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17 UNITED STATES DISTRICT COURT
 18 SOUTHERN DISTRICT OF CALIFORNIA

19 SOUTHWEST KEY PROGRAMS,
 20 INC.,

21 Plaintiff,

22 v.

23 CITY OF ESCONDIDO,

24 Defendant.
 25
 26
 27
 28

Case No.: 15cv1115-H-BLM

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

[28 U.S.C. § 517]

Judge: Hon. Marilyn L. Huff

Courtroom: 15A

Date: to be rescheduled from Oct. 31, 2016

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I. INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address whether the protections of the Fair Housing Act (“FHA”), 42 U.S.C. § 3601 *et seq.*, extend to group homes for unaccompanied children in the care and custody of the United States Department of Health and Human Services. The United States Department of Justice and the Department of Housing and Urban Development (“HUD”) share enforcement authority over the FHA. 42 U.S.C. §§ 3610, 3612(a)-(b), (o), 3613(e), 3614. The United States thus has a strong interest in ensuring the correct and consistent interpretation and application of the FHA.

II. BACKGROUND

A. Housing for Unaccompanied Children

Federal law entrusts the care and custody of “unaccompanied alien children”¹ to the United States Department of Health and Human Services, deliberately treating these unaccompanied children differently from adults and requiring that they be housed largely in group home settings.²

¹ “Unaccompanied alien children,” also referred to in this Statement of Interest as “unaccompanied children,” are defined as children under 18 who have no parent or legal guardian in the United States available to provide care and physical custody and who lack lawful immigration status. 6 U.S.C. § 279(g)(2).

² Under a settlement agreement, unaccompanied minors are required to be housed “in licensed, non-secure facilities that meet certain standards.” *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

1 The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002)
2 abolished the former Immigration and Nationalization Service, and transferred most of its
3 immigration benefits and law enforcement functions to the new Department of Homeland
4 Security. *See D.B. v. Cardall*, 826 F.3d 721, 732 (4th Cir. 2016). However, Congress
5 transferred the care of unaccompanied children to the Office of Refugee Resettlement
6 (“ORR”), within the Department of Health and Human Services. 6 U.S.C. § 279(a).
7
8 Among other things, it charged ORR with: “ensuring that the interests of the child are
9 considered in decisions and actions relating to [his or her] care and custody,” with
10 “making placement determinations,” with “identifying qualified individuals, entities, and
11 facilities to house unaccompanied alien children,” and with “overseeing the infrastructure
12 and personnel of facilities in which unaccompanied alien children reside.” §
13 279(b)(1)(B), (C), (F), and (G).
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17 Section 235 of the William Wilberforce Trafficking Victims Protection
18 Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008), *codified as*
19 *amended at* 8 U.S.C. § 1232, requires unaccompanied children “in Department of Health
20 and Human Services custody” to “be promptly placed in the least restrictive setting that is
21 in the best interest of the child,” subject to certain considerations. § 1232(c)(2)(A).
22 Unaccompanied children may not be placed “in a secure facility absent a determination
23 that the child poses a danger to self or others or has been charged with . . . a criminal
24 offense.” *Id.*³
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³ As explained below, a “secure” facility is defined in administrative guidance as
Statement of Interest of the United States of America

1 To the extent not otherwise superseded by statute, ORR is also bound by a 1997
2 consent decree (“*Flores Settlement*”), which “sets out nationwide policy for the
3 detention, release, and treatment of minors in [its] custody” (ECF No. 72-4, Exhibit
4 1 to Pl.’s Opp. Br., ¶ 9). *See also Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016)
5 (recognizing continuing applicability of *Flores Settlement* to unaccompanied minors).
6 The *Flores Settlement* requires ORR to “treat . . . all minors in its custody with dignity,
7 respect, and special concern for their particular vulnerability as minors,” and, subject to
8 certain considerations, to “place each detained minor in the least restrictive setting
9 appropriate to the minor’s age and special needs.” *Flores Settlement*, ¶ 11. It noted that
10 the federal government “usually houses persons under the age of 18 in an open setting,
11 such as a foster or group home, and not in detention facilities.” *Flores Settlement* at 45
12 (Settlement Exhibit 6). Thus, subject to limited exceptions, while in ORR’s “legal
13 custody,” an unaccompanied child “shall be placed temporarily in a licensed program,”
14 defined as one “that is licensed by an appropriate State agency to provide residential,
15 group, or foster care services for dependent children, including a program operating
16 group homes” *Id.*, ¶¶ 6, 19.

17 Under this framework, as ORR’s administrative guidance explains, unaccompanied
18 children in its custody “are cared for through a network of state-licensed ORR-funded
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“the most restrictive placement option,” such as a “juvenile detention center.” ORR
GUIDE: CHILDREN ENTERING THE U.S. UNACCOMPANIED (“ORR POLICY GUIDE”),
available at www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied, at “Guide to Terms” page.

1 care providers,” which are “residential care providers that provide temporary housing and
2 other services.” ORR FACT SHEET, *available at www.acf.hhs.gov/sites/default/files/orr/
3 orr_uc_updated_fact_sheet_1416.pdf*, at 2; ORR POLICY GUIDE at “Introduction” page.
4 The vast majority are placed in “shelter care,” defined as “a residential care provider
5 facility . . . in the least restrictive environment.” ORR POLICY GUIDE at “Guide to
6 Terms” page (contrasting “Staff Secure Care,” which has “stricter security” for
7 unaccompanied children who “require close supervision but . . . not . . . a secure facility,”
8 and “Secure Care” such as a “juvenile detention center,” “the most restrictive placement
9 option for an unaccompanied child who poses a danger to self or others or has been
10 charged with . . . a criminal offense”); ORR ANNUAL REPORT TO CONGRESS FY 2014 at
11 72, *available at www.acf.hhs.gov/sites/default/files/orr/orr_annual_report_to_congress_
12 fy_2014_signed.pdf* (in fiscal year 2014, of 57,496 unaccompanied children, 45,703
13 (79%) were placed in shelter care; 773 (1%) were placed in secure or staff secure care).

