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19 UNITED STATES DISTRICT COURT  
20 SOUTHERN DISTRICT OF CALIFORNIA

21 SOUTHWEST KEY PROGRAMS,  
22 INC.,

23 Plaintiff,

24 v.

25 CITY OF ESCONDIDO,

26 Defendant.

Case No. 15-cv-01115-H-BLM

**PLAINTIFF SOUTHWEST KEY  
PROGRAMS, INC.'S MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT**

Judge: Hon. Marilyn L. Huff  
Courtroom: 15A  
Date: October 31, 2016  
Time: 10:30 a.m.

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1 **I. INTRODUCTION**

2 As required by federal law, Southwest Key cares for unaccompanied children,  
3 many of whom are fleeing violence in Central America. The City of Escondido  
4 rejected Southwest Key's proposal for housing unaccompanied children. The City  
5 does not dispute a reasonable jury could find the rejection was motivated by  
6 discrimination or caused an unjustified disparate impact. Instead, it makes a futile  
7 attempt to obtain summary judgment on issues unrelated to the merits.

8 First, a group home for children protected by Congress is a dwelling covered by  
9 fair housing law. Like children in any home, unaccompanied children eat breakfast, go  
10 to class, have lunch, play, do homework, have a snack, and go to bed. They decorate  
11 their rooms, which are not locked. They take field trips to movies, baseball games, and  
12 museums. The City's position distorts both fact and law and would license  
13 discrimination against unaccompanied children, indeed all children in group homes,  
14 something Congress could not have intended.

15 Second, regardless of immigration status, fair housing law protects "any  
16 person" from illegal denial of housing based on race or national origin. 42 U.S.C.  
17 § 3604(a). Congress meant what it said, and the City cannot rewrite the statute to its  
18 liking. Congress specifically protected unaccompanied children and could not have  
19 intended to exclude them from fair housing law.

20 Third, Southwest Key is entitled to pursue equal protection claims on its own  
21 behalf and that of the children it serves. Southwest Key was targeted for  
22 discrimination itself, and it may also protect the rights of children with whom it has a  
23 strong relationship, because they face significant hindrance and practical barriers to  
24 doing so themselves.

25 Fourth, this Court has inherent power to enjoin Supremacy Clause violations.  
26 The pretextual use of local power to discriminate against a federal contractor and  
27 interfere with federal policy violates the Supremacy Clause. The motion for summary  
28 judgment should therefore be denied.

1 **II. FACTUAL BACKGROUND**

2 Southwest Key reunifies “unaccompanied immigrant children with their  
3 families while providing shelter and services in a nurturing and therapeutic  
4 environment.” City Ex. 16 at 310. Unaccompanied children “come primarily from  
5 Guatemala, Honduras, and El Salvador,” often to “escape abuse, persecution, or  
6 exploitation.” City Ex. 12 at 194-95. Many qualify for asylum, Special Immigrant  
7 Juvenile Status, T-visas, or U-visas. Transactional Records Access Clearinghouse,  
8 *Representation for Unaccompanied Children in Immigration Court; New Data on*  
9 *Unaccompanied Children in Immigration Court.*<sup>1</sup>

10 **A. Legal Framework for Housing Unaccompanied Children**

11 To protect unaccompanied children, Congress has adopted detailed statutes that  
12 complement a consent decree governing the children’s care and placement. *Flores v.*  
13 *Lynch*, 828 F.3d 898, 903 (9th Cir. 2016). The statutes and settlement mandate caring  
14 for the children primarily in settings such as licensed group homes.

15 **1. Relevant statutes**

16 An “unaccompanied alien child” is one for whom “there is no parent or legal  
17 guardian in the United States” or “no parent or legal guardian in the United States is  
18 available to provide care and physical custody.” 6 U.S.C. § 279(g)(2). In 2002,  
19 Congress transferred care of unaccompanied children from the Immigration and  
20 Naturalization Service (“INS”) to the Office of Refugee Resettlement (“ORR”), 6  
21 U.S.C. § 279(a), “to move towards a child welfare-based-model of care for children  
22 and away from the adult detention model.” City Ex. 12 at 194. ORR coordinates and  
23 implements “the care and placement” of unaccompanied children. 6 U.S.C. §  
24 279(b)(1)(A). ORR must “ensur[e] that the interests of the child are considered in  
25 decisions and actions relating to the care and custody” of unaccompanied children,  
26 including “placement determinations.” 6 U.S.C. § 279(b)(1)(B)-(C). ORR places

27 \_\_\_\_\_  
28 <sup>1</sup> See <http://trac.syr.edu/immigration/reports/371/> (Nov. 25, 2014);  
<http://trac.syr.edu/immigration/reports/359/> (July 15, 2014).

1 children “in either a detention facility or an alternative to such a facility.” 6 U.S.C.  
2 § 279(g)(1). ORR works with entities such as Southwest Key to house unaccompanied  
3 children in local communities. 6 U.S.C. § 279(b)(1)(F).

4 The Department of Homeland Security does not care for unaccompanied  
5 children. 6 U.S.C. § 279(a); 8 U.S.C. § 1232(b)(3). An unaccompanied child must be  
6 immediately transferred to ORR custody and “promptly placed in the least restrictive  
7 setting that is in the best interest of the child.” 8 U.S.C. § 1232(b)(3), (c)(2)(A).  
8 Importantly, “[a] child shall not be placed in a secure facility absent a determination  
9 that the child poses a danger to self or others or has been charged with having  
10 committed a criminal offense.” 8 U.S.C. § 1232(c)(2)(A).

## 11 2. *Flores* settlement

12 The *Flores* settlement (“Settlement”) requires ORR, as successor to INS, to  
13 treat unaccompanied children “with dignity, respect and with special concern for their  
14 particular vulnerability as minors,” placing each child “in the least restrictive setting  
15 appropriate to the minor’s age and special needs.” Settlement ¶ 11 (SWK Ex. 1 at 7).  
16 With exceptions not relevant here, an unaccompanied child “shall be placed  
17 temporarily in a licensed program.” *Id.* ¶ 19 (SWK Ex. 1 at 12). Such a program is  
18 “licensed by an appropriate State agency to provide residential, group, or foster care  
19 services for dependent children, including a program operating group homes. *Id.* ¶ 6  
20 (SWK Ex. 1 at 4). The homes “shall be non-secure as required under state law,”  
21 comply with state welfare rules, and meet requirements including a “reasonable right  
22 to privacy.” *Id.* ¶ 6 & Ex. 1 ¶ A(12) (SWK Ex. 1 at 5, 27).

23 Unaccompanied children are usually housed “in an open setting, such as a foster  
24 or group home, and not in detention facilities.” *Id.* Ex. 6 (SWK Ex. 1 at 45). The  
25 settlement allows confinement in a “detention facility” only in narrow circumstances,  
26 for example when “no appropriate licensed program is immediately available” or the  
27 child “has been charged with, is chargeable, or has been convicted of a crime.” *Id.* ¶¶  
28 12(A), 21(A) (SWK Ex. 1 at 8, 12). Otherwise, ORR must place children in a

1 “licensed program.” *Flores*, 828 F.3d at 903.

2 **B. Southwest Key Group Homes**

3 Southwest Key operates licensed programs by Cooperative Agreement with  
4 ORR. City Ex. 13 at 196-98. The agreement is about “caring for children” who have  
5 often fled violence and abuse and “endur[ed] physical and sexual assault.” *Id.* at 196.  
6 ORR ensures “shelter and care” of the children “in a safe and appropriate  
7 environment.” *Id.* Southwest Key provides “residential services” to the children  
8 because it has “demonstrated child welfare, social service or related experience and  
9 [is] appropriately licensed to provide shelter care, foster care, or group care and  
10 related services.” *Id.* at 197. The “residential services” must be consistent with *Flores*  
11 and “state residential care licensing requirements.” *Id.* at 198.

