IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *Plaintiff*, v. SAFEHOUSE, a Pennsylvania nonprofit corporation; JOSE BENITEZ, as President and Treasurer of Safehouse, *Defendants*.	:	Civil Action No. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and U.S. DEPARTMENT OF JUSTICE; WILLIAM P. BARR, in his official capacity as Attorney General of the United States; and WILLIAM M. McSWAIN, in his official capacity as U.S. Attorney for the Eastern District of Pennsylvania, *Third-Party Defendants*.	:	

REPLY IN SUPPORT OF THE UNITED STATES' EMERGENCY MOTION FOR STAY PENDING APPEAL OR FOR AN ADMINISTRATIVE STAY

Safehouse's response to the United States' emergency motion for a stay pending appeal asks this Court to make unsupported factual findings, falsely equate supervised drug consumption with drug and alcohol relapse and recovery services, and accept a fiction in which Safehouse's operations would not include the ongoing illegal use of heroin, fentanyl, and other controlled substances. The United States' motion asks only that this Court stay the *effect* of its final order pending the appeal of this case before the legal issues in this case are conclusively resolved. The United States has met its burden to show that a stay is warranted.

As this Court recognized in resolving the parties' dispositive motions, it ruled on "a difficult and complex matter of first impression" in this case. ECF No. 141 at 4. Moreover, the Court's ruling will have an immediate effect on the Philadelphia community and, while not binding on courts in other districts, may have significant and long-ranging effects on the state of addiction treatment and illegal opioid use in this country. This is an issue of national interest. Given this complex, impactful issue of first impression, and the Court's departure from the rulings of five circuit court decisions, the United States has shown that it has a substantial case

on the merits and a "reasonable chance, or probability, of winning" on appeal.[1] *Revel AC, Inc. v. IDEA Boardwalk LLC*, 802 F.3d 558, 565 (3d Cir. 2015).

Staying the *effect* of the Court's order and judgment would have the practical effect of maintaining the parties' positions. That is because, over the last 19 months, Safehouse has not opened a consumption room or offered its supervised drug consumption services. This Court should reject Safehouse's attempt to reframe the status quo in this case because *Safehouse itself* asserted that it would not seek to open a consumption room in Philadelphia until the Court entered a declaratory judgment in its favor. *See* ECF No. 137 at 8; Ex. A, ECF No. 137-1 at ¶ 24. Such a ruling would not, as Safehouse suggests, operate as an injunction in the government's favor. A stay "operates upon the judicial proceeding itself" by "halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). While this may have "some functional overlap with an injunction," in that "[b]oth can have the practical effect of preventing some action before the legality of that action has been conclusively determined," a stay "*temporarily suspend[s] the*

[1] Safehouse confuses the standard for showing a likelihood of success on the merits. It contends the government must show a "probability" of success on the merits, and cites *Revel AC*, the same case cited by the Government. *Revel AC* directs that, to show a "substantial case on the merits" a movant must show a "reasonable chance, or probability, of winning" on appeal. *See Revel AC*, 802 F.3d at 568 (quoting *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). But the Third Circuit further clarified that, "while it is not enough that the chance of success on the merits be better than negligible, the likelihood of winning on appeal *need not be more likely than not*." 802 F.3d at 569 (internal quotation marks and citations omitted and emphasis added). The government has met this burden.

Moreover, *Revel AC* also directed courts to take a sliding-scale approach, in which the probability of success that must be demonstrated is inversely proportional to the balance of harms (and vice versa). 802 F.2d at 570. Because the United States has shown irreparable harm by demonstrating that, if this Court's order is incorrect, Safehouse will violate a statute mandating injunctive relief, the government's burden to show its likelihood of success lessens and it must show "serious questions going to the merits," *id.*, which the government has done. *See* Mot. for Stay at 19-20.

source of authority to act—the order or judgment in question—not by directing an actor's conduct." *Id.* (emphasis added). This is what the government seeks here: a suspension of the judicial alteration of the status quo.[2] *See id.* This Court can appropriately award this relief and stay the effect of its order.