18 **B. Southwest Key’s Proposed Group Home**

19 Plaintiff Southwest Key Programs, Inc. (“Southwest Key”) is a state-licensed,
20 ORR-funded residential care provider that provides group homes along with support
21 services for unaccompanied children. (*See* ECF No. 57-15, Cooperative Agreement
22 between ORR and Southwest Key (“Cooperative Agreement”).)⁴ In 2014, Southwest
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26 ⁴ This document is filed under seal at ECF No. 57-15 as Exhibit 13 to the
27 Defendant’s Motion for Summary Judgment. (*See* ECF No. 57-1, Declaration of Alan
28 Fenstermacher, at 3:20-28 (identifying and authenticating this exhibit).) The Plaintiff
later withdrew this document’s confidential designation under the protective order. (ECF
No. 73, at 24-28).

1 Key applied to the City for a conditional use permit to operate one such group home as a
2 “government services” land use at a former skilled nursing facility property.⁵ City
3
4 Council Resolution No. 2014-134 (approved Nov. 19, 2014), *available at*
5 *www.escondido.org/Data/Sites/1/media/agendas/Council/11-19-14CCAgendaPacket.pdf*,
6 at 88-100. The proposed group home would have been “licensed program” “shelter
7
8 care,” as described above, and house up to 96 unaccompanied children aged
9 approximately 6-17, of whom 91% were expected to come from Guatemala, El Salvador,
10 or Honduras. *Id.*, ¶ 1; ORR FACT SHEET at 2. (*See generally* ECF No. 57-15,
11 Cooperative Agreement.) Consistent with the requirements imposed by federal law,
12 Southwest Key states that it intended to care for the unaccompanied children by
13 providing a homelike setting in which the unaccompanied children keep bedrooms
14 unlocked, may personalize and decorate their rooms, eat meals together, do homework,
15 may wear their own clothes, have access to outside play, go on educational and
16 recreational field trips, and may receive mail, visitors, and phone calls. (*See generally*
17 ECF No. 72, Pl.’s Opp. Br., at 1, 5-6 (citations to record omitted).) The unaccompanied
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22 ⁵ Plaintiff alleges that it first approached the City to propose to use two motels as
23 locations to house the unaccompanied children. (ECF No. 29, Pl.’s First Amended
24 Compl., ¶ 42.) The motels were located in a commercial zone in which “residential care
25 facilities,” as the Plaintiff proposed to designate them, would have been able to operate as
26 of right. *Id.*, ¶¶ 42-44. Nevertheless, the city’s planning staff rejected the proposal,
27 classifying the facility as a “shelter,” rather than a “residential care facility.” *Id.*, ¶ 45.
28 Shelters were prohibited in the zone in which the motel sites were located. *Id.* After the
rejection of the motel locations, Southwest Key worked with city officials to identify an
alternate, acceptable site. *Id.*, ¶ 50. At the City’s suggestion, it agreed to seek approval
to use the recently closed skilled nursing facility. *Id.*, ¶ 53.

1 children’s typical day would include breakfast, school, recreation, dinner, homework,
2 evening snack, and bedtime; and they can participate in a student council to give them “a
3 meaningful voice in all aspects of their care.” *Id.* Southwest Key’s homes have common
4 areas including recreation rooms, study halls, a cafeteria, and a computer lab. *Id.*
5

6 The City denied the application, finding that the facility would not provide services
7 required by the community, would have a “negative impact,” and would “cause a
8 deterioration of bordering land uses.” Planning Comm’n Resolution No. 6015 (effective
9 August 2, 2014), ¶¶ 21, 22, available at [www.escondido.org/Data/Sites/1/media/agendas/
10 Council/10-15-14_PHG14-0017/PlanningCommisionReports/Tab16.pdf](http://www.escondido.org/Data/Sites/1/media/agendas/Council/10-15-14_PHG14-0017/PlanningCommisionReports/Tab16.pdf); City Council
11 Resolution No. 2014-134, ¶¶ 19, 28, 34. The City determined that allowing the facility
12 would “establish a non-residential use in the neighborhood that is more intensive than the
13 previously approved skilled nursing facility,” and that it would not be compatible with
14 the surrounding single-family homes, among many other concerns. Planning Comm’n
15 Resolution No. 6015, ¶¶ 19-23; City Council Resolution No. 2014-134, ¶ 34; *see*
16 *generally id.*
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21 The City did not, however, reject the proposed “government services” designation,
22 and recognized that “government services” categorically “exclude[s] correctional
23 institutions.” City Council Resolution No. 2014-134, ¶¶ 7, 8; accord Escondido
24 Municipal Code § 33-123. The City made no finding that the use would have been a jail,
25 correctional facility, or immigration detention facility (although the Planning
26 Commission did acknowledge that some citizen commenters considered the property to
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1 be a “federal detention facility,” Planning Comm’n Resolution No. 6015, ¶ 19); and its
 2 denial was not based on these or related grounds. *See generally id.*; City Council
 3 Resolution No. 2014-134.⁶
 4

5 Among other things, Plaintiff alleges that the City’s conduct was motivated by
 6 discrimination on the basis of the race, color, or national origin of the home’s residents,
 7 and had an unjustified disparate impact based on these factors. (ECF No. 29, Pl.’s First
 8 Amended Compl., ¶¶ 2; *id.* at 126-129.) Specifically, it contends that the City has a
 9 history of discrimination, *id.*, ¶¶ 32-40; that comments in opposition to the group home
 10 made by city residents⁷ and public officials reflect “broader national-origin and racial
 11 animus towards Latinos or individuals from Latin American countries,” *id.*, ¶¶ 60-83; and
 12 that the City’s actions “caused a statistically significant disparate impact based on race or
 13 national origin” (ECF No. 72, Pl.’s Opp. Br., at 21).
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17 III. ARGUMENT

18 The City filed a motion for summary judgment, in which it argues that the
 19 proposed group home is not a “dwelling” covered by the FHA because it is equivalent to
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22 ⁶ One Planning and Zoning Commissioner stated that because the purpose of the
 23 proposed home was “to begin the process of correcting their illegal status,” it violated the
 24 intent of the zoning code’s prohibition of “a correctional institution,” though he admitted
 25 this interpretation of the home did not “conform exactly to the letter of the law” of the
 26 zoning code. (ECF No. 72-9, Exhibit 5-2 to Pl.’s Opp. Br., at 37.) In any event, this
 27 rationale was not among the findings adopted by the City.

28 ⁷ Plaintiff alleges that the comments made by members of the public included
 statements about the City’s changing “character” and “ghettoization;” concerns about
 diseases that may be carried by the unaccompanied children; and references to them as
 “criminals.” (ECF No. 29, Pl.’s First Amended Compl., ¶ 75.)

