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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SOUTHWEST KEY PROGRAMS, INC.,

Plaintiff,

v.

CITY OF ESCONDIDO,

Defendant.

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
Time: to be scheduled

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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).

The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) abolished the former Immigration and Nationalization Service, and transferred most of its immigration benefits and law enforcement functions to the new Department of Homeland Security. *See D.B. v. Cardall*, 826 F.3d 721, 732 (4th Cir. 2016). However, Congress transferred the care of unaccompanied children to the Office of Refugee Resettlement ("ORR"), within the Department of Health and Human Services. 6 U.S.C. § 279(a). Among other things, it charged ORR with: "ensuring that the interests of the child are considered in decisions and actions relating to [his or her] care and custody," with "making placement determinations," with "identifying qualified individuals, entities, and facilities to house unaccompanied alien children," and with "overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside." § 279(b)(1)(B), (C), (F), and (G).

Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008), *codified as amended at* 8 U.S.C. § 1232, requires unaccompanied children "in Department of Health and Human Services custody" to "be promptly placed in the least restrictive setting that is in the best interest of the child," subject to certain considerations. § 1232(c)(2)(A). Unaccompanied children may not be placed "in a secure facility absent a determination that the child poses a danger to self or others or has been charged with . . . a criminal offense." *Id.*[3]

[3] As explained below, a "secure" facility is defined in administrative guidance as

To the extent not otherwise superseded by statute, ORR is also bound by a 1997 consent decree ("*Flores* Settlement"), which "sets out nationwide policy for the detention, release, and treatment of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

Under this framework, as ORR's administrative guidance explains, unaccompanied 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.

care providers," which are "residential care providers that provide temporary housing and other services." ORR FACT SHEET, *available at www.acf.hhs.gov/sites/default/files/orr/orr_uc_updated_fact_sheet_1416.pdf*, at 2; ORR POLICY GUIDE at "Introduction" page. The vast majority are placed in "shelter care," defined as "a residential care provider facility . . . in the least restrictive environment." ORR POLICY GUIDE at "Guide to Terms" page (contrasting "Staff Secure Care," which has "stricter security" for unaccompanied children who "require close supervision but . . . not . . . a secure facility," and "Secure Care" such as a "juvenile detention center," "the most restrictive placement option for an unaccompanied child who poses a danger to self or others or has been charged with . . . a criminal offense"); ORR ANNUAL REPORT to CONGRESS FY 2014 at 72, *available at www.acf.hhs.gov/sites/default/files/orr/orr_annual_report_to_congress_fy_2014_signed.pdf* (in fiscal year 2014, of 57,496 unaccompanied children, 45,703 (79%) were placed in shelter care; 773 (1%) were placed in secure or staff secure care).

B. Southwest Key's Proposed Group Home

Plaintiff Southwest Key Programs, Inc. ("Southwest Key") is a state-licensed, ORR-funded residential care provider that provides group homes along with support services for unaccompanied children. (*See* ECF No. 57-15, Cooperative Agreement between ORR and Southwest Key ("Cooperative Agreement").)[4] In 2014, Southwest

[4] This document is filed under seal at ECF No. 57-15 as Exhibit 13 to the Defendant's Motion for Summary Judgment. (*See* ECF No. 57-1, Declaration of Alan 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).

Key applied to the City for a conditional use permit to operate one such group home as a "government services" land use at a former skilled nursing facility property.[5] City Council Resolution No. 2014-134 (approved Nov. 19, 2014), *available at www.escondido.org/Data/Sites/1/media/agendas/Council/11-19-14CCAgendaPacket.pdf*, at 88-100. The proposed group home would have been "licensed program" "shelter care," as described above, and house up to 96 unaccompanied children aged approximately 6-17, of whom 91% were expected to come from Guatemala, El Salvador, or Honduras. *Id.*, ¶ 1; ORR FACT SHEET at 2. (*See generally* ECF No. 57-15, Cooperative Agreement.) Consistent with the requirements imposed by federal law, Southwest Key states that it intended to care for the unaccompanied children by providing a homelike setting in which the unaccompanied children keep bedrooms unlocked, may personalize and decorate their rooms, eat meals together, do homework, may wear their own clothes, have access to outside play, go on educational and recreational field trips, and may receive mail, visitors, and phone calls. (*See generally* ECF No. 72, Pl.'s Opp. Br., at 1, 5-6 (citations to record omitted).) The unaccompanied

[5] Plaintiff alleges that it first approached the City to propose to use two motels as locations to house the unaccompanied children. (ECF No. 29, Pl.'s First Amended Compl., ¶ 42.) The motels were located in a commercial zone in which "residential care facilities," as the Plaintiff proposed to designate them, would have been able to operate as of right. *Id.*, ¶¶ 42-44. Nevertheless, the city's planning staff rejected the proposal, classifying the facility as a "shelter," rather than a "residential care facility." *Id.*, ¶ 45. 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.

