest" at the time.

This case addresses state policies that affect the length and conditions of detention faced by immigrant children and their mothers in Texas. The detention of immigrant families in Texas and elsewhere has received extensive news coverage and analysis in both state and national media outlets for several years, dating back to the previous presidential administration

and intensifying during the current administration. There are few, if any, issues in which the public has shown a higher level of sustained interest. This case also touches on the relationship between state administrative law and federal immigration policy[1] and thus could have far-reaching legal and policy ramifications in future cases, both here in Texas and in other states where immigrant children may be detained.[2] Given the continued statewide and national significance of these issues, I believe it is imperative that the entire Court hears and decides this appeal.

With regard to the merits of the Court's opinion, I agree with the Court that Plaintiffs Grassroots Leadership, Inc., a non-profit organization focused on "advocating for

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[1] The detention and treatment of minors in immigration custody is governed by the terms of the *Flores* Settlement Agreement, a court-approved settlement of a federal lawsuit filed by detained minors against the Immigration and Naturalization Service. *See Flores v. Barr*, 934 F.3d 910, 912–16 (9th Cir. 2019); *Flores v. Lynch*, 828 F.3d 898, 901–03 (9th Cir. 2016). The agreement sets strict limitations on the length of time that children may be detained in immigration facilities, generally no longer than 20 days. *See Lynch*, 828 F.3d at 901–03; *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1070 (C.D. Cal. 2017). However, when ICE detains children in state-licensed facilities, this prolongs indefinitely the length of time that children may be detained. *See Lynch*, 828 F.3d at 903. Thus, declaring the DFPS rule valid or invalid could have a significant effect on federal immigration policy moving forward. As Plaintiffs observe in their brief, "The State is not a mere bystander to the federal government's policies. A license is required before the federal government can detain children longer—its stated goal. Only the State can license the facilities as child-care centers. By issuing a rule to license these facilities, the State enables the federal government to prolong children's detention under unsafe conditions."

[2] In addition to the two Texas facilities at issue in this appeal, ICE opened a third immigrant detention center in New Mexico. *See id*. at 904. Although that facility is now closed, there is another detention center located in Pennsylvania that "has been monitored and licensed by state authorities under the state standards applicable to child residential and day treatment facilities" in that state. *See id*. at 903; *see also Sessions*, 394 F. Supp. 3d at 1066–71 (discussing alleged conditions at Pennsylvania facility). If future lawsuits were to be filed in other states where immigrant children are detained, courts in those jurisdictions could look to this Court's opinion for guidance. Moreover, this Court's opinion could either encourage or discourage current and future detainees in Texas and elsewhere from filing similar lawsuits, and it could also encourage or discourage other states to adopt rules similar to the DFPS rule.

policies that reduce reliance on incarceration and detention," and Gloria Valenzuela, the owner of a child-care center located in El Paso that has no connection to the immigrant detention centers at issue in this case, lack standing to challenge the DFPS rule. *See Grassroots Leadership, Inc.*, 2018 Tex. App. LEXIS 9643, at *8–13. However, I would conclude that the Detainee Plaintiffs have standing to assert their claims.

Standing, a component of subject-matter jurisdiction, "'requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.'" *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018) (quoting *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012)). Stated another way, to have standing, "'[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id*. at 485. "As for the injury itself, it 'must be concrete and particularized, actual or imminent, not hypothetical.'" *Heckman*, 369 S.W.3d at 155.

"Our concern is with a party's right to initiate a lawsuit and the trial court's corresponding power to hear the case *ab initio*." *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 n.9 (Tex. 1993). Thus, "[s]tanding is determined at the time suit is filed in the trial court, and subsequent events do not deprive the court of subject matter jurisdiction." *Id*. In determining whether a plaintiff has standing, "[w]e construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent." *Heckman*, 369 S.W.3d at 150 (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)).