12 Southwest Key operates licensed group homes in California. Rodriguez  
13 30(b)(6) Dep. at 40:9-13, 45:11-12 (SWK Ex. 2 at 55, 60); Avilez Dep. at 14:14–15:2,  
14 151:1-2 (SWK Ex. 3 at 90-91, 104); Rios Dep. at 22:3-10 (SWK Ex. 4 at 116); SWK  
15 Req. for Judicial Notice ¶¶ 1-4. In Escondido, it proposed a “facility which will be  
16 licensed in California as a Group Home,” City Ex. 17 at 410, ultimately through a  
17 conditional use permit application to convert a former skilled nursing facility.  
18 Southwest Key proposed “a children’s shelter,” not a “children’s jail,” “juvenile  
19 lockup,” or “detention facility.” Rodriguez 30(b)(6) Dep. at 99:12-15, 103:10 (SWK  
20 Ex. 2 at 68, 72); Rios Dep. at 57:8-18 (“shelter group homes”) (SWK Ex. 4 at 136);  
21 Transcript of Escondido Planning Commission Hearing of June 24, 2014 (6/24/14  
22 Hearing Tr.) at 26:20-23 (“We run 22 licensed children’s shelters ... We are not a  
23 detention center.”) (SWK Ex. 5 at 171).

24 Southwest Key “does not contract with Department of Homeland Security and  
25 it is not a correctional facility. Rather, it is a residential care facility that is licensed by  
26 the California Department of Social Services.” City Ex. 19 at 417; SWK Ex. 6 at 294.  
27 The “state licensing” agency “prefers to have home like settings.” Rios Dep. at 99:25–  
28 100:1 (SWK Ex. 4 at 140-41). A children’s shelter is not “punitive.” Rodriguez

1 30(b)(6) Dep. at 100:5 (SWK Ex. 2 at 69). It is a “group home” run on “a social work  
2 model,” not “a law enforcement model.” *Id.* at 100:6-7 (SWK Ex. 2 at 69); Rios Dep.  
3 at 34:25 (SWK Ex. 4 at 123).

4 When meeting a new resident, Southwest Key staff “greet the minor” and “offer  
5 them water and food and comfort them, letting them know that their care has changed  
6 from that of ICE and DHS ... and begin to establish a rapport.” Avilez Dep. at 50:13-  
7 21 (SWK Ex. 3 at 96). The children are given rooms and may keep their clothing. *Id.*  
8 at 51:8-18 (SWK Ex. 3 at 97); Settlement Ex. 1 ¶ A(12) (SWK Ex. 1 at 27). They  
9 have a “robust” student council to give them “a meaningful voice in all aspects of  
10 their care.” City Ex. 16 at 361.

11 Children currently stay with Southwest Key an average of 35 days and have  
12 stayed up to 170 days.<sup>2</sup> Rodriguez 30(b)(6) Dep. at 55:25–56:4 (SWK Ex. 2 at 61-62);  
13 Rios Dep. at 35:22–36:3 (SWK Ex. 4 at 124-25). There is no time limit other than  
14 turning 18. Avilez Dep. at 56:21-23, 57:20–58:10 (SWK Ex. 3 at 98-100); Rodriguez  
15 30(b)(6) Dep. at 56:13-18 (SWK Ex. 2 at 62). As with other children, unaccompanied  
16 children have breakfast, participate in schooling, have lunch, “do recreational  
17 activities ... then they have their dinner, do homework, get ready for bed [and] have  
18 their evening snack” before bedtime. Rios Dep. at 28:4-16 (SWK Ex. 4 at 117); *see*  
19 *also* City Staff Report to Planning Commission (“Staff Report”) at 21 (SWK Ex. 7 at  
20 317). They can “decorate their rooms with arts and crafts.” Rios Dep. at 159:2-5  
21 (SWK Ex. 4 at 143). Their rooms are not locked, and children may receive mail and  
22 family visitors and make telephone calls. *Id.* at 32:3–33:7, 47:20-24 (SWK Ex. 4 at  
23 121-22, 129). The proposed group home includes recreation rooms, study halls, a  
24 cafeteria, and a computer lab. Staff Report at 9 (SWK Ex. 7 at 305). It would have had  
25 “movie night” on Fridays and Saturdays. *Id.* at 21 (SWK Ex. 7 at 317).

26  
27 <sup>2</sup> The 27 days referred to in the First Amended Complaint (“FAC”) ¶ 26 reflect the  
28 average in fiscal year 2014. Rodriguez 30(b)(6) Dep. at 56:5-6 (SWK Ex. 2 at 62). As  
the evidence shows, the average may change from year to year.

1 Southwest Key takes children “off-site for recreational activities” to  
2 “community space,” such as parks or schools, or private property. Avilez Dep. at  
3 36:13, 38:21–39:1, 171:7-25 (SWK Ex. 3 at 93-95, 105); Rodriguez Dep. at 380:17–  
4 383:7 (SWK Ex. 8 at 342-45); *see also* 6/24/14 Hearing Tr. at 27:19–28:13 (SWK Ex.  
5 5 at 172-73). Children go on field trips “to the San Diego Padres ... to the movies, to  
6 local parks, museums, [and] different places that San Diego has to offer.” Rios Dep. at  
7 31:5-7 (SWK Ex. 4 at 120); *see also* City Ex. 14 at 219 (“outings or field trips in the  
8 community”); City Ex. 16 at 361 (“visits to the surrounding community for leisure  
9 activities”); City Ex. 19 at 417 (“educational and recreational field trips”). Southwest  
10 Key must provide such an outing once a week. Rios Dep. at 37:1-2 (SWK Ex. 4 at  
11 126).

12 Southwest Key staff are not law enforcement officers. Instead, they are “youth  
13 care workers” who “supervise and interact with the kids.” *Id.* at 30:3-4 (SWK Ex. 4 at  
14 119). Southwest Key uses a “strength-based program” that does not depend on  
15 “negative consequences.” Avilez Dep. at 35:4-5 (SWK Ex. 3 at 92); *see also* City Ex.  
16 14 at 218 (discussing “strength based perspective”). As many parents do, Southwest  
17 Key uses a “behavioral chart” with appropriate consequences, such as writing “a letter  
18 of apology” or not being “allowed to go on an outing.” Rios Dep. at 34:1-4 (SWK Ex.  
19 4 at 123). As with any children, “natural consequences” include loss of privileges such  
20 as going on “special outings” or playing “Foosball, X-box [or] PlayStation.” City Ex.  
21 16 at 391.

22 The City’s Assistant Planning Director described the proposed use as an  
23 “unaccompanied youth care facility.” Staff Report at 1 (SWK Ex. 7 at 297); 6/24/14  
24 Hearing Tr. at 11:22 (SWK Ex. 5 at 156). He acknowledged “Southwest Key staff act  
25 as parental authorities,” and unaccompanied children are not “detainees but are  
26 residents of the facility ... similar to the previous use” as “a skilled nursing facility.”  
27 Staff Report at 8 (SWK Ex. 7 at 304).

28 The City declined to classify the proposed use as a “[d]etainee program,” SWK

1 Ex. 9 at 351, and ultimately classified it as “[g]overnmental services,” which excludes  
 2 “correctional institutions.” Staff Report at 1 (SWK Ex. 7 at 297); 6/24/14 Hearing Tr.  
 3 at 12:15-18 (SWK Ex. 5 at 157); Escondido Municipal Code § 33-332.