The United States has established irreparable harm. Safehouse incorrectly contends that the government must produce evidence that it will suffer irreparable harm absent entry of a stay pending appeal.[3] But where, as here, a governing statute mandates injunctive relief, irreparable harm is presumed. *See Instant Air Freight Co. v. C.F. Air Freight, Inc*., 882 F.2d 797, 803 (3d Cir. 1989); *see also Gov't of V.I. v. V.I. Paving, Inc*., 714 F.2d 283, 286 (3d Cir. 1983). *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (When a statute "in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," a court does not weigh the typical equitable considerations).

This Court must defer to Congress's finding that a violation of § 856(a) would result in irreparable harm. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497-98

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[2] Safehouse suggests this Court should give no weight to preservation of the status quo. But, it is well-understood that "[t]he 'preservation of the status quo' represents the goal of preliminary injunctive relief in any litigation" and, likewise, the goal of a stay pending appeal. *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 813 (3d Cir. 1989) (discussing the propriety of a preliminary injunction pending the outcome of arbitration). While preserving the status quo is not a standalone factor in determining whether an injunction (or a stay) should issue, it is shorthand for the need to protect the integrity of the *process* of resolving a legal issue. *Id.*

[3] The United States rejects Safehouse's narrative that it has "strenuously resisted" development of a factual record in this case. *See* ECF No. 149 at 16, n. 9. Rather, the United States has argued that, regardless of any policy arguments that Safehouse may claim support its planned consumption rooms, its conduct is illegal as a matter of law. This *legal* position regarding application of the CSA does not prevent the government from raising, in support of its motion for a stay, the irreparable harm caused by Safehouse's violation of a statute or the multiple injuries that Safehouse's conduct will inflict upon the City of Philadelphia, any neighborhood in which Safehouse may locate, and on and the residents, property owners, businesspeople, and children within those neighborhoods.

(2001); *SEC v. Gentile*, 939 F.3d 549, 556 (3d Cir. 2019) (where acts of Congress explicitly provide for injunctions, "courts must account for the policy judgments exemplified by those statutes when exercising their equitable discretion"). Section 856(f) provides that "[a]ny person who violates subsection (a) *shall* be subject to declaratory and injunctive remedies as set forth in [21 U.S.C. § 843(f)]." (emphasis added). Thus, should this Court's interpretation of § 856(a)(2) be overruled, this Court can presume that a violation of § 856(a)(2) constitutes irreparable harm. *See Gentile*, 939 F.3d at 557-58. *Compare TVA v. Hill*, 437 U.S. 153, 180 (1978) (traditional equitable discretion foreclosed by "shall" language in statute) *with eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006) (courts weigh traditional equitable factors where statute provides that a court "may" grant injunctive relief). *Cf. Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 140 (3d Cir. 1997) (plain language of statute, including "shall" directive, limits court's considerations). Safehouse ignores the Congressional determination, formalized in statute, that a violation of § 856(a)(2) *will* constitute irreparable harm to the public.

Safehouse also asks this Court to ignore "the underlying substantive policy" in the Controlled Substances Act ("CSA"), which this Court must consider in determining whether a stay is appropriate. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 (1987); *see also Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 337 (D.C. Cir. 1987) (consideration of irreparable harm "is of course defined in terms of the evil that the particular statute was designed to prevent"). The underlying substantive policy of the CSA supports issuance of a stay. In enacting the CSA, Congress declared that "[t]he illegal . . . possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C.S. § 801. Safehouse suggests this Court should ignore this clear

statement of purpose and disregard the concentrated illegal possession and improper use of controlled substances that will occur within Safehouse's walls.

Safehouse does not dispute that its users will illegally possess and use dangerous drugs in its facility. Safehouse's consumption rooms will involve the open and ongoing use of illegal heroin and fentanyl. But Congress has clearly spoken about the illegality of this conduct and the harm it inflicts on the public. A district court cannot "override Congress' policy choice, articulated in a statute as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." *Id.* (citing *Hill*, 437 U.S. 153, 194). Thus the government need not put on evidence about the harm to the public from illegal drug use: Congress has already determined that this harm exists. The deference this Court must give to Congress's statutory determination is especially important where, as here, Safehouse only seeks to protect the interests of its founders and its potential users, without considering the interests of the public at large, including Philadelphians' interests in being free from crime and disorder in the locations around their schools and homes.[4]