The Detainee Plaintiffs consist of eleven mothers and their minor children who were detained at the time suit was filed in the two immigrant detention centers in Texas that are

licensed under the DFPS rule. Detainee Plaintiffs allege that the licensure of the facilities allowed the children to be detained for longer periods of time and to sleep in bedrooms with unrelated adults, which violates the children's privacy rights and exposes them to the risk of sexual assault.[3] This risk of harm is not speculative or hypothetical. One mother testified at a preliminary hearing that when she and her 12-year-old daughter were detained at one of the facilities, an adult woman had touched "her [daughter] on her private parts." Additionally, there was expert testimony admitted at the hearing tending to show that the negative psychological effects of detention on children are severe and that the negative effects increase in severity the longer that children are detained. I would conclude on this record that the Detainee Plaintiffs sufficiently alleged a concrete and particularized injury to the minor children who were detained at the facilities. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010) (concluding that "significant risk" of injury from agency action, even if injury did not occur, was "sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis"); *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 594 (Tex. 2016) ("The law has recognized numerous types of legal injuries, including injuries to a person's . . . right to privacy . . . ."); *see also Billings v. Atkinson*, 489 S.W.2d 858, 861 (Tex. 1973) ("Damages for mental suffering are recoverable without the necessity of showing actual physical injury in a case of

[3] The Court concluded that the text of the rule "does not allow a minor to share a bedroom with an *unrelated* adult." *Texas Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 Tex. App. LEXIS 9643, at *15–16 (Tex. App.—Austin Nov. 28, 2018, no pet. h.) (mem. op.) (emphasis in original). I disagree. The text of the rule expressly provides that an FRC "is not required to comply" with "the limitation on a child sharing a bedroom with an adult . . . if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member." 26 Tex. Admin. Code § 748.7(c)(2). In other words, so long as the child's parent "or other family member" shares the bedroom with the child, unrelated adults may also sleep in the same bedroom.

willful invasion of the right of privacy because the injury is essentially mental and subjective, not actual harm done to the plaintiff's body.").

I would also conclude that the injury is "fairly traceable" to the FRC rule and Defendants. The Court concludes that it is not, reasoning that "the length of detention is traceable to federal immigration policy and the *Flores* Settlement Agreement's requirement that state facilities detaining minors be licensed." *Grassroots Leadership, Inc.*, 2018 Tex. App. LEXIS 9643, at *16. However, the Court's conclusion is contrary to both United States and Texas Supreme Court precedent recognizing that an injury can have multiple causes and that an injury is traceable to a party so long as the party "contributed" to the injury in some way. *See, e.g.*, *Massachusetts v. E.P.A.*, 549 U.S. 497, 523 (2007) (concluding that agency contributed to state's injury from global warming because of agency's failure to regulate greenhouse gases); *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997) (concluding that agency's "determinative or coercive effect upon the action of someone else" contributed to plaintiff's injury); *Heckman*, 369 S.W.3d at 157 (concluding that plaintiff's injury from state law on indigent defendants could be traceable to Williamson County because county was responsible for implementing state law "within its borders" and therefore contributed to plaintiff's injury).

In this case, although ICE ultimately decides the length of detention, ICE is constrained by the *Flores* settlement, which restricts the length of time that immigrant children may be detained in unlicensed facilities. However, those restrictions do not apply if ICE detains children in facilities licensed by DFPS. Thus, the FRC Rule and DFPS's promulgation of it "alters the legal regime to which [ICE] is subject," *see Bennett*, 520 U.S. at 168–69, and enables ICE to detain children for longer periods of time at the DFPS-licensed facilities. Accordingly, the Detainee Plaintiffs' injuries are "fairly traceable" to DFPS.

Finally, I would conclude that the injury is likely to be redressed by the requested relief. The requested relief is the invalidation of the DFPS rule that allows the children to be detained for a prolonged period of time in conditions that violate their privacy rights and endanger their safety. Accordingly, the invalidation of the rule would restore the legal protections afforded to the minor children that existed before DFPS adopted the rule, including the strict limitations under *Flores* on the amount of time that they may be detained in the Texas facilities and the prohibition on children sleeping in the same bedrooms with unrelated adults in those facilities.[4] *See Flores v. Sessions*, 394 F. Supp. 3d 1041, 1070–71 (C.D. Cal. 2017); *see also* 26 Tex. Admin Code §§ 748.3357, .3361, .3363.