### 4 **III. SUMMARY JUDGMENT STANDARD**

5 The Court may not grant the City’s motion unless “there is no genuine dispute  
 6 as to any material fact” and the City “is entitled to judgment as a matter of law.” Fed.  
 7 R. Civ. P. 56(a). The Court must view the evidence in the light most favorable to  
 8 Southwest Key and draw all reasonable inferences in its favor. *Pacific Shores*  
 9 *Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013);  
 10 *Mattos v. Agarano*, 661 F.3d 433, 439 (9th Cir. 2011). If relevant facts are undisputed,  
 11 the Court may grant summary judgment to Southwest Key on an issue for which the  
 12 City seeks summary judgment. Fed. R. Civ. P. 56(f)(1); *Albino v. Baca*, 747 F.3d  
 13 1162, 1176 (9th Cir.), *cert. denied*, 135 S. Ct. 403 (2014).

### 14 **IV. ARGUMENT**

15 The City does not dispute a reasonable jury could find it rejected housing for  
 16 unaccompanied children because of race or national origin, sharing or bowing to  
 17 community bias, in violation of fair housing and equal protection law.<sup>3</sup> *Village of*  
 18 *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977);  
 19 *Ave. 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016); *Mhany*  
 20 *Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016); *Pacific Shores*,  
 21 730 F.3d at 1156 n.14. The City also does not dispute there are jury questions under  
 22 fair housing law that it caused an unjustified disparate impact based on race or  
 23 national origin. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities*  
 24 *Project, Inc.*, 135 S. Ct. 2507, 2521-22 (2015); *Ave. 6E*, 818 F.3d at 503; *Mhany*, 819  
 25 F.3d at 617-20; *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1418 (2007).

26  
 27 <sup>3</sup> The federal and state fair housing claims, FAC ¶¶ 126-34, are discussed together  
 28 because state fair housing law cannot provide “fewer rights and remedies” than federal  
 law. Cal. Govt. Code § 12955.6.

1 Nor does the City dispute a reasonable jury could find its rejection of housing for  
2 unaccompanied children was “motivated by hostility to federal law, policy, or  
3 practice.” FAC ¶ 142.

4 Instead, the City makes a series of unsupported contentions unrelated to the  
5 merits. The facts and law demonstrate (a) the City rejected a dwelling covered by fair  
6 housing law; (b) fair housing law protects all persons involved in this case; (c)  
7 Southwest Key may pursue equal protection claims; and (d) the Court may grant  
8 injunctive relief for Supremacy Clause violations.

9 **A. A Correct Reading of the Complete Record and Relevant Law Shows**  
10 **the Proposed Group Home for Children Is a Dwelling Covered by**  
11 **Fair Housing Law.**

12 Consistent with its mission of providing shelter in a nurturing environment,  
13 Southwest Key proposed to open a group home in Escondido. The City declined to  
14 classify the group home as a “[d]etainee program,” SWK Ex. 9 at 351, and gave it a  
15 designation that excludes “correctional institutions.” Staff Report at 1 (SWK Ex. 7 at  
16 297). The complete and undisputed record confirms Southwest Key is entitled to  
17 judgment as a matter of law that the City made unavailable or denied a dwelling.

18 **1. A dwelling is any temporary or permanent residence,**  
19 **construed broadly as required by Congress’s purpose to**  
20 **promote fair housing throughout the United States.**

21 Congress adopted the Fair Housing Act “to provide, within constitutional  
22 limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601. The Act  
23 is given a “generous construction.” *United States v. Gilbert*, 813 F.2d 1523, 1527 (9th  
24 Cir. 1987). Under the Act, it is unlawful to “make unavailable or deny, a dwelling to  
25 any person because of race ... or national origin.” 42 U.S.C. § 3604(a).

26 A “dwelling” is “any building, structure, or portion thereof which is occupied  
27 as, or designed or intended for occupancy as, a residence.” 42 U.S.C. § 3602(b). The  
28 definition of dwelling is given a “broad and inclusive” interpretation. *Lakeside Resort*  
*Enters., L.P. v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 156 (3d Cir. 2006)  
(quoting *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

1 The Act does not define “residence.” In a leading case, the court applied that  
2 term’s ordinary meaning as “a temporary or permanent dwelling place, abode or  
3 habitation to which one intends to return as distinguished from the place of temporary  
4 sojourn or transient visit.” *United States v. Hughes Mem. Home*, 396 F. Supp. 544,  
5 549 (W.D. Va. 1975). That definition is accepted. *See Lakeside*, 455 F.3d at 157;  
6 *United States v. Univ. of Nebraska at Kearney*, 940 F. Supp. 2d 974, 977 (D. Neb.  
7 2013); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995).

8 A dwelling need not be “a permanent residence.” *Connecticut Hosp. v. City of*  
9 *New London*, 129 F. Supp. 2d 123, 134 (D. Conn. 2001). Courts look to “whether the  
10 facility is intended or designed for occupants who intend to remain in the facility for  
11 any significant period of time” and “whether those occupants would view the facility  
12 as a place to return to during that period.” *Lakeside*, 455 F.3d at 158. The home  
13 proposed by Southwest Key meets that standard as a matter of law.

14 **2. Southwest Key provides a dwelling for unaccompanied**  
15 **children on a supportive social work model in fulfillment of**  
16 **ORR’s duty to care for children *in loco parentis*.**

17 Southwest Key cares for children in a homelike setting. The current average  
18 stay is 35 days, and children have stayed as long as 170 days. Children stay in the  
19 same rooms, which they may personalize. Their day resembles that of any child, with  
20 breakfast, schooling, lunch, recreation, dinner, homework, snack, and bedtime. They  
21 play at local parks or schools and take field trips to baseball games, movies, or  
22 museums. Accordingly, the proposed group home is a dwelling. *See Lakeside*, 455  
23 F.3d at 159-60 (group home was dwelling where it had “14.8-day average stay” and  
24 was “intended to accommodate” stays of 30 days or longer and residents made it  
25 “their ‘residence’ while they were there”); *Connecticut Hosp.*, 129 F. Supp. 2d at 134-  
26 35 (“supportive nature” of group home showed “occupancy resembles that of a  
resident far more than that of a hotel guest”).

27 The *Flores* settlement and Cooperative Agreement confirm the proposed group  
28 home is a dwelling. Unaccompanied children are usually housed in “a foster or group

1 home, and not in detention facilities,” Settlement Ex. 6 (SWK Ex. 1 at 45), which  
2 Southwest Key does not operate. Rodriguez 30(b)(6) Dep. at 99:8-9 (SWK Ex. 2 at  
3 68). The Cooperative Agreement requires “residential services ... consistent with state  
4 residential care licensing requirements.” City Ex. 13 at 196, 198. As a “facility  
5 providing 24-hour care for seven or more children,” the proposed use would have  
6 been “licensed as a group home.” 22 Cal. Code Regs. § 84001(g)(1). That is a  
7 dwelling.

8 Indeed, *Hughes* itself established that a children’s group home is a dwelling.  
9 396 F. Supp. at 547 (group home was dwelling where it was “open to needy and  
10 dependent children, whether orphans or not, who are determined to be in need of a  
11 residence at the Home”); *see also Cohen v. Township of Cheltenham*, 174 F. Supp. 2d  
12 307, 311 & n.4 (E.D. Pa. 2001) (“residential child care facility,” or “group home,”  
13 was dwelling). The “broad definition” of dwelling thus “includes a needy children’s  
14 home.” *Gilbert*, 813 F.2d at 1527 (citing *Hughes*, 396 F. Supp. at 549).