1 a “jail” or “detention facility.” (ECF No. 56-1, Def.’s Mem. in Supp. Mot. Summ. J, at 5-
2 19.⁸) The City is wrong. First, group homes for unaccompanied children in the care and
3 custody of the Department of Health and Human Services are “dwelling[s]” under the
4 FHA, like numerous similar homes that have been held to be such, because they are
5 intended to be occupied as a residence. It is immaterial whether they choose to live there,
6 or whether they must abide by rules and restrictions. It similarly is irrelevant whether
7 they pay rent while living there. The City’s attempt to restrict the scope of the FHA
8 should be rejected. Second, group homes for unaccompanied children are not jails, as
9 they lack a punitive purpose, and are distinguished from federal immigration detention
10 facilities under the applicable legal framework. Thus, the City’s argument is contrary to
11 case law establishing the FHA’s coverage and misapprehends the federal requirements
12 for licensed program shelter care for unaccompanied children.

17 **A. Group Homes for Unaccompanied Children in the Care and Custody of the**
18 **Department of Health and Human Services Are “Dwelling[s]” Covered by the**
19 **FHA**

20 The Fair Housing Act makes it unlawful to “make unavailable or deny, a dwelling
21 to any person because of race, color, . . . or national origin.” 42 U.S.C. § 3604(a). It
22 defines “dwelling” to include “any building, structure, or portion thereof which is
23 occupied as, or designed or intended for occupancy as, a *residence* by one or more
24

27 ⁸ Southwest Key asserts other claims but the United States’ Statement of Interest
28 addresses only those arguments raised by Defendant in its motion for summary judgment
concerning the coverage of the FHA.

1 families.” § 3602(b) (emphasis added).⁹ The FHA’s definition of “dwelling” is broadly
 2 construed. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008)
 3 (broadly construing “dwelling” because “the Supreme Court has repeatedly instructed us
 4 to give the Fair Housing Act a ‘broad and inclusive’ interpretation”) (citations omitted).
 5 Applying the ordinary dictionary meaning of “residence” – *i.e.* “a temporary or
 6 permanent dwelling place, abode or habitation to which one intends to return as
 7 distinguished from a place of temporary sojourn or transient visit,” *see, e.g., Schwarz*,
 8 544 F.3d at 1214 – courts have found a wide array of temporary supportive housing to be
 9 intended as a residence, and thus “dwelling[s]” covered by the FHA.

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 12
 13 **1. Group Homes for Unaccompanied Children in the Care and Custody of the**
 14 **Department of Health and Human Services are Intended as Residences**

15 Courts have found facilities similar to Southwest Key’s proposed group home to be
 16 “dwelling[s]” under the FHA. Though no single factor is dispositive, when determining
 17 whether a group home or facility is a “dwelling,” courts consider a wide range of indicia
 18 that the group home or facility is intended as a residence. Specifically, the factors courts
 19 have considered persuasive include: (1) the occupants are more than mere transients,
 20 *Cohen v. Twp. of Cheltenham*, 174 F. Supp. 2d 307, 322 (E.D. Pa. 2001); *Conn. Hosp. v.*
 21 *City of New London*, 129 F. Supp. 2d 123, 133 (D. Conn. 2001); (2) they view the facility
 22 as place to return to during their stay, *Lakeside Resort Enters., L.P. v. Bd. of Supervisors*
 23 *of Palmyra Twp.*, 455 F.3d 154, 159 (3d Cir. 2006), *cert. denied*, 549 U.S. 1180 (2007);
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28 ⁹ “Family” includes a single individual. § 3602(c).

1 *Cohen*, 174 F. Supp. 2d at 322-23; (3) they have their own room, bed, or space which
2 they may personalize or decorate, *Lakeside Resort*, 455 F.3d at 159-160; (4) they can
3 receive mail or visitors at the facility, *id.*; (5) they treat the facility as a home while there,
4 such as by eating meals together and taking care of the property and their belongings, *see*
5 *id.*; *Schwarz*, 544 F.3d at 1214-16; *Cohen*, 174 F. Supp. 2d at 322-23; (6) they have
6 nowhere else to go during their stay, *Conn. Hosp.*, 129 F. Supp. 2d at 134; (7) the homes
7 have a supportive or familial nature, *id.*; (8) the residents spend time together in common
8 areas, *Schwarz*, 544 F.3d at 1215-16; (9) the housing provider or residents characterize
9 the facility as a residence or home, *United States v. Hughes Mem'l Home*, 396 F. Supp.
10 544, 549 (W.D. Va. 1975); *Conn. Hosp.*, 129 F. Supp. 2d at 134; and (10) the residents
11 spend a significant length of time in the home, *Lakeside Resort*, 455 F.3d at 158;
12 *Schwarz*, 544 F.3d at 1214-15; *Cohen*, 174 F. Supp. 2d at 322, 323 n.11.

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17 For example, in *Lakeside Resort*, the Third Circuit held a proposed drug- and
18 alcohol-treatment facility group home in a converted hotel, with an average stay of 14.8
19 days, to be a “dwelling” under the FHA. 455 F.3d at 157. It applied two factors: 1)
20 whether the facility “is intended or designed for occupants who intend to remain . . . for
21 any significant period of time,” and 2) “whether those occupants would view [the facility]
22 as a place to return to during that period.” *Id.* at 158 (citation and internal quotation
23 marks omitted). The average stay was held to satisfy the first factor because 14.8 days is
24 “certainly longer” than the typical one- to two-night stay in a motel; some residents stay
25 longer; “significant period of time” was not defined; and other courts had found one-
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1 month stays to suffice. *Id.* at 158-59. The second factor was met because residents ate
2 meals together, returned to their rooms at night, received mail at the facility, hung
3 pictures on their walls, and had visitors in their rooms. *Id.* at 160.¹⁰

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5 In *Cohen*, a group home for abused and abandoned children was held to be a
6 “dwelling,” even though their stay was “finite,” there was a “designated place of
7 “discharge,” and they were informed early that they would be “moved” elsewhere. 174
8 F. Supp. 2d at 322-323. Applying Third Circuit precedent, the court considered whether
9 occupants would: (1) “reside in the structure for a significant time period,” (2) “be more
10 than mere transients,” and (3) “view the facility as a place to which they will return.” *Id.*
11 (citations omitted). It held that no “magic number” constituted a “significant time;”
12 rather, the analysis is “flexible” and “takes all factors into consideration.” *Id.* at 323 n.11.
13 The factors were met because “for the period of their stay . . . , the children would treat
14 the home as any other resident would,” they would “eat their meals together, have
15 housekeeping responsibilities, and sleep in the home,” and some of them would stay for
16 up to ten months. *Id.* at 322-23. *See also Hughes Mem’l Home*, 396 F. Supp. at 547, 549