For these reasons, I would grant Plaintiffs' motion for en banc reconsideration, conclude that the Detainee Plaintiffs have standing to assert their claims, and proceed to consider the merits of their challenge to the validity of the DFPS rule. Because the Court does not, I respectfully dissent.

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[4] In their briefs on original submission and in their responses to the motion for en banc reconsideration, Defendants also argued that the case was moot because the Detainee Plaintiffs had been released from confinement at the time the district court entered its judgment. This Court did not address this issue in its opinion because of its resolution of the standing issue. *See Grassroots Leadership, Inc.*, 2018 Tex. App. LEXIS 9643, at *13 n.5. Without going into unnecessary detail here, *see* Tex. R. App. P. 47.1, I would conclude that, as a result of the length of time that the Detainee Plaintiffs were confined and the fact that they could be re-detained at the same facilities in the future, their claims satisfy the "capable of repetition yet evading review" exception to the mootness doctrine. *See Sosna v. Iowa*, 419 U.S. 393, 401–02 (1975); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 227–28 (3d Cir. 2011).

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Goodwin, Baker, Triana, Kelly, and Smith

Dissenting Opinion to Denial of En Banc Reconsideration
Joined by Justices Kelly and Smith

Filed: December 5, 2019

APPENDIX 4

Texas Administrative Code
Title 26. Health and Human Services
Part 1. Health and Human Services Commission
Chapter 748. Minimum Standards for General Residential Operations
Subchapter A. Purpose and Scope

26 TAC § 748.7

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

Currentness

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

(1) The center is operated by or under a contract with United States Immigration and Customs Enforcement;

(2) The center is operated to enforce federal immigration laws;

(3) Each child at the center is detained with a parent or other adult family member, who remains with the child at the center; and

(4) A parent or family member with a child provides the direct care for the child except for specific circumstances when the child is cared for directly by the center or another adult in the custody of the center.

(b) Classification. A family residential center is a general residential operation (GRO) and must comply with all associated requirements for GROs, unless the family residential center is approved for an individual waiver or variance or an exception is provided in this section. The department is responsible for regulating the provision of childcare as authorized by Chapters 40 and 42, Texas Human Resources Code and Chapter 261, Texas Human Resources Code. The department does not oversee requirements that pertain to other law, including whether the facilities are classified as secure or in compliance with any operable settlement agreements or other state or federal restrictions.

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

(1) the limitation of room occupants to four in §748.3357 of this title (relating to What are the requirements for floor space in a bedroom used by a child?), except that nothing in this exception shall be construed to require fewer than 60 square feet per child;

(2) the limitation on a child sharing a bedroom with an adult in §748.3361 of this title (relating to May a child in care share a bedroom with an adult?), if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member; and

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(3) the limitations on children of the opposite gender sharing a room in §748.3363 of this title (relating to May children of opposite genders share a bedroom?), except that nothing in this exception shall be construed to permit children from different families who are over the age of six and members of the opposite gender to share a bedroom.

(d) Limitation of exception. Notwithstanding subsection (c) of this section, and as further described in §745.8313 of this title (relating to Is a waiver or variance unconditional?), the department retains the authority for placing conditions on the scope of the exceptions authorized for a family residential center, including conditions related to limiting occupancy in accordance with fire safety standards, limitations related to allowing children and adults of the opposite gender to occupy the same room only if they are part of the same family, and any other limitation determined by the department to be necessary to the health, safety, or welfare of children in care.

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

Credits

Source: The provisions of this §748.7 adopted to be effective March 1, 2016, 41 TexReg 1493; transferred effective March 9, 2018, as published in the Texas Register February 16, 2018, 43 TexReg 909.

Current through 45 Tex.Reg. No. 492, dated January 17, 2020, as effective on or before January 24, 2020.

26 TAC § 748.7, 26 TX ADC § 748.7

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