15 The proposed group home lacks the characteristics of a “detention facility.”  
16 Mem. of P&A ISO Summ. Judg. (Doc. No. 56-1) at 10 (“MSJ”). The children’s rooms  
17 are not locked. Southwest Key cannot and does not use “razor wire.” Rodriguez Dep.  
18 at 513:11-12 (SWK Ex. 8 at 349). The “decorative tubular steel fencing” is consistent  
19 with “the residential nature of the surrounding area.” Staff Report at 9 (SWK Ex. 7 at  
20 305); *see also* 6/24/14 Hearing Tr. at 17:2-5 (“tubular steel” fence “consistent with the  
21 other site fencing” and compatible with “design and style of the neighborhood”)  
22 (SWK Ex. 5 at 162). As Southwest Key explained, “the fence is there to protect these  
23 children,” not create a jail, and “[i]t is best practice within the childcare residential  
24 industry to put such fencing around perimeters.” 6/24/14 Hearing Tr. at 30:22–31:5  
25 (SWK Ex. 5 at 175-76). ORR does not require a fence. Rodriguez Dep. at 513:13-14  
26 (SWK Ex. 8 at 349).

27 Southwest Key staff are youth care workers, not law enforcement officers. Law  
28

1 enforcement maintains no presence at its group homes.<sup>4</sup> Southwest Key is a “pat down  
2 free company prohibiting staff from conducting strip searches.” City Ex. 15 at 272. By  
3 contrast, as courts hold, “juvenile offenders admitted to the general population of a  
4 juvenile detention center” are subject to strip searches. *J.B. ex rel. Benjamin v.*  
5 *Fassnacht*, 801 F.3d 336, 337 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1462 (2016).  
6 Staff may not restrain children, Rios Dep. at 42:8-10 (SWK Ex. 4 at 127), except for  
7 certain “safe non-harmful control and restrain positions ... as a ***last resort*** when a  
8 person is in danger to self and others.” City Ex. 16 at 394 (emphasis in original); *see*  
9 *also* City Ex. 14 at 214 (“employee can restrain a child for attempting to run from the  
10 program” only if “clear and present danger,” for example if child “is attempting to  
11 jump out of a moving vehicle or run across several lanes of traffic”). By contrast, for  
12 juveniles incarcerated on delinquency charges, courts approve “[r]estraints bearing a  
13 reasonable relationship” to “any legitimate governmental objective,” *Blackmon v.*  
14 *Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013), which permits much greater restraints  
15 than Southwest Key allows.

16 The “PREA Manual” does not exempt unaccompanied children from fair  
17 housing law. MSJ at 17. To protect children, Congress directed the adoption of  
18 “national standards for the detection, prevention, reduction, and punishment of rape  
19 and sexual assault in facilities that maintain custody of unaccompanied alien  
20 children.” 42 U.S.C. § 15607(d)(1). The manual properly implements a “zero  
21 tolerance policy against child abuse and neglect,” City Ex. 15 at 254, consistent with  
22 the pre-existing right of children in group homes “[t]o be free of physical, sexual,  
23 emotional, or other abuse, and corporal punishment.” 22 Cal. Code Regs.

24 \_\_\_\_\_  
25 <sup>4</sup> The “officials” who visit, MSJ at 19, are ORR “compliance monitors,” Avilez Dep.  
26 at 56:16 (SWK Ex. 3 at 98), who review progress and make “sure their policies are  
27 implemented.” Rodriguez 30(b)(6) Dep. at 192:13–194:3 (SWK Ex. 2 at 77-79); *see*  
28 *also* Rios Dep. at 64:23-24 (ORR “review[s] the cases and where we are in the process  
of reunification”) (SWK Ex. 4 at 137). ICE or DHS officers visit only “to drop off  
adolescents or drop off paperwork.” Avilez Dep. at 56:10-11 (SWK Ex. 3 at 98); *see*  
*also* Rios Dep. at 53:2-6 (ICE or DHS “come in to serve the notice to appear” but for  
“no other purpose”) (SWK Ex. 4 at 135).

1 § 84072(c)(15). A “policy to report any sexual abuse [or] sexual harassment,” Rios  
2 Dep. at 69:20-21 (SWK Ex. 4 at 139), does not turn a group home into a jail.

3 Nor do rules convert a dwelling into a jail. All children have rules. The rules for  
4 children in Southwest Key’s care are similar to if not less strict than rules in other  
5 children’s group homes. Avilez Dec. ¶ 9. As with other caregivers, a group home is  
6 “entrusted with parent-like authority to care for, supervise, and, as necessary,  
7 discipline” children in its care. *United States v. Swank*, 676 F.3d 919, 923 (9th Cir.  
8 2012). In group homes or otherwise, children are often “constantly supervised” and  
9 “not allowed to leave” without supervision. MSJ at 18. Parents commonly maintain  
10 “line of sight supervision” over children. Avilez Dep. at 87:9 (SWK Ex. 3 at 102).  
11 Likewise, parents often list “prohibited actions” and may search children’s  
12 belongings.<sup>5</sup> MSJ at 18. Parents may have “structured regimens” and “daily  
13 schedules.” *Id.* at 18-19. Indeed, “the essence of family life” is “structure that provides  
14 standards of behavior, love and support freely given even in the face of misbehavior,  
15 and appreciation of the consequences of failing to live up to expectations.”  
16 *Connecticut Hosp.*, 129 F. Supp. 2d at 134; *cf. Kearney*, 940 F. Supp. 2d at 980  
17 (“rules” do not “make a place less ‘residential’”).

18 In a licensed group home that provides “24-hour care and supervision to  
19 children,” state law appropriately requires a “structured environment,” but that does  
20 not mean a group home is a jail. Cal. Health & Safety Code § 1502(a)(13); *see also* 22  
21 Cal. Code Regs. § 84001(g)(1). With exceptions not relevant here, a group home  
22 “may give the same consent for [a] child as a parent.” Cal. Health & Safety Code §  
23

24 <sup>5</sup> Staff make exceptions to the “list of prohibited actions.” MSJ at 18; *see City Ex. 16*  
25 *at 317* (children may return to rooms “with authorization” and may keep items in their  
26 rooms “at the discretion of the Program Director”); Avilez Dec. ¶¶ 3-5. Children may  
27 retain their property. Avilez Dec. ¶ 6; Settlement Ex. 1 ¶ A(12) (providing for “storage  
28 of personal belongings”) (SWK Ex. 1 at 27). Staff minimize room searches to  
preserve rapport with children. Avilez Dec. ¶ 7; 22 Cal. Code Regs. § 84072(c)(31)  
(no “unreasonable searches of personal belongings”). The restriction on interaction  
with strangers is designed to protect vulnerable children with histories of trafficking  
and post-traumatic stress disorder. Avilez Dec. ¶ 8.

1 1530.6. A group home employs “administrative, child care, social work and support  
2 staff,” not correctional officers. 22 Cal. Code Regs. § 84065(b). Staff are subject to a  
3 “Reasonable and Prudent Parent Standard,” which is “the standard characterized by  
4 careful and sensible parental decisions that maintain the child's health, safety, and best  
5 interest.” 22 Cal. Code Regs. § 84001(r)(1). Accordingly, Southwest Key is acting in  
6 the capacity of a parent and providing a dwelling to children in its care.

7 When the state is “assuming the parents’ role, the state also assumes the  
8 parents’ authority to limit the minor's freedom of action.” *In re Eric J.*, 25 Cal. 3d 522,  
9 530 (1979). A parent’s “duty of supervision and control” requires “a parent to have  
10 the ability to monitor their child’s activities whenever the parent deems it appropriate”  
11 and thus “demands that the parent have ‘joint access or control’ of a minor child’s  
12 bedroom.” *In re D.C.*, 188 Cal. App. 4th 978, 985 (2010); *see also, e.g., United States*  
13 *v. DiPrima*, 472 F.2d 550, 551 (1st Cir. 1973); *Vandenberg v. Superior Court*, 8 Cal.  
14 App. 3d 1048, 1055 (1970). Therefore, rules for behavior and access to rooms do not  
15 convert a group home into a “detention facility.”