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22 ¹⁰ Likewise, the Eleventh Circuit held that state-licensed “halfway houses” for
23 recovering substance abusers, with an average stay of six to ten weeks were “dwelling[s]”
24 under the FHA. *Schwarz*, 544 F.3d at 1207, 1213-16. Contrasting hotels, the court held:
25 “the more occupants treat a building like their home—*e.g.*, cook their own meals, clean
26 their own rooms and maintain the premises, do their own laundry, and spend free time
27 together in common areas,” and “the longer the typical occupant lives in a building, the
28 more likely it is . . . a ‘dwelling.’” *Id.* at 1214-15. It held the homes were more like
dwellings, in comparison to factors in other cases, and because they have “common
living areas . . . where residents can socialize like a family,” and residents sign leases,
cook their own food, eat together, clean and maintain the premises, spend free time
together, and do laundry. *Id.* at 1215-16.

1 (children’s home for up to 60 orphans and needy children is a “dwelling” because the
2 children were called “residents,” they went to school outside the home but lived at its
3 residential facilities, and its director described it as “residential”); *Conn. Hosp.*, 129 F.
4 Supp. 2d at 125, 134 (holding that group homes for recovering substance abusers with an
5 average stay of one to three months were “dwelling[s]” under the FHA, reasoning that
6 residents “are not transient guests, although these homes provide short term living
7 arrangements;” residents “have nowhere else to go during this period,” “considered the
8 residences to be their homes,” and “described life there in familial terms;” and the homes
9 have a “supportive nature.”)¹¹

13 The factors enumerated above, on which courts have relied to find that a facility is
14 intended as a residence, are present here. Unaccompanied children in group homes,
15 subject to rules, enjoy private phone calls, mail, and visits with guests; have private space
16 to store personal belongings; wear their own clothes when available, and use personal
17 grooming items; receive an exhaustive array of individualized support services – such as
18 health care and counseling, individual and group counseling, acculturation and adaptation

21 ¹¹ Courts have found the FHA to cover a wide range of other types of temporary
22 housing. These have included: a nursing home for up to 210 residents, *Hovsons, Inc. v.*
23 *Twp. of Brick*, 89 F.3d 1096,1098 (3d Cir. 1996); summer bungalows, *United States. v.*
24 *Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990), *cert. denied*, 501 U.S. 1205
25 (1991); temporary student housing, *United States. v. Univ. of Neb. at Kearney*, 940 F.
26 Supp. 2d 974, 977 (D. Neb. 2013); a ship offering one-month stays to recovering
27 substance abusers, *Project Life, Inc. v. Glendening*, No. WMN–98–2163,1998 WL
28 1119864, at *1 & n. 4 (D. Md. Nov. 30, 1998); seasonal housing for migrant workers,
Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment, 986 F. Supp. 544 (E.D. Wis.
1997); and a care facility for homeless persons with AIDS, *Support Ministries for*
Persons with AIDS, Inc., v. Vill. of Waterford, 808 F. Supp. 120 (N.D.N.Y. 1992).

1 services, and an assessment of their personal goals, strengths, and weaknesses – which
2 are “sensitive to the age, culture, native language and the complex needs of each minor;”
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4 enjoy hours of recreation and leisure each day; have access to religious services of their
5 choice; and receive classroom education, as well as appropriate reading materials in
6 languages other than English for use during leisure time. *Flores* Settlement at 24-28, ¶¶
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8 1-14 (Settlement Exhibit 1); ORR POLICY GUIDE at § 3.3; ORR FACT SHEET at 2.
9 Housing providers like Southwest Key are known as “residential care providers.” ORR
10 POLICY GUIDE at § 1.2. As explained in greater detail below, this supportive model of
11 care is based on “child welfare best practices,” ORR FACT SHEET at 2, in which
12 unaccompanied children are treated “with dignity, respect and with special concern for
13 their particular vulnerability,” *Flores* Settlement, ¶ 11.
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16 Plaintiff has presented evidence that it cares for unaccompanied children in a
17 homelike setting in which they keep bedrooms unlocked, may personalize and decorate
18 their rooms, eat meals together, do homework, may wear their own clothes, have access
19 to outside play, go on educational and recreational field trips, and may receive mail,
20 visitors, and phone calls. *See generally* ECF No. 72, Pl.’s Opp. Br., at 1, 5-6 (citations to
21 record omitted). Their typical day includes breakfast, school, recreation, dinner,
22 homework, evening snack, and bedtime, and they can participate in a student council to
23 have a voice in all aspects of their care. *Id.* The homes have common areas including
24 recreation rooms and study halls, where the unaccompanied children would be able to
25 spend free time together. *Id.*
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1 Further, though relatively short, the average length of stay of Southwest Key's
2 group homes' residents of 30 to 35 days¹² is well within the range of average stays that
3 courts have found to support a finding that residents remain for a "significant" amount of
4 time. *See, e.g., Lakeside Resort*, 455 F.3d at 158-59 (14.8 days); *Project Life, Inc.*, 1998
5 WL 1119864 at *2 & n. 4 (one month); *Conn. Hosp.*, 129 F. Supp. 2d at 132 (one to three
6 months). Moreover, the fact that some of the unaccompanied children have remained as
7 long as 170 days and there is no maximum stay (as long as the resident is under age 18)
8 (ECF No. 72, Pl.'s Opp. Br., at 5 (citations to record omitted)) further weighs in favor of
9 such a finding. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1052 n.2 (9th Cir.
10 2007) (considering not only average length of stay but also maximum length of stay);
11 *Lakeside Resort*, 455 F.3d at 158-59 (similar). In sum, because group home providers for
12 unaccompanied children in the care and custody of the Department of Health and Human
13 Services care for them in a homelike setting, and because courts have found that
14 analogous group homes for children (and adults) are covered by the FHA, homes like
15 Southwest Key's proposed group home are "dwelling[s]" under the FHA.

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21 **2. It is Immaterial to Coverage Under the FHA that Unaccompanied**
22 **Children do not Choose their Housing Placement at Southwest Key's**
23 **Group Homes and that They Must Follow Rules**

24 Based only on the general notion that the FHA is intended to promote "freedom of
25 choice" in housing, Defendant seeks to inject into the FHA a requirement that residents
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28 ¹² *See* ECF No. 72, Pl.'s Opp. Br., at 5 (citations to record omitted); ORR FACT SHEET at 2 (average stay in ORR-funded housing in fiscal year 2015 was 34 days).