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

The City denied the application, finding that the facility would not provide services required by the community, would have a "negative impact," and would "cause a deterioration of bordering land uses." Planning Comm'n Resolution No. 6015 (effective August 2, 2014), ¶¶ 21, 22, *available at www.escondido.org/Data/Sites/1/media/agendas/Council/10-15-14_PHG14-0017/PlanningCommisionReports/Tab16.pdf*; City Council Resolution No. 2014-134, ¶¶ 19, 28, 34. The City determined that allowing the facility would "establish a non-residential use in the neighborhood that is more intensive than the previously approved skilled nursing facility," and that it would not be compatible with the surrounding single-family homes, among many other concerns. Planning Comm'n Resolution No. 6015, ¶¶ 19-23; City Council Resolution No. 2014-134, ¶ 34; *see generally id*.

The City did not, however, reject the proposed "government services" designation, and recognized that "government services" categorically "exclude[s] correctional institutions." City Council Resolution No. 2014-134, ¶¶ 7, 8; *accord* Escondido Municipal Code § 33-123. The City made no finding that the use would have been a jail, correctional facility, or immigration detention facility (although the Planning Commission did acknowledge that some citizen commenters considered the property to

be a "federal detention facility," Planning Comm'n Resolution No. 6015, ¶ 19); and its denial was not based on these or related grounds. *See generally id.*; City Council Resolution No. 2014-134.[6]

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

III. ARGUMENT

The City filed a motion for summary judgment, in which it argues that the proposed group home is not a "dwelling" covered by the FHA because it is equivalent to

[6] One Planning and Zoning Commissioner stated that because the purpose of the proposed home was "to begin the process of correcting their illegal status," it violated the intent of the zoning code's prohibition of "a correctional institution," though he admitted this interpretation of the home did not "conform exactly to the letter of the law" of the zoning code. (ECF No. 72-9, Exhibit 5-2 to Pl.'s Opp. Br., at 37.) In any event, this rationale was not among the findings adopted by the City.

[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.)

a "jail" or "detention facility." (ECF No. 56-1, Def.'s Mem. in Supp. Mot. Summ. J, at 5-19.[8]) The City is wrong. First, group homes for unaccompanied children in the care and custody of the Department of Health and Human Services are "dwelling[s]" under the FHA, like numerous similar homes that have been held to be such, because they are intended to be occupied as a residence. It is immaterial whether they choose to live there, or whether they must abide by rules and restrictions. It similarly is irrelevant whether they pay rent while living there. The City's attempt to restrict the scope of the FHA should be rejected. Second, group homes for unaccompanied children are not jails, as they lack a punitive purpose, and are distinguished from federal immigration detention facilities under the applicable legal framework. Thus, the City's argument is contrary to case law establishing the FHA's coverage and misapprehends the federal requirements for licensed program shelter care for unaccompanied children.

A. Group Homes for Unaccompanied Children in the Care and Custody of the Department of Health and Human Services Are "Dwelling[s]" Covered by the FHA

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

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

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

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

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

[9] "Family" includes a single individual. § 3602(c).

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

For example, in *Lakeside Resort,* the Third Circuit held a proposed drug- and alcohol-treatment facility group home in a converted hotel, with an average stay of 14.8 days, to be a "dwelling" under the FHA. 455 F.3d at 157. It applied two factors: 1) whether the facility "is intended or designed for occupants who intend to remain . . . for any significant period of time," and 2) "whether those occupants would view [the facility] as a place to return to during that period." *Id*. at 158 (citation and internal quotation marks omitted). The average stay was held to satisfy the first factor because 14.8 days is "certainly longer" than the typical one- to two-night stay in a motel; some residents stay longer; "significant period of time" was not defined; and other courts had found one-

month stays to suffice. *Id*. at 158-59. The second factor was met because residents ate meals together, returned to their rooms at night, received mail at the facility, hung pictures on their walls, and had visitors in their rooms. *Id.* at 160.[10]

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

[10] Likewise, the Eleventh Circuit held that state-licensed "halfway houses" for recovering substance abusers, with an average stay of six to ten weeks were "dwelling[s]" under the FHA. *Schwarz*, 544 F.3d at 1207, 1213-16. Contrasting hotels, the court held: "the more occupants treat a building like their home—*e.g.*, cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas," and "the longer the typical occupant lives in a building, the 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.