16 It is immaterial that unaccompanied children do not choose their group homes.  
17 Children in general do not choose their homes. Unless emancipated, all children live  
18 where directed by a parent or “legal guardian.” MSJ at 6. In placing unaccompanied  
19 children in group homes, ORR acts “as guardian in loco parentis.” H.R. No. Rep. 109-  
20 143, at 127 (2005). As such, ORR resembles social service agencies and juvenile  
21 courts, which also place children in group or foster homes. *See City Ex. 18* (“ORR  
22 makes the initial placement of the minors while in other group homes it may be  
23 Probation, or Child Protective Services”); *Tamas v. Dep’t of Soc. & Health Servs.*,  
24 630 F.3d 833, 843 (9th Cir. 2010); *In re D.R.*, 185 Cal. App. 4th 852, 859 (2010); *In*  
25 *re Hadley B.*, 148 Cal. App. 4th 1041, 1048 (2007). A home remains a dwelling  
26 regardless of whether children live there at a parent’s direction or that of an agency  
27 acting *in loco parentis*. In *Hughes* itself, the group home cared for children “referred  
28 to the Home by courts or social agencies.” 396 F. Supp. at 547. Accordingly, the

1 proposed group home remains a dwelling, with children placed in the home “through a  
2 legal guardian.” MSJ at 6.

3 The City confuses “custody” of children with “detention.” MSJ at 13. Parents  
4 exercise “care, custody, and control of their children,” *Troxel v. Granville*, 530 U.S.  
5 57, 65 (2000), as do agencies acting *in loco parentis*, but that does not mean the  
6 children are in “detention.” Likewise, the availability of “habeas corpus” does not  
7 mean a child lives in “detention.” MSJ at 12. For habeas purposes, “custody” does not  
8 require “physical detention.” *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th  
9 Cir. 1995). A federal court may exercise habeas review of federal decisions to place  
10 immigrant children with “foster parents and adoption agencies.” *Nguyen Da Yen v.*  
11 *Kissinger*, 528 F.2d 1194, 1202-03 (9th Cir. 1975). Such children are not in  
12 “detention.” It is thus absurd to suggest that ORR “custody” of unaccompanied  
13 children *in loco parentis* means they live in “detention facilities.”<sup>6</sup>

14 The City’s misguided position to the contrary hinges on a decision limited to its  
15 radically different facts, which held that a jail is not a dwelling. *Garcia v. Condarco*,  
16 114 F. Supp. 2d 1158 (D.N.M. 2000) (followed in *Renda v. Iowa Civil Rights*  
17 *Comm’n*, 784 N.W.2d 8 (Iowa 2010)). The jail was “designed and intended to be a  
18 penal facility,” not a residence or group home. *Id.* at 1161. This case is not about a  
19 jail. Southwest Key provides care for children on a social work model, not punishment  
20 in a penal institution on a law enforcement model.<sup>7</sup> Indeed, *Garcia* itself recognized  
21 “a children’s home” is a dwelling. *Id.* at 1160 (citing *Hughes*, 396 F. Supp. at 549).  
22 The City’s own authority thus supports Southwest Key.

23  
24 <sup>6</sup> It distorts the record to claim Southwest Key represented or admitted that  
25 unaccompanied children are “federal detainees” or “detained.” MSJ at 11, 16. As it  
26 clearly told the City, the children are housed in “licensed childcare facilities,” not  
“detention centers.” 6/24/14 Hearing Tr. at 35:14-19 (SWK Ex. 5 at 180).

27 <sup>7</sup> The children are not confined for violating 8 U.S.C. § 1325, which was complete  
28 upon entry and does not continue. *United States v. Rincon-Jimenez*, 595 F.2d 1192,  
1194 (9th Cir. 1979). In any event, some unaccompanied children present themselves  
lawfully at a port of entry. Rios Dep. at 43:5-9 (SWK Ex. 4 at 128).

1 The City’s mistaken attempt to make “freedom of choice” a statutory element  
2 of “dwelling” in all cases conflicts with the clear text of the Fair Housing Act. MSJ at  
3 3-4. While freedom of choice is one value protected by the Act, nothing in the statute  
4 makes it necessary to the definition of “dwelling” in all cases. As noted, children do  
5 not choose their dwellings, yet they are protected by the Act, which covers the  
6 “residence” of “any person.” 42 U.S.C. §§ 3602(b), 3604(a). The City may “not resort  
7 to legislative history to cloud a statutory text that is clear.” *Ratzlaf v. United States*,  
8 510 U.S. 135, 147–48 (1994); *see also United States v. Gonzalez-Mendez*, 150 F.3d  
9 1058, 1061 (9th Cir. 1998) (“[W]e do not consider legislative history when a statute is  
10 clear on its face.”). Congress meant what it said, and the City may not insert language  
11 into the Act that Congress omitted.

12 In addition, the Court “cannot interpret federal statutes to negate their own  
13 stated purposes.” *New York State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–  
14 20 (1973). To adopt the City’s position would violate the Act’s purpose by licensing  
15 discrimination against unaccompanied children. Congress could not have intended that  
16 result, especially in light of the “intricate web of statutory provisions relating to  
17 UACs” that “reflects Congress’s unmistakable desire to protect that vulnerable  
18 group.” *D.B. v. Cardall*, 826 F.3d 721, 738 (4th Cir. 2016).

19 Indeed, the City’s position would license discrimination against all children  
20 living in group homes, and anyone required to live in a certain place. A person under  
21 conservatorship lives where directed by the conservator. Cal. Probate Code § 2352.  
22 Courts restrict the residence of persons on parole or other supervision. *See, e.g.*, 18  
23 U.S.C. § 3563(b)(13); 18 U.S.C. § 3583(d); *United States v. Serrapio*, 754 F.3d 1312,  
24 1318 (11th Cir. 2014); *In re Taylor*, 60 Cal. 4th 1019, 1037 (2015). Those persons  
25 may live in a “halfway house, restitution center, mental health facility,” or other  
26 “rehabilitation facilities.” *United States v. Voda*, 994 F.2d 149, 152 (5th Cir. 1993).  
27 Those residences are dwellings. *Pacific Shores*, 730 F.3d at 1157; *Schwarz v. City of*  
28 *Treasure Island*, 544 F.3d 1201, 1213-16 (11th Cir 2008); *Lakeside*, 455 F.3d at 159-

1 60; *Connecticut Hosp.*, 129 F. Supp. 2d at 131-35. To adopt the City’s faulty position  
 2 would improperly create “absurd results” by promoting discrimination against persons  
 3 living in dwellings under direction of a court or conservator. *Andreiu v. Ashcroft*, 253  
 4 F.3d 477, 482 (9th Cir. 2001).<sup>8</sup>

5  
 6 **3. A proper reading of federal requirements shows that the unaccompanied children cared for by Southwest Key do not live in “detention facilities.”**

7  
 8 The City wrenches the word “detention” out of statutory context. Congress did  
 9 not exempt all unaccompanied children from fair housing law by allowing a few of  
 10 them to be placed in “detention.” By distinguishing between “a detention facility or an  
 11 alternative to such a facility” and requiring placement in “the least restrictive setting,”  
 12 Congress mandated that most unaccompanied children shall not live in a “detention  
 13 facility.” 6 U.S.C. § 279(g)(1), 8 U.S.C. § 1232(c)(2)(A); *cf.* 6 U.S.C. § 279(b)(1)(J)  
 14 (distinguishing between “care and placement” and “detention”); 8 U.S.C. § 1232(b)(1)  
 15 (distinguishing between “care and custody” and “detention”); 42 U.S.C. § 672(c)  
 16 (distinguishing between “child-care institution” and “detention facilities”). The “use  
 17 of different words or terms within a statute demonstrates that Congress intended to  
 18 convey a different meaning for those words.” *S.E.C. v. McCarthy*, 322 F.3d 650, 656  
 19 (9th Cir. 2003).