1 themselves “choose” to live at the dwelling and live with few restrictions. ECF No. 56-1,
2 at 3-5. This argument fails, as there is no such requirement in the FHA. To the contrary,
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4 the statute’s coverage has been found to extend to a range of facilities where residents
5 have limited (if any) choice or control over their housing placements, lack freedom to
6 leave the facility unsupervised, lack full independence over their daily lives, or are
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8 otherwise subject to strict rules and regulations.

9 For example, children in group home settings, who by definition lack another safe
10 place to live, are necessarily subject to supervision and placement decisions by courts,
11 other public agencies, or care providers. The children in the home held to be a
12 “dwelling” in *Hughes Mem’l Home*, 396 F.Supp. at 549, were referred by courts, public
13 welfare departments, social agencies, or parents or guardians. In *United States v. Mass.*
14 *Indus. Fin. Agency*, 910 F. Supp. 21, 26 n.2 (D. Mass 1996), a nonprofit’s residential
15 school for “emotionally disturbed adolescents” “whom state or local authorities
16 determined to be in need of” services was held to be a “dwelling” under the FHA.
17 Neither of these court opinions identifies concerns about or even considers the extent (or
18 lack) of the children’s choice or control over their placement.
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22 Similarly, the residents of the treatment facility held to be a “dwelling” in *Lakeside*
23 *Resort*, 455 F.3d at 154, 160, were “*not allowed off the grounds of the facility*
24 *unsupervised.*” (emphasis added). The residents of the halfway houses for recovering
25 substance abusers held to be a “dwelling” in *Schwarz*, 544 F.3d at 1207, had to follow an
26 extensive set of rules, including: no drugs or alcohol, no pornography, required property
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1 maintenance, and no overnight guests without permission. Neither of these court
2 opinions expresses concern that such restrictions on the residents' freedom or
3 independence make the housing any less of a "dwelling." The City misreads *Conn.*
4 *Hosp.* (ECF No. 56-1, at 9), which did not hold that the FHA requires residents to be
5 fully "willing participants" in their housing. In distinguishing between the structured
6 group home at issue in the case and a substance abuse "rehabilitative facility," the court
7 merely recognized that the residents of the group home were "willing participants" in the
8 treatment program. 129 F. Supp. 2d at 133. The court did not suggest that distinction
9 was dispositive to its conclusion that the home was a "dwelling."

13 Finally, it is worth noting that the FHA does not exclude dwellings simply because
14 residents may share restroom or cooking facilities. HUD has issued an implementing
15 regulation defining dwelling to include "dwellings in which sleeping accommodations are
16 provided but toileting or cooking facilities are shared by occupants of more than one
17 room." 24 C.F.R. § 100.201 (Definitions). HUD's implementing regulations were issued
18 through the notice-and-comment process pursuant to Congressional authority, 42 U.S.C.
19 § 3614a, and have the force of law. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199,
20 1203 (2015) ("Rules issued through the notice-and-comment process . . . have the 'force
21 and effect of law.'") (citation omitted). Further, HUD's interpretation of the FHA is
22 entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S.
23 837, 843-44 (1984), which gives regulations "controlling weight unless they are arbitrary,
24 capricious, or manifestly contrary to the statute." See *Meyer v. Holley*, 537 U.S. 280,
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1 287-88 (2003) (affording *Chevron* deference to HUD’s FHA regulations, recognizing that
2 HUD is “the federal agency primarily charged with the implementation and
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4 administration of the [FHA] . . . [a]nd we ordinarily defer to an administering agency’s
5 reasonable interpretation of a statute”) (citations omitted). Here, HUD’s regulations
6 reasonably interpret the FHA’s definition of “dwelling” to include group living
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8 arrangements with shared restrooms or cooking facilities, as confirmed by the many
9 courts to extend the FHA’s coverage to such group housing.

10 In short, these authorities establish that a resident’s choice over his or her housing
11 placement or control over his or her residence do not govern a court’s determination of
12 whether the home is a “dwelling” under the FHA.
13

14 **3. There is No Requirement that Group Home Residents Must Pay Rent in** 15 **Order to Be Covered by the FHA**

16 The FHA makes it unlawful to “refuse to sell or rent . . . *or otherwise make*
17 *unavailable or deny*, a dwelling to *any person* because of race, color, . . . or national
18 origin.” 42 U.S.C. § 3604(a) (emphasis added). Courts construe this provision broadly,
19 encompassing a variety of conduct aimed at a range of housing settings, including those
20 whose residents do not pay rent. HUD’s regulation implementing this provision declares
21 it unlawful to “engage in any conduct *relating to the provision of housing* which
22 otherwise makes unavailable or denies dwellings *to persons* because of race . . . or
23 national origin.” 24 C.F.R. § 100.50(b) (emphasis added). HUD’s implementing
24 regulations further confirm that “sleeping accommodations in shelters intended for
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1 occupancy as a residence for homeless persons” are among the dwellings protected by the
2 FHA. 24 C.F.R. § 100.201. As explained, these regulations have the force of law, *Perez*,
3 135 S. Ct. at 1203 and are entitled to *Chevron* deference, *Meyer*, 537 U.S. at 287-88.
4

5 Courts have explicitly held that residents need not pay rent in order for their home
6 to be covered by the protections of § 3604(a). In *Woods v. Foster*, 884 F. Supp. 1169,
7 1175 (N.D. Ill. 1995), the defendants argued “that the FHA is limited to acts related to the
8 sale or rental of a dwelling,” such that the plaintiffs “cannot recover . . . because the
9 Shelter is free.” The court flatly rejected this argument, on the grounds that the plain
10 language of § 3604(a) prohibits acts that “otherwise make unavailable or deny, a dwelling
11 to any person.” *Id.* at 1174. The court went on to hold that the home was a “dwelling,”
12 reasoning that because the residents “have nowhere else to ‘return to,’ the Shelter is their
13 residence in the sense that they live there and not in any other place.” *Id.* at 1173-74;
14 accord *Hughes Mem’l Home*, 396 F. Supp. at 549 (citation omitted) (rejecting
15 defendant’s argument that the group home for orphans and needy children is not covered
16 “because it is not engaged in the commercial sale or rental of residential facilities,” and
17 holding that “the Home is prohibited from discrimination even with respect to residents
18 for whom no payment is made”).
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24 The Ninth Circuit has not “squarely addressed the issue of whether all temporary
25 shelters fit within the Act’s definition of ‘dwelling.’” *Cmty. Hous., Inc. v. City of Boise*,
26 490 F.3d 1041, 1048 n.2 (9th Cir. 2007).¹³ Nonetheless, it has applied the FHA to
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28 ¹³ The issue of whether the FHA extends to non-paying residents at a shelter did