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

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

[11] Courts have found the FHA to cover a wide range of other types of temporary housing. These have included: a nursing home for up to 210 residents, *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096,1098 (3d Cir. 1996); summer bungalows, *United States. v. Columbus Country Club*, 915 F.2d 877, 881 (3d Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991); temporary student housing, *United States. v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974, 977 (D. Neb. 2013); a ship offering one-month stays to recovering substance abusers, *Project Life, Inc. v. Glendening*, No. WMN–98–2163,1998 WL 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).

services, and an assessment of their personal goals, strengths, and weaknesses – which are "sensitive to the age, culture, native language and the complex needs of each minor;" enjoy hours of recreation and leisure each day; have access to religious services of their choice; and receive classroom education, as well as appropriate reading materials in languages other than English for use during leisure time. *Flores* Settlement at 24-28, ¶¶ 1-14 (Settlement Exhibit 1); ORR POLICY GUIDE at § 3.3; ORR FACT SHEET at 2. Housing providers like Southwest Key are known as "residential care providers." ORR POLICY GUIDE at § 1.2. As explained in greater detail below, this supportive model of care is based on "child welfare best practices," ORR FACT SHEET at 2, in which unaccompanied children are treated "with dignity, respect and with special concern for their particular vulnerability," *Flores* Settlement, ¶ 11.

Plaintiff has presented evidence that it cares for unaccompanied children in a homelike setting in which they keep bedrooms unlocked, may personalize and decorate their rooms, eat meals together, do homework, may wear their own clothes, have access to outside play, go on educational and recreational field trips, and may receive mail, visitors, and phone calls. *See generally* ECF No. 72, Pl.'s Opp. Br., at 1, 5-6 (citations to record omitted). Their typical day includes breakfast, school, recreation, dinner, homework, evening snack, and bedtime, and they can participate in a student council to have a voice in all aspects of their care. *Id.* The homes have common areas including recreation rooms and study halls, where the unaccompanied children would be able to spend free time together. *Id.*

Further, though relatively short, the average length of stay of Southwest Key's group homes' residents of 30 to 35 days[12] is well within the range of average stays that courts have found to support a finding that residents remain for a "significant" amount of time. *See, e.g.*, *Lakeside Resort*, 455 F.3d at 158-59 (14.8 days); *Project Life, Inc.*, 1998 WL 1119864 at *2 & n. 4 (one month); *Conn. Hosp.*, 129 F. Supp. 2d at 132 (one to three months). Moreover, the fact that some of the unaccompanied children have remained as long as 170 days and there is no maximum stay (as long as the resident is under age 18) (ECF No. 72, Pl.'s Opp. Br., at 5 (citations to record omitted)) further weighs in favor of such a finding. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1052 n.2 (9th Cir. 2007) (considering not only average length of stay but also maximum length of stay); *Lakeside Resort*, 455 F.3d at 158-59 (similar). In sum, because group home providers for unaccompanied children in the care and custody of the Department of Health and Human Services care for them in a homelike setting, and because courts have found that analogous group homes for children (and adults) are covered by the FHA, homes like Southwest Key's proposed group home are "dwelling[s]" under the FHA.

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

Based only on the general notion that the FHA is intended to promote "freedom of choice" in housing, Defendant seeks to inject into the FHA a requirement that residents

[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).

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

For example, children in group home settings, who by definition lack another safe place to live, are necessarily subject to supervision and placement decisions by courts, other public agencies, or care providers. The children in the home held to be a "dwelling" in *Hughes Mem'l Home,* 396 F.Supp. at 549, were referred by courts, public welfare departments, social agencies, or parents or guardians. In *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 26 n.2 (D. Mass 1996), a nonprofit's residential school for "emotionally disturbed adolescents" "whom state or local authorities determined to be in need of" services was held to be a "dwelling" under the FHA. Neither of these court opinions identifies concerns about or even considers the extent (or lack) of the children's choice or control over their placement.