20 Congress transferred care of unaccompanied children to ORR specifically “to  
 21 move towards a child welfare-based-model of care for children and away from the  
 22 adult detention model.” City Ex. 12 at 194. Congress thus narrowly restricted the  
 23 circumstances in which unaccompanied children may be confined in “detention” in a  
 24 “secure facility.” 8 U.S.C. § 1232(b)(1), (c)(2)(A). By contrast, Congress broadly  
 25 authorizes detention of adults facing immigration proceedings. 8 U.S.C. §

26 <sup>8</sup> In any event, by seeking refuge in the United States, unaccompanied children are  
 27 “willing participants” in the federal program that cares for them. MSJ at 8. They are  
 28 free to ask an immigration judge for “voluntary departure” to “return back to their  
 home country.” *Rodriguez* 30(b)(6) Dep. at 64:13-14, 268:19-20 (SWK Ex. 2 at 65,  
 82); *Rios* Dep. at 51:18-19 (SWK Ex. 4 at 133).

1 1225(b)(1)(B)(ii); 8 U.S.C. § 1225(b)(2)(A); 8 U.S.C. § 1226(a). These statutory  
2 differences reinforce the clear intent to protect unaccompanied children from living in  
3 a “detention facility” except in rare circumstances not present here.

4 The *Flores* settlement manifests similar intent. In setting “nationwide policy for  
5 the detention, release, and treatment of minors,” the settlement demonstrates that most  
6 unaccompanied children are not in “detention.” Settlement ¶ 9 (SWK Ex. 1 at 6). For  
7 most children, the settlement requires placement in a “licensed program” that  
8 “provide[s] residential, group, or foster care services” in settings such as “group  
9 homes.” *Id.* ¶¶ 6, 19 (SWK Ex. 1 at 4, 12). In contrast, the settlement narrowly  
10 restricts the circumstances under which a child may be sent to a “juvenile detention  
11 facility” or “INS detention facility,” neither of which Southwest Key operates. *Id.* ¶¶  
12 12A, 21 (SWK Ex. 1 at 8, 12-13). Therefore, unaccompanied children are typically  
13 housed in “a foster or group home” such as those run by Southwest Key, not in  
14 “detention facilities.” *Id.* Ex. 6 (SWK Ex. 1 at 45).

15 Under *Flores*, “a converted medium security prison” operated as a “detention  
16 facility” does not qualify as a “licensed program.” *Bunikyte, ex rel. Bunikiene v.*  
17 *Chertoff*, No. A-07-CA-164-SS, 2007 WL 1074070, at \*4, 9 (W.D. Tex. Apr. 9,  
18 2007). By contrast, a Southwest Key group home qualifies as a licensed program and  
19 therefore a dwelling under fair housing law. *Cf. D.B.*, 826 F.3d at 732 (distinguishing  
20 “licensed program” from “secure facility” allowed “only under specified limited  
21 circumstances”); *Walding v. United States*, 955 F. Supp. 2d 759, 764-65 (W.D. Tex.  
22 2013) (contrasting “detention facilities” with “shelter care facilities” and noting ORR  
23 must “locate appropriate shelter care facilities as an alternative to secure detention or  
24 risk violating the *Flores* settlement”).

#### 25 **4. A dwelling need not be sold or rented.**

26 It is immaterial that children “do not pay to reside” with Southwest Key. MSJ at  
27 6. The City may not “make unavailable or deny” a dwelling to “any person” for  
28 prohibited reasons. 42 U.S.C. § 3604(a). That language is “as broad as Congress could

1 have made it.” *Woods*, 884 F. Supp. at 1175. A dwelling need not be sold or rented to  
2 establish a violation of § 3604(a). The City’s position violates “the plain language of  
3 the FHA,” because § 3604(a) is not “limited to those who pay for their own housing,”  
4 but rather “extend[s] to all victims of the types of discrimination prohibited by the  
5 Act.” *Id.*; *cf. Bloch v. Frischholz*, 587 F.3d 771, 776 (7th Cir. 2009) (“[T]he  
6 ‘otherwise make unavailable or deny’ part” of § 3604(a) “is not tethered to the words  
7 ‘sale or rental.’”).

8 The City cannot rely on *Johnson v. Dixon*, 786 F. Supp. 1 (D.D.C. 1991), which  
9 concerned a different provision of the Act that covers only a “buyer or renter.” *Id.* at 4  
10 (quoting 42 U.S.C. § 3604(f)(1)). Nor can the City rely on *Intermountain Fair Hous.*  
11 *Council v. Boise Rescue Mission Ministries*, 717 F. Supp. 2d 1101 (D. Idaho 2010),  
12 *aff’d on other grounds*, 657 F.3d 988 (9th Cir. 2011). In that case, guests usually  
13 stayed 17 nights at most, were “not guaranteed the same bed,” could not “stay at the  
14 shelter during the day,” were “not allowed to personalize” their areas, and generally  
15 could not “receive phone calls, mail, or have visitors at the shelter.” *Id.* at 1111; *cf.*  
16 *Smith v. The Salvation Army*, No. CIV. 13-114-J, 2015 WL 5008261, at \*5-6 (W.D.  
17 Pa. Aug. 20, 2015) (shelter not dwelling where guests could stay only three nights,  
18 were not guaranteed same bed or room, and could not personalize rooms or have  
19 visitors). By contrast, children stay with Southwest Key up to 170 days, retain and  
20 personalize their rooms, stay at home during the day, and are entitled to receive phone  
21 calls, mail, and visitors. The proposed group home thus remains a dwelling regardless  
22 of payment.

### 23 **5. The alleged availability of other housing is irrelevant.**

24 It is irrelevant that there was allegedly “adequate capacity” to house  
25 unaccompanied children elsewhere. MSJ at 22. A dwelling may be either “occupied  
26 as, or designed or intended for occupancy as, a residence.” 42 U.S.C. § 3602(b). As a  
27 result, a dwelling need not “be in existence or occupied. A prospective dwelling is  
28 sufficient.” *Gilbert*, 813 F.2d at 1528; *see also Ave. 6E*, 818 F.3d at 509 (“[A] city

1 cannot defeat a showing of disparate impact on a minority group by simply stating  
2 that other similarly-priced and similarly-modelled housing is available in the general  
3 area.”). Therefore, it is sufficient that Southwest Key intended to house children in  
4 Escondido. In any event, the “relevant time period,” MSJ at 22, continues beyond  
5 2015, as Southwest Key seeks injunctive relief. The demand for housing  
6 unaccompanied children has continued to increase, and Southwest Key has continued  
7 to add new beds. Avilez Dep. at 243:2-21 (SWK Ex. 3 at 110); Rodriguez 30(b)(6)  
8 Dep. at 73:3-5 (SWK Ex. 2 at 66). Indeed, ORR recently issued a call for new  
9 housing. SWK Ex. 10 at 353-420. Southwest Key is thus entitled to judgment as a  
10 matter of law that the City made unavailable or denied a dwelling.