1 shelters without suggesting that statutory coverage depends on residents' payment of rent.
2 *See Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996) (applying
3 FHA to "24-hour emergency shelters for the homeless;" no consideration of whether
4 residents paid to stay there). Thus, Defendant's reliance on *Intermountain Fair Hous.*
5 *Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1111 (D. Idaho 2010),
6 *aff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011), (ECF No. 56-1, at 5-6), is
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8 misplaced, because its highly fact-specific determination considered not only the lack of
9 payment by residents, but also over a dozen distinct aspects of that shelter, including that
10 guests are not guaranteed the same bed, cannot stay at the shelter during the day, cannot
11 stay any given night unless they check in at certain hours, may not personalize or leave
12 belongings in their assigned bed area, and may not receive calls, mail, or visitors. None
13 of these are aspects of the Southwest Key group home. Defendant's reliance on *Johnson*
14 *v. Dixon*, 786 F. Supp. 1 (D.D.C. 1991), (ECF No. 56-1, at 5-6), is equally unavailing, as
15 that case addressed a different provision of the FHA, § 3604(f)(1), which specifically
16 references a "buyer or renter."
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25 come before the court in *Community House*, but the court did not decide the issue,
26 because it did not need to in order to find that the housing at issue was covered by the
27 FHA. *See Cmty. Hous.*, 490 F.3d at 1048 n.2 (finding that the emergency homeless
28 shelter "provides more than transient overnight housing" based on its rent-generating
longer term transitional units, and thus having "little trouble concluding that at least part
of the facility" is a dwelling).

1 **B. Group Homes for Unaccompanied Children, Such As Those Provided by**
 2 **Southwest Key, Are Neither “Jails” Nor Immigration “Detention Facilities”**

3 The City argues that the proposed home is like a “jail” or is an immigration
 4 “detention facility” in which unaccompanied children are “incarcerated,” and not a
 5 “dwelling,” because they are in federal “custody,” lack choice as to their placement, and
 6 are at times referred to as being “detained” by the government. (ECF No. 56-1, at 3-19.)
 7
 8 The City is mistaken.

9
 10 **1. Group Homes For Unaccompanied Children Are Not Jails or Prisons**
 11 **Because They Do Not Have a Punitive or Correctional Purpose**

12 The City cites two cases in which courts declined to extend the FHA’s coverage to
 13 jails or prisons, but misreads them to conclude that the defining characteristic of the
 14 prisons at issue was the inmate’s lack of “choice” to be housed there, when in fact their
 15 defining characteristic was their punitive purpose. In the first, *Garcia v. Condarco*, the
 16 court determined that the city jail was not a “dwelling” because “[e]ssential to the
 17 distinction between a home and a detention facility is purpose,” and “the primary purpose
 18 of a jail is to provide just punishment, adequate deterrence, protection of the public, and
 19 correctional treatment.” 114 F. Supp. 2d 1158, 1161 (D.N.M. 2000). Put another way,
 20 jail “is not designed or intended as a ‘residence’ for detainees; rather, it is designed and
 21 intended to be a penal facility.” *Id.* at 1161.¹⁴ In the second, *Renda v. Iowa Civil Rights*

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 26 ¹⁴ The City points out that the *Garcia* court gave little weight to the factors more
 27 typically used by courts to determine whether housing is a “dwelling” under the FHA,
 28 observing that such a test was inconclusive since, for example, the plaintiff neither had
 intent to return (being involuntarily confined), nor was her one-year stay “transient.” *Id.*
 at 1160. In no way does this observation suggest that this Court should disregard the

1 *Comm'n*, 784 N.W.2d 8, 16 (Iowa 2010), the court found plaintiff's expectation to remain
2 in prison not determinative of whether prison is a "dwelling" under state fair housing law;
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4 and it followed *Garcia* to hold that the prison is not a "dwelling" because it is "designed
5 and intended to be a penal facility" and plaintiff "has no choice in her placement."

6 Although both *Garcia* and *Renda* were influenced in part by the FHA's policy of
7 promoting "freedom of choice in housing," neither case compels a conclusion that choice
8 is a *required* element of a dwelling. *Garcia*, 114 F. Supp. 2d. at 1163; *see also Renda*,
9 784 N.W.2d at 16. Rather, in those cases, the "penal" purpose of the jail or prison was
10 the primary basis for its distinction from a residence, as explained. *Garcia*, 114 F. Supp.
11 2d. at 1161; *Renda*, 784 N.W.2d at 16. In any event, while housing choice is one value
12 advanced by the FHA, nothing in the FHA suggests that people should be *excluded* from
13 its broad protection from discrimination simply because they lack full choice over any or
14 every aspect of their housing.¹⁵ (And as the cases discussed more fully above exemplify,
15 lack of choice over housing placement does not deny group homes the FHA's
16 protections; nor does it convert them into jails.)
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23 typical factors used by the numerous courts discussed above. Even *Garcia* specifically
24 recognized that examining those features was appropriate in assessing group homes for
25 children. *Id.* at 1159-60 (citing *Hughes Mem'l Home*, 396 F. Supp. at 549, *Mass. Indus.*
Fin. Agency, 910 F. Supp. at 26 n. 2).

26 ¹⁵ To the extent legislative intent is considered, it is important to note that another
27 critical purpose of the FHA was to promote "truly integrated and balanced living
28 patterns," *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citing 114 Cong.
Rec. 3419, 3422 (1968) (quotation marks omitted), a purpose which is relevant here.

1 The City’s reliance on *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d
2 974 (D. Neb. 2013), (ECF No. 56-1, at 8-9), is similarly unhelpful. There, the court
3 found university housing to be “residential,” because “students living in those facilities
4 eat their meals, wash their laundry, do their schoolwork, socialize, and sleep there, just as
5 people ordinarily do in the places they call home.” *Kearney*, 940 F. Supp. 2d at 978. In
6 responding to and rejecting the defendants’ “unflattering association” between jails and
7 university housing, the court also recognized the students’ choice to attend university as
8 *one* of several distinctions between university housing and jails; however, it primarily
9 distinguished the punitive, correctional, and public-protection purpose of jails from
10 university housing and rejected defendant’s “misapprehension [] that rules make a place
11 less ‘residential.’” *Id.* at 980.