Similarly, the residents of the treatment facility held to be a "dwelling" in *Lakeside Resort*, 455 F.3d at 154, 160, were "*not allowed off the grounds of the facility unsupervised*." (emphasis added). The residents of the halfway houses for recovering substance abusers held to be a "dwelling" in *Schwarz,* 544 F.3d at1207, had to follow an extensive set of rules, including: no drugs or alcohol, no pornography, required property

maintenance, and no overnight guests without permission. Neither of these court opinions expresses concern that such restrictions on the residents' freedom or independence make the housing any less of a "dwelling." The City misreads *Conn. Hosp*. (ECF No. 56-1, at 9), which did not hold that the FHA requires residents to be fully "willing participants" in their housing. In distinguishing between the structured group home at issue in the case and a substance abuse "rehabilitative facility," the court merely recognized that the residents of the group home were "willing participants" in the treatment program. 129 F. Supp. 2d at 133. The court did not suggest that distinction was dispositive to its conclusion that the home was a "dwelling."

Finally, it is worth noting that the FHA does not exclude dwellings simply because residents may share restroom or cooking facilities. HUD has issued an implementing regulation defining dwelling to include "dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room." 24 C.F.R. § 100.201 (Definitions). HUD's implementing regulations were issued through the notice-and-comment process pursuant to Congressional authority, 42 U.S.C. § 3614a, and have the force of law. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("Rules issued through the notice-and-comment process . . . have the 'force and effect of law.'") (citation omitted). Further, HUD's interpretation of the FHA is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984), which gives regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *See Meyer v. Holley*, 537 U.S. 280,

287-88 (2003) (affording *Chevron* deference to HUD's FHA regulations, recognizing that HUD is "the federal agency primarily charged with the implementation and administration of the [FHA] . . . [a]nd we ordinarily defer to an administering agency's reasonable interpretation of a statute") (citations omitted). Here, HUD's regulations reasonably interpret the FHA's definition of "dwelling" to include group living arrangements with shared restrooms or cooking facilities, as confirmed by the many courts to extend the FHA's coverage to such group housing.

In short, these authorities establish that a resident's choice over his or her housing placement or control over his or her residence do not govern a court's determination of whether the home is a "dwelling" under the FHA.

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

The FHA makes it unlawful to "refuse to sell or rent . . . *or otherwise make unavailable or deny*, a dwelling to *any person* because of race, color, . . . or national origin." 42 U.S.C. § 3604(a) (emphasis added). Courts construe this provision broadly, encompassing a variety of conduct aimed at a range of housing settings, including those whose residents do not pay rent. HUD's regulation implementing this provision declares it unlawful to "engage in any conduct *relating to the provision of housing* which otherwise makes unavailable or denies dwellings *to persons* because of race . . . or national origin." 24 C.F.R. § 100.50(b) (emphasis added). HUD's implementing regulations further confirm that "sleeping accommodations in shelters intended for

occupancy as a residence for homeless persons" are among the dwellings protected by the FHA. 24 C.F.R. § 100.201. As explained, these regulations have the force of law, *Perez*, 135 S. Ct. at 1203 and are entitled to *Chevron* deference, *Meyer*, 537 U.S. at 287-88.

Courts have explicitly held that residents need not pay rent in order for their home to be covered by the protections of § 3604(a). In *Woods v. Foster*, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995), the defendants argued "that the FHA is limited to acts related to the sale or rental of a dwelling," such that the plaintiffs "cannot recover . . . because the Shelter is free." The court flatly rejected this argument, on the grounds that the plain language of § 3604(a) prohibits acts that "otherwise make unavailable or deny, a dwelling to any person." *Id.* at 1174. The court went on to hold that the home was a "dwelling," reasoning that because the residents "have nowhere else to 'return to,' the Shelter is their residence in the sense that they live there and not in any other place." *Id.* at 1173-74*; accord Hughes Mem'l Home*, 396 F. Supp. at 549 (citation omitted) (rejecting defendant's argument that the group home for orphans and needy children is not covered "because it is not engaged in the commercial sale or rental of residential facilities," and holding that "the Home is prohibited from discrimination even with respect to residents for whom no payment is made").