11 **B. Regardless of Immigration Status, Fair Housing Law Protects Any**  
12 **Person from Denial of Housing Based on Race or National Origin,**  
13 **Especially Unaccompanied Children.**

14 The City wrongly suggests fair housing law does not protect “undocumented  
15 immigrants.” MSJ at 20. The Fair Housing Act protects “any person” from unlawful  
16 denial of housing based on race or national origin. 42 U.S.C. § 3604(a). A law  
17 protecting “any person” protects everyone regardless of “status under the immigration  
18 laws.” *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Act “protects ‘any person,’  
19 regardless of his immigration status,” and it is no defense “to assert that those harmed  
20 by the [City’s] actions are undocumented residents.” *Cent. Alabama Fair Hous. Ctr. v.*  
21 *Magee*, 835 F. Supp. 2d 1165, 1196 (M.D. Ala. 2011), *vacated as moot*, No. 11–  
22 16114–CC, 2013 WL 2372302 (11th Cir. May 17, 2013) (quoting *Plyler*, 457 U.S. at  
23 210). *Magee* remains persuasive in construing the Act’s plain language. *Rosenbloom*  
24 *v. Pyott*, 765 F.3d 1137, 1154 n.14 (9th Cir. 2014).

25 The Department of Housing and Urban Development (“HUD”) confirmed that  
26 “[a] requirement involving citizenship or immigration status will violate the Act when  
27 ‘it has the purpose or [unjustified] effect of discriminating on the basis of national  
28 origin,’” and therefore race as well. *Office of General Counsel Guidance on Fair*  
*Housing Act Protections for Persons with Limited English Proficiency*, at 3 (Sept. 15,

1 2016) (“LEP Guidance”).<sup>9</sup> HUD’s guidance commands “considerable and substantial  
2 deference.” *Castellano v. Access Premier Realty, Inc.*, No. 1:15-CV-0407-MCE-KJS,  
3 2016 WL 1588430, at \*5 (E.D. Cal. Apr. 20, 2016); *see also Barrientos v. 1801-1825*  
4 *Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009).

5 The City thus cannot avoid a disparate impact claim as “unsound” by claiming  
6 it rejected “aliens not lawfully present.”<sup>10</sup> *Keller v. City of Fremont*, 719 F.3d 931,  
7 949 (8th Cir. 2013) (Loken, J.). Except for persons with certain drug convictions, 42  
8 U.S.C. § 3607(b)(4), the Fair Housing Act covers everyone regardless of previous  
9 conduct. *Cf. Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1292 (8th Cir. 1975)  
10 (blanket denial of “employment to any person convicted of a crime” violated Title  
11 VII). Congress meant what it said by “any person,” 42 U.S.C. § 3604(a), and the City  
12 may not rewrite the statute to its liking. The City does not dispute the facts present a  
13 jury question that any rejection of unaccompanied children based on immigration  
14 status was a “pretext to disguise what is in fact [race or] national-origin  
15 discrimination,” or had an unjustified “effect of discriminating on the basis of [race  
16 or] national origin.” *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973). The City is  
17 thus not entitled to summary judgment on disparate treatment or disparate impact.

18 Nor can it avoid a disparate impact claim on the ground that “the vast majority”  
19 of those impacted “are persons of Latino descent.” *Reyes v. Waples Mobile Home*  
20 *Park Ltd. P’ship*, No. 1:16-CV-563, 2016 WL 4582049, at \*4 (E.D. Va. Sept. 1,  
21 2016). That contention proves too much and conflicts with HUD’s guidance. For  
22 example, if a landlord prohibits tenants who speak Spanish, the vast majority of  
23 persons impacted would be Hispanic. It would be absurd to immunize that practice  
24 from disparate impact scrutiny, as HUD has concluded. *See* LEP Guidance at 1-9. A  
25

26 <sup>9</sup> <http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.

27 <sup>10</sup> The City relies on the comments of only one judge in *Keller*. *See* 719 F.3d at 953  
28 (Colloton, J., concurring in part and concurring in judgment); *Id.* at 953-60 (Bright, J.,  
dissenting).

1 practice may or may not be “necessary to achieve a valid interest,” *Inclusive*  
 2 *Communities Project*, 135 S. Ct. at 2523, but that goes to whether it is justified, not  
 3 whether it is subject to disparate impact review. Therefore, any “assertion that the  
 4 [City] was primarily discriminating against some other, non-protected group (in this  
 5 case non-citizens) does not undermine [the] showing of a prima-facie case of disparate  
 6 impact against Latinos.” *Magee*, 835 F. Supp. 2d at 1196. If “statistical data” shows a  
 7 residential land use decision has “a disparate impact on minorities,” which the City  
 8 does not dispute on this motion, “the city’s obligation is to establish a legitimate and  
 9 credible basis for its decision.” *Ave. 6E*, 818 F.3d at 513. The City does not dispute a  
 10 reasonable jury could find its unjustified actions caused a statistically significant  
 11 disparate impact based on race or national origin, and thus it is not entitled to  
 12 summary judgment.

13 In any event, this case does not concern all persons “not lawfully present.”  
 14 *Keller*, 719 F.3d at 949 (Loken, J.). Instead, it involves children protected by Congress  
 15 whose residence in the United States is authorized pending resolution of immigration  
 16 proceedings. 6 U.S.C. § 279(b)(1); 8 U.S.C. § 1232(a)(5)(D)(i), (c)(2)(A). The  
 17 congressional intent to protect those children precludes any attempt to exclude them  
 18 from fair housing law. *Keller* is also irrelevant because the plaintiffs in that case did  
 19 not “identify the ‘relevant population’ to be compared.” 719 F.3d at 948 (Loken, J.).  
 20 Southwest Key identified three comparison groups: the populations in the City as a  
 21 whole, in “congregate living quarters,” and in “juvenile group homes.” FAC ¶ 33. The  
 22 City does not dispute any of those comparisons in this motion, and its actions are  
 23 therefore subject to disparate impact review.

24 **C. Southwest Key May Pursue Equal Protection Claims For Itself and**  
 25 **the Children It Serves, Given Its Relationship With Children Who**  
 26 **Face Hindrance To Filing Suit.**

27 The City does not contest a reasonable jury could find it caused damages to  
 28 Southwest Key that a favorable judgment would redress, and thus Southwest Key has  
 Article III standing. FAC ¶¶ 124-25; *Nozzi v. Hous. Auth. of City of Los Angeles*, 806

1 F.3d 1178, 1190 (9th Cir. 2015); *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d  
2 1027, 1039 (11th Cir. 2008). Instead, the City claims Southwest Key may not assert  
3 “someone else’s” equal protection rights under § 1983. MSJ at 23. The City is  
4 mistaken for two reasons.

5 First, a reasonable jury could find that Southwest Key was a target of  
6 discrimination due to association with Hispanic children. Therefore, Southwest Key  
7 may litigate an equal protection claim in its own right. *RK Ventures, Inc. v. City of*  
8 *Seattle*, 307 F.3d 1045, 1055 (9th Cir. 2002). As its Vice President for Immigrant  
9 Children’s Services testified, “there was a racial component to how [city officials]  
10 were treating Southwest Key.” Rodriguez 30(b)(6) Dep. at 218:20-22 (SWK Ex. 2 at  
11 81). In answer to a question about “racial discrimination by the city against Southwest  
12 Key,” she discussed “inflammatory” comments and “people were yelling at me,  
13 telling me to go home, ‘take Southwest Key home and out of our community.’” *Id.* at  
14 280:5-10, 281:7-9 (SWK Ex. 2 at 84-85); *see also* Rodriguez Dep. at 423:19–424:1  
15 (“I was told I better go home or else ... They were threatening me directly.”) (SWK  
16 Ex. 8 at 347-48). As Southwest Key’s Regional Executive Director testified, the  
17 Planning Commission meeting included “some of the most hateful, sadistic comments  
18 that I’ve ever experienced in my life,” with “racist comments made towards us by the  
19 public” and people “bumping us, stepping on our feet, [and] spitting on us.” Avilez  
20 Dep. at 196:7-15 (SWK Ex. 3 at 107). There were similar comments at the City  
21 Council hearing. *Id.* at 209:13-16 (SWK Ex. 3 at 108). This bias, which the City either  
22 shared or knowingly bowed to, extended to Southwest Key itself, allowing it to make  
23 a claim under § 1983.<sup>11</sup>

24 Second, “[t]he rule against third-party representation is not absolute.” Martin A.  
25 Schwartz, 1 *Section 1983 Litigation: Claims and Defenses* (4th ed.) § 2.02[D].  
26

27 <sup>11</sup> If necessary, the complaint can be amended to conform to this evidence, which the  
28 City elicited in discovery and from which it suffers no prejudice. *Grisham v. Philip*  
*Morris, Inc.*, 670 F. Supp. 2d 1014, 1022-23 (C.D. Cal. 2009).