12 In sum, the limited FHA case law addressing jails and prisons establishes merely
13 that courts have found jails, with their punitive, correctional, public-protection, and
14 deterrent purposes, not to be “dwellings.”

15 Here, the purposes of the proposed Southwest Key group home – family
16 reunification, dignity, safety, and care for the unaccompanied children – are
17 fundamentally different from punitive, correctional, deterrent, or public-protection
18 purposes that characterize jails. When Congress transferred care of unaccompanied
19 children to the Department of Health and Human Services in 2002, it mandated that “the
20 interests of the child are considered in decisions and actions relating to [his or her] care
21 and custody.” 6 U.S.C. § 279(b)(1)(B). Congress was well aware that unaccompanied
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1 children had “special needs and circumstances.” Staff of S. Comm. on Governmental
2 Affairs, 107th Cong., *Summary of Legislation to Establish a Department of Homeland*
3 *Security 2* (Comm. Print 2002), *reprinted in* Homeland Security Act Legislative History,
4 2002 WL 32516495, at *4 (2002).¹⁶ ORR has explained that the transfer reflected
5 Congress’s intent “to move towards a child welfare-based-model of care for children and
6 away from the adult detention model.” ORR FACT SHEET at 1.
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9 Congress also requires that, subject to certain considerations, unaccompanied
10 children be placed “in the least restrictive setting that is in the best interest of the child.”
11 8 U.S.C. § 1232(c)(2)(A). Similarly, the *Flores* Settlement mandates that unaccompanied
12 children be treated “with dignity, respect and with special concern for their particular
13 vulnerability,” and, subject to certain considerations, “in the least restrictive setting
14 appropriate to the minor’s age and special needs.” *Flores* Settlement, ¶ 11. ORR and
15 Southwest Key recognize that many unaccompanied children are victims of
16 homelessness, violence, physical or sexual assault, or poor socioeconomic conditions,
17 and that the “main purpose” of ORR’s “care and placement program” “is to provide a
18 safe and appropriate environment.” (ECF No. 57-15, Cooperative Agreement, at 1.)
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24 ¹⁶ See also *Role of Immigration in the Dep’t of Homeland Sec. pursuant to H.R.*
25 *5005, the Homeland Sec. Act of 2002: Hearing Before the Subcomm. on Immigration,*
26 *Border Sec. & Claims of the H.R. Comm. on the Judiciary*, 107th Cong., 2d Sess. 38, 53
27 (2002), *reprinted in* Homeland Security Act Legislative History, 2002 WL 32516537, at
28 *48, *61 (2002) (hearing testimony that unlike the Department of Homeland Security, ORR “has the child welfare expertise to properly care for these vulnerable children” and can “take care of children, their psychological, emotional and other material needs, [which] is very vital to how these children are treated and their wellbeing”).

1 Southwest Key’s “licensed program” housing must be “sensitive to the age, culture,
2 native language and the complex needs of each minor.” *Flores* Settlement at 28, ¶ B
3 (Settlement Exhibit 1). Among other things, it must provide each child: (1) “[p]roper
4 physical care . . . including suitable living accommodations, food, appropriate clothing,
5 and personal grooming items;” (2) “[a]n individualized needs assessment,” including an
6 “educational assessment and plan,” a “statement of religious preference and practice,” an
7 “assessment of the minor’s personal goals, strengths, and weaknesses,” and names of
8 relatives to help in family reunification; (3) education; (4) recreation, leisure, and outdoor
9 activities; (5) counseling; (6) “[v]isitation and contact with family members” during
10 which “staff shall respect the minor’s privacy;” (7) “[a] reasonable right to privacy,”
11 including private space to store personal belongings, private phone calls, mail, and visits
12 with guests (as permitted by applicable rules), and the right to wear his or her own
13 clothes where available; (8) family reunification services; and (9) legal services
14 information. *Flores* Settlement, ¶ 6; 24-28, ¶¶ 1-14 (Settlement Exhibit 1).

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20 ORR’s administrative guidance refers to housing providers like Southwest Key as
21 “residential care providers” and further illustrates its “child welfare-based-model of care
22 for children,” which is “based on child welfare best practices in order to provide a safe
23 environment,” and is not punitive. ORR POLICY GUIDE at § 1.2; ORR FACT SHEET at 1.
24 Those providers’ facilities “differ greatly from typical confinement facilities and
25 prisons,” with most being “shelters, group homes, and residential therapeutic centers,”
26 where unaccompanied children “move around freely in a supervised environment.”
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1 Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment
2 Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77770 (Dec. 24, 2014).¹⁷
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4 “Many care provider facilities are run by nonprofit grantees and located in residential
5 neighborhoods.” *Id.* at 77770. “Youth care worker[s]” at residential care providers like
6 Southwest Key are “employees whose primary responsibility is for the supervision and
7 monitoring of [unaccompanied children] at care provider facilities;” they “are not law
8 enforcement officers, but provide supervision analogous to supervisors at a domestic
9 group home.” *Id.* at 77771.

12 Finally, pursuant to the *Flores* settlement agreement, upon taking custody of an
13 unaccompanied minor, ORR or the shelter in which the unaccompanied minor is placed
14 makes prompt and continuous efforts toward “family reunification and . . . release.”
15 *Flores* Settlement, ¶ 18. “ORR begins the process of finding family members . . . as soon
16 as the child enters ORR’s care.” ORR POLICY GUIDE at § 2.2. During this residency,
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20 ¹⁷ This cited authority is the preamble to the interim final rule implementing the
21 Prison Rape Elimination Act of 2003 (“PREA”), Pub. L. No. 108-79, 117 Stat. 972
22 (2003), as amended. When Congress passed PREA, the law did not apply to ORR’s care
23 provider facilities. With the Violence Against Women Reauthorization Act of 2013, Pub.
24 L. No. 113-4, 127 Stat. 54 (2013), Congress amended PREA and directed the Department
25 of Health and Human Services/ORR to publish national standards for detecting,
26 preventing, reducing, and punishing rape and sexual assault in ORR facilities; it did not
27 require ORR to adopt the standards governing Federal prisons. *See* 42 U.S.C. §
28 15607(d). In response, ORR issued the cited rule to create standards for “the prevention,
detection, and response to sexual abuse and sexual harassment” in its care provider
facilities. *See generally* 79 Fed. Reg. at 77768-70. The implementation of such
protections does not make the ORR facilities prisons, as the City implies. (ECF No. 56-
1, at 17.) As explained above, the overall characteristics of ORR-funded group home
facilities differ markedly from penal institutions like jails or prisons.