The Ninth Circuit has not "squarely addressed the issue of whether all temporary shelters fit within the Act's definition of 'dwelling.'" *Cmty. Hous., Inc. v. City of Boise*, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007).[13] Nonetheless, it has applied the FHA to

[13] The issue of whether the FHA extends to non-paying residents at a shelter did

shelters without suggesting that statutory coverage depends on residents' payment of rent. *See Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 942 (9th Cir. 1996) (applying FHA to "24-hour emergency shelters for the homeless;" no consideration of whether residents paid to stay there). Thus, Defendant's reliance on *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101, 1111 (D. Idaho 2010), *aff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011), (ECF No. 56-1, at 5-6), is misplaced, because its highly fact-specific determination considered not only the lack of payment by residents, but also over a dozen distinct aspects of that shelter, including that guests are not guaranteed the same bed, cannot stay at the shelter during the day, cannot stay any given night unless they check in at certain hours, may not personalize or leave belongings in their assigned bed area, and may not receive calls, mail, or visitors. None of these are aspects of the Southwest Key group home. Defendant's reliance on *Johnson v. Dixon*, 786 F. Supp. 1 (D.D.C. 1991), (ECF No. 56-1, at 5-6), is equally unavailing, as that case addressed a different provision of the FHA, § 3604(f)(1), which specifically references a "buyer or renter."

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come before the court in *Community House*, but the court did not decide the issue, because it did not need to in order to find that the housing at issue was covered by the FHA. *See Cmty. Hous.*, 490 F.3d at 1048 n.2 (finding that the emergency homeless 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).

B. Group Homes for Unaccompanied Children, Such As Those Provided by Southwest Key, Are Neither "Jails" Nor Immigration "Detention Facilities"

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

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

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

[14] The City points out that the *Garcia* court gave little weight to the factors more typically used by courts to determine whether housing is a "dwelling" under the FHA, 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

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

Although both *Garcia* and *Renda* were influenced in part by the FHA's policy of promoting "freedom of choice in housing," neither case compels a conclusion that choice is a *required* element of a dwelling. *Garcia*, 114 F. Supp. 2d. at 1163; *see also Renda*, 784 N.W.2d at 16. Rather, in those cases, the "penal" purpose of the jail or prison was the primary basis for its distinction from a residence, as explained. *Garcia*, 114 F. Supp. 2d. at 1161; *Renda*, 784 N.W.2d at 16. In any event, while housing choice is one value advanced by the FHA, nothing in the FHA suggests that people should be *excluded* from its broad protection from discrimination simply because they lack full choice over any or every aspect of their housing.[15] (And as the cases discussed more fully above exemplify, lack of choice over housing placement does not deny group homes the FHA's protections; nor does it convert them into jails.)

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typical factors used by the numerous courts discussed above. Even *Garcia* specifically recognized that examining those features was appropriate in assessing group homes for 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).

[15] To the extent legislative intent is considered, it is important to note that another critical purpose of the FHA was to promote "truly integrated and balanced living 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.

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

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

Here, the purposes of the proposed Southwest Key group home – family reunification, dignity, safety, and care for the unaccompanied children – are fundamentally different from punitive, correctional, deterrent, or public-protection purposes that characterize jails. When Congress transferred care of unaccompanied children to the Department of Health and Human Services in 2002, it mandated that "the interests of the child are considered in decisions and actions relating to [his or her] care and custody." 6 U.S.C. § 279(b)(1)(B). Congress was well aware that unaccompanied

children had "special needs and circumstances." Staff of S. Comm. on Governmental Affairs, 107th Cong., *Summary of Legislation to Establish a Department of Homeland Security* 2 (Comm. Print 2002), *reprinted in* Homeland Security Act Legislative History, 2002 WL 32516495, at *4 (2002).[16] ORR has explained that the transfer reflected Congress's intent "to move towards a child welfare-based-model of care for children and away from the adult detention model." ORR FACT SHEET at 1.

Congress also requires that, subject to certain considerations, unaccompanied children be placed "in the least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(c)(2)(A). Similarly, the *Flores* Settlement mandates that unaccompanied children be treated "with dignity, respect and with special concern for their particular vulnerability," and, subject to certain considerations, "in the least restrictive setting appropriate to the minor's age and special needs." *Flores* Settlement, ¶ 11. ORR and Southwest Key recognize that many unaccompanied children are victims of homelessness, violence, physical or sexual assault, or poor socioeconomic conditions, and that the "main purpose" of ORR's "care and placement program" "is to provide a safe and appropriate environment." (ECF No. 57-15, Cooperative Agreement, at 1.)