1 Southwest Key may assert the equal protection rights of unaccompanied children  
2 because it has Article III standing and a “close relationship” with children who face  
3 “hindrance” to suit. *Mills v. United States*, 742 F.3d 400, 406-07 (9th Cir. 2014)  
4 (“[p]rudential” rule of “third party standing” not compelled by Constitution).

5 As the operator of group homes for unaccompanied children, Southwest Key  
6 has a sufficient relationship with the children to assert their rights. *Smith v. Org. of*  
7 *Foster Families For Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) (foster parents  
8 could “raise the rights” of foster children); *Young*, 529 F.3d at 1041 (landlord could  
9 challenge discrimination against Hispanic tenants); *Aid for Women v. Foulston*, 441  
10 F.3d 1101, 1113 (10th Cir. 2006) (physicians could “provide proper representation”  
11 for rights of minor patients).

12 Unaccompanied children suffer at least “some hindrance” to suit. *Powers v.*  
13 *Ohio*, 499 U.S. 400, 411 (1991). They “need not face insurmountable hurdles” or  
14 “absolute impossibility of suit.” *Pennsylvania Psychiatric Soc. v. Green Spring Health*  
15 *Servs., Inc.*, 280 F.3d 278, 290 & n.14 (3d Cir. 2002). Any affected child would face  
16 “practical barriers” due to “the small financial stake” for that child and “the economic  
17 burdens of litigation.” *Powers*, 499 U.S. at 415. Children are “not legally sophisticated  
18 and are often unable even to maintain suits without a representative or guardian.” *Aid*  
19 *for Women*, 441 F.3d at 1114. By definition, unaccompanied children lack a parent or  
20 guardian in the United States. 6 U.S.C. § 279(g)(2). They would likely “face  
21 hostility.” *Young*, 529 F.3d at 1044. Southwest Key may therefore protect the rights of  
22 unaccompanied children.

23 In *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470 (9th Cir. 1998),  
24 the court summarily held that plaintiffs could not assert “the rights of the mentally ill,”  
25 but it did not discuss the settled law that a party may litigate its own claim due to  
26 association with protected persons or assert the rights of those persons given sufficient  
27 relationship and hindrance. *Id.* at 479. *San Pedro* is not binding because it did not  
28 address the questions at issue here. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S.

1 157, 170 (2004); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir.  
2 2007); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1203 (9th Cir. 2006).

3 The City's other cases do not apply here. *Kowalski v. Tesmer*, 543 U.S. 125,  
4 127, 133 (2004) (attorneys could not assert rights of defendants in "ongoing state  
5 criminal proceedings" who had "ample avenues to raise their constitutional challenge  
6 in those proceedings"); *Fleck & Associates, Inc. v. Phoenix*, 471 F.3d 1100, 1105 &  
7 n.3 (9th Cir. 2006) (plaintiff did not allege "cognizable personal injury," close  
8 relationship, or hindrance); *Zivojinovich v. Ritz Carlton Hotel Co., LLC*, 445 F. Supp.  
9 2d 1337, 1343 (M.D. Fla. 2006) (management companies lacked "constitutional  
10 standing" and did not allege "close relationship" or "hindrance").

11 **D. The Court Retains Inherent Power to Grant Injunctive Relief for**  
12 **Supremacy Clause Violations Arising from the Pretextual Use of**  
13 **Local Powers to Invade and Obstruct Federal Policy.**

14 This Court retains inherent power to grant injunctive relief against Supremacy  
15 Clause violations, which Congress has not foreclosed here. *Armstrong v. Exceptional*  
16 *Child Ctr., Inc.*, 135 S. Ct. 1378, 1383-84 (2015); *Tohono O'odham Nation v. Ducey*,  
17 130 F. Supp. 3d 1301, 1316 (D. Ariz. 2015). The City does not dispute there is a jury  
18 question that it "discriminat[ed] against a federal contractor" or rejected  
19 unaccompanied children because of "hostility to federal law, policy, or practice." FAC  
20 ¶ 142-43. If so motivated, the City violated the Supremacy Clause.

21 First, the City "singled out contractors who work for the United States for  
22 discriminatory treatment." *Washington v. United States*, 460 U.S. 536, 546 (1983).  
23 Second, the City invaded the field of immigration, where "Congress left no room" for  
24 local regulation and the federal interest is dominant. *Arizona v. United States*, 132 S.  
25 Ct. 2492, 2501 (2012); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1026  
26 (9th Cir. 2013); *Lozano v. City of Hazleton*, 724 F.3d 297, 316 (3d Cir. 2013); *United*  
27 *States v. South Carolina*, 720 F.3d 518, 529-31 (4th Cir. 2013). Third, the City  
28 obstructed "the accomplishment and execution of the full purposes and objectives of  
Congress," *Valle del Sol*, 732 F.3d at 1023, which directed ORR to house

1 unaccompanied children in local communities, and thus interfered with the balance  
 2 struck by Congress on immigration. *Arizona*, 132 S. Ct. at 2505; *Valle del Sol*, 732  
 3 F.3d at 1027. A city “may not unilaterally prohibit those lacking lawful status from  
 4 living within its boundaries, without regard for the Executive Branch’s enforcement  
 5 and policy priorities.” *Lozano*, 724 F.3d at 318.

6 Nor may a city “achieve its own immigration policy,” *Arizona*, 132 S. Ct. at  
 7 2506, through pretextual use of its power to “control land use.” MSJ at 24. The City  
 8 may not avoid preemption with “illusory or pretextual” grounds. *California Tow*  
 9 *Truck Ass’n v. City & County of San Francisco*, 693 F.3d 847, 860 (9th Cir. 2012). A  
 10 city violates the Supremacy Clause by misusing local powers with intent “to limit or  
 11 terminate” activity authorized by federal law to which the city is “diametrically  
 12 opposed.” *City of Charleston v. A Fisherman’s Best, Inc.*, 310 F.3d 155, 174 (4th Cir.  
 13 2002). The City does not dispute a reasonable jury could find it “improperly intended  
 14 the resolution” rejecting Southwest Key “to be an obstacle” to the “national program”  
 15 for housing unaccompanied children. *Id.* at 175; *cf. United States v. Onslow County*  
 16 *Bd. of Educ.*, 728 F.2d 628, 642 (4th Cir. 1984) (school board violated Supremacy  
 17 Clause due to “discriminatory *animus* directed at the United States and its  
 18 employees”). It is thus not entitled to summary judgment.

## 19 **V. CONCLUSION**

20 For the foregoing reasons, the City’s motion for summary judgment should be  
 21 denied, and the Court should grant summary judgment to Southwest Key that the City  
 22 made unavailable or denied a dwelling covered by fair housing law.

23 Dated: October 3, 2016

ACLU FOUNDATION OF SAN DIEGO  
& IMPERIAL COUNTIES

24  
 25 s/ David Loy  
 David Loy (229235)