1 “ORR and its care providers work to ensure that children are released timely and safely
2 from ORR custody to parents . . . or other adults . . . who can care for the child’s physical
3 and mental well-being.” *Id.* at “Introduction” page. Unaccompanied children remain in
4 ORR care until they are released, repatriated, obtain legal status, or turn 18. *Id.*¹⁸

6 As this legal and administrative framework shows, the purposes of group homes
7 for unaccompanied children are family reunification, dignity, safety, and care for the
8 unaccompanied children – a purpose that the residential care provider accomplishes in the
9 “least restrictive” setting and with personalized care, in recognition of their unique
10 vulnerability. That purpose is not one of punishment, deterrence, incarcerating convicted
11 persons, or correcting delinquent behavior akin to the purposes of the jails or prisons in
12 the FHA cases on which Defendant relies.

16 **2. Group Homes for Unaccompanied Children Are Not Federal Immigration 17 Detention Centers**

18 The City is wrong that the unaccompanied children to be housed by Southwest Key
19 are in “immigration detention” simply because they are in the “care and custody” of
20

21 ¹⁸ In its Reply brief, the City cites to *Gold v. Griego*, 2000 U.S. Dist. LEXIS 14897
22 (D.N.M. 2000), an unpublished opinion pre-dating *Garcia*, in which a jail where the
23 plaintiff had been a pretrial detainee was held not to be a “dwelling.” (ECF No. 74 at 6).
24 It argues that unaccompanied children are analogous to pretrial detainees in jails, since
25 they are not “convicted of a crime” and are being “held to assure they are present in
26 court.” *Id.* While that opinion did recognize that a “common thread” of many FHA cases
27 was housing choice, the court focused on the facility’s “incarceration” role,
28 characterizing it as a “place of incarceration to serve a period of confinement,” much like
any other jail or prison, without relying on the plaintiff’s pretrial status. *Gold*, 2000 U.S.
Dist. LEXIS 14897 at *5-*6. Thus, *Gold* does nothing to advance the City’s argument
that the housing here is analogous to jails courts have held not to be covered by the FHA.

1 ORR, and the legal framework at times refers to them as being “detained.” In reality, all
2 of the relevant authorities consistently and explicitly *distinguish* “secure” facilities and
3 immigration “detention” facilities from licensed program shelter care group homes. As
4 set forth in the ORR FACT SHEET, “Congress transferred the care and custody of these
5 children to HHS from the former [INS] to move towards a child welfare-based-model of
6 care for children and *away from the adult detention model.*” (emphasis added).
7
8 Additionally, the ORR POLICY GUIDE, at “Guide to Terms” page, defines and
9 distinguishes “shelter care,” which is “a residential care provider facility,” from “secure
10 care,” which is “the most restrictive placement option,” used only under limited
11 circumstances, which may include a “juvenile detention center or a highly structured
12 therapeutic facility.”
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14

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16 This is consistent with Congress’s mandate that unaccompanied children in ORR’s
17 custody “shall be promptly placed in the least restrictive setting that is in the best interest
18 of the child,” and “not be placed in a secure facility absent” certain determinations. 8
19 U.S.C. § 1232(c)(2)(A). *See also* 6 U.S.C. § 279(g)(1) (defining “placement” to mean
20 placement “in either a detention facility or an alternative to such a facility”).
21
22

23 Similarly, the *Flores* Settlement recognizes that ORR “usually houses persons
24 under the age of 18 in an open setting, such as a foster or group home, and not in
25 detention facilities.” *Flores* Settlement, at 45 (Settlement Exhibit 6). It reiterates the
26 distinction between a “licensed program,” such as a group home, and an “immigration
27 detention facility” and provides that certain unaccompanied minors (such as certain
28

1 unaccompanied minors charged or convicted of crimes) may in fact be placed in a “State
2 or county juvenile detention facility, or a secure INS detention facility, or INS-contracted
3 facility, having separate accommodations for minors.” *Id.*, ¶¶ 21, 22. The City’s selected
4 extrapolation of the words “custody,” “detained,” or “detention” from these authorities
5 ignores their context and these explicit distinctions between secure immigration detention
6 and licensed provider shelter care like Southwest Key’s group homes.
7

8
9 Likewise, federal courts have recognized the distinction between shelter care and
10 immigration detention facilities. One court held that, categorically, unaccompanied
11 children “in the custody of HHS/ORR” are “not in ‘immigration detention.’” *D.B. v.*
12 *Poston*, 119 F. Supp. 3d 472, 485 (E.D. Va. 2015) (explaining that HHS/ORR “has *no*
13 *responsibility* for adjudicating the immigration status of any individual” and “Congress
14 intentionally separated HHS/ORR from any immigration considerations or decisions”)
15 (citation omitted), *aff’d in relevant part*, *Cardall*, 826 F.3d 721. In another decision,
16 *Walding v. United States*, the court contrasts the shelter care facility at issue with
17 immigration “detention facilities.” 955 F. Supp. 2d 759, 764 (W.D. Tex. 2013)
18 (“Although INS had existing facilities in place, most of these were detention facilities,
19 and ORR[] wanted to use alternatives such as shelter care facilities [] in order to better
20 comply with the *Flores* Settlement Agreement.”).¹⁹
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22
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26 ¹⁹ The discussion of “detention” by the dissent in *Reno v. Flores*, 507 U.S. 292,
27 323 n.4, 324 (1993), cited by the City (ECF No. 74, City’s Reply Br., at 7), does not
28 apply to the governing framework at issue in this case, as it pre-dates both the *Flores*
Settlement (1997) and the Homeland Security Act’s transfer of authority for the care of
unaccompanied children to ORR.

IV. CONCLUSION

For the above reasons, the Court should find that the proposed Southwest Key group home is a “dwelling” covered by the Fair Housing Act and is neither a jail nor a detention facility.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I electronically filed the foregoing Statement of Interest with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all Filing Users whose email addresses are denoted on the Electronic Mail Notice List.

Executed November 3, 2016.

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