[16] *See also Role of Immigration in the Dep't of Homeland Sec. pursuant to H.R. 5005, the Homeland Sec. Act of 2002*: *Hearing Before the Subcomm. on Immigration, Border Sec. & Claims of the H.R. Comm. on the Judiciary*, 107th Cong., 2d Sess. 38, 53 (2002), *reprinted in* Homeland Security Act Legislative History, 2002 WL 32516537, at *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").

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

ORR's administrative guidance refers to housing providers like Southwest Key as "residential care providers" and further illustrates its "child welfare-based-model of care for children," which is "based on child welfare best practices in order to provide a safe environment," and is not punitive. ORR POLICY GUIDE at § 1.2; ORR FACT SHEET at 1. Those providers' facilities "differ greatly from typical confinement facilities and prisons," with most being "shelters, group homes, and residential therapeutic centers," where unaccompanied children "move around freely in a supervised environment."

Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, 79 Fed. Reg. 77768, 77770 (Dec. 24, 2014).[17] "Many care provider facilities are run by nonprofit grantees and located in residential neighborhoods." *Id.* at 77770. "Youth care worker[s]" at residential care providers like Southwest Key are "employees whose primary responsibility is for the supervision and monitoring of [unaccompanied children] at care provider facilities;" they "are not law enforcement officers, but provide supervision analogous to supervisors at a domestic group home." *Id*. at 77771.

Finally, pursuant to the *Flores* settlement agreement, upon taking custody of an unaccompanied minor, ORR or the shelter in which the unaccompanied minor is placed makes prompt and continuous efforts toward "family reunification and . . . release." *Flores* Settlement, ¶ 18. "ORR begins the process of finding family members . . . as soon as the child enters ORR's care." ORR POLICY GUIDE at § 2.2. During this residency,

[17] This cited authority is the preamble to the interim final rule implementing the Prison Rape Elimination Act of 2003 ("PREA"), Pub. L. No. 108-79, 117 Stat. 972 (2003), as amended. When Congress passed PREA, the law did not apply to ORR's care provider facilities. With the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013), Congress amended PREA and directed the Department of Health and Human Services/ORR to publish national standards for detecting, preventing, reducing, and punishing rape and sexual assault in ORR facilities; it did not require ORR to adopt the standards governing Federal prisons. *See* 42 U.S.C. § 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.

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

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

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

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

[18] In its Reply brief, the City cites to *Gold v. Griego*, 2000 U.S. Dist. LEXIS 14897 (D.N.M. 2000), an unpublished opinion pre-dating *Garcia*, in which a jail where the plaintiff had been a pretrial detainee was held not to be a "dwelling." (ECF No. 74 at 6). It argues that unaccompanied children are analogous to pretrial detainees in jails, since they are not "convicted of a crime" and are being "held to assure they are present in court." *Id*. While that opinion did recognize that a "common thread" of many FHA cases was housing choice, the court focused on the facility's "incarceration" role, 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.

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

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

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

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

Likewise, federal courts have recognized the distinction between shelter care and immigration detention facilities. One court held that, categorically, unaccompanied children "in the custody of HHS/ORR" are "not in 'immigration detention.'" *D.B. v. Poston*, 119 F. Supp. 3d 472, 485 (E.D. Va. 2015) (explaining that HHS/ORR "has *no responsibility* for adjudicating the immigration status of any individual" and "Congress intentionally separated HHS/ORR from any immigration considerations or decisions") (citation omitted), *aff'd in relevant part*, *Cardall*, 826 F.3d 721. In another decision, *Walding v. United States*, the court contrasts the shelter care facility at issue with immigration "detention facilities." 955 F. Supp. 2d 759, 764 (W.D. Tex. 2013) ("Although INS had existing facilities in place, most of these were detention facilities, and ORR[] wanted to use alternatives such as shelter care facilities [] in order to better comply with the *Flores* Settlement Agreement.").[19]

[19] The discussion of "detention" by the dissent in *Reno v. Flores*, 507 U.S. 292, 323 n.4, 324 (1993), cited by the City (ECF No. 74, City's Reply Br., at 7), does not 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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