Furthermore, this Court can consider the harm that supervised injection sites have wrought in other cities. The Court can take judicial notice of evidence in the public record,

[4] Safehouse derisively suggests that the United States should not be concerned about the detrimental impacts that Safehouse's facility will inflict on the community, suggesting that this is a "local" issue about which the federal government has no concern. ECF No. 149 at 19. But the citizens of this city rely on the federal government, the Department of Justice, and their local United States Attorney's Office to enforce federal law and thereby effectuate the will of their elected Senate and Congressional representatives. Here, the Department of Justice is vindicating Philadelphians' interest in remaining free from concentrated illegal drug use, consistent with Congress's determination that such conduct is illegal. 21 U.S.C. § 856(a)(2).

including news media stories, reports of governmental entities, and academic studies showing that consumption rooms bring crime and disorder where they are opened.

In recent weeks, health officials in Alberta released a report about the impacts that Calgary consumption rooms have had on the neighborhoods in which they are located.[5] The report uncovered increased needle debris, increased reports of crime, and "open defecation and urination in public spaces" within the immediate vicinity of consumption rooms.[6] *Id.* at p.iii, 12, 25-27, 38. The increased crime includes drug traffickers who "appear to be openly conducting their business unabated near the [sites] due to a burgeoning client base" and theft, prostitution, and breaking and entering by drug users. *Id.* at 35. The report found that consumption rooms "exacerbate existing social problems and encourage a higher concentration of drug users and trafficking within those areas." *See id.* In short, this report validates and reinforces the very

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[5] *See* Alberta Health, Government of Alberta, Supervised Consumption Services Review Committee "*Impact: A socio-economic review of supervised consumption sites in Alberta*" (March 2020) available at: https://open.alberta.ca/dataset/dfd35cf7-9955-4d6b-a9c6-60d353ea87c3/resource/11815009-5243-4fe4-8884-11ffa1123631/download/health-socio-economic-review-supervised-consumption-sites.pdf.

[6] Pursuant to Federal Rule of Evidence 201(b), a court may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Courts may take judicial notice of matters of public record, including published reports of administrative bodies. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993); *cf. Benak v. All. Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006) (notice reflects what is in the public realm at the time). Here, it is appropriate for this Court to consider the report of the government of Alberta. *See United States ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 140 (E.D. Pa. 2012) (courts may take judicial notice of government documents published on websites or otherwise). This report also rebuts Safehouse's contention that the government relies on "only speculation that Safehouse will subject the citizens of this City to the risk of 'increased drug use and drug dealing'" or that "the data" shows the opposite. *See* ECF No. 149. The government's assertions are based on the judgment of law enforcement officers and the experiences of other cities.

harms raised by the United States and *amici* neighborhood associations, which Safehouse asks this Court to ignore.[7]

In arguing that its interests support denying a stay and maintenance of the status quo, Safehouse asserts that it will serve the public by offering a public health intervention. For this reason, Safehouse apparently contends that this Court should override Congressional judgment that illegal drug use is harmful to the public. This approach is wrong for several reasons.

First, Safehouse misses the mark in discussing cases where alcohol and addiction treatment centers were permitted to open, upon finding that withholding treatment would irreparably harm those suffering from alcoholism or addiction. ECF No. 149 at 22. The government does not seek to prevent Safehouse from providing treatment, including medically assisted addiction treatment, therapy, or the myriad other social services Safehouse contends it aspires to provide. The government's stay motion is directed only at the disputed conduct in this case—supervising the consumption of illegal drugs.

Second, Safehouse makes the same public interest argument that the Supreme Court rejected in *Oakland Cannabis Buyers Coop.* 532 U.S. at 495. There, the Ninth Circuit reversed a district court injunction prohibiting a community collective from distributing marijuana to its patients, directing the district court to weigh the public interest, including the harm in depriving patients of marijuana. The Supreme Court reversed, holding that the "Court of Appeals erred

[7] The report also reinforces the government's contention that Safehouse is getting out ahead of the authorities in this area by seeking to open without regulation or practices established by the United States' public health experts. The report reflected concern that Alberta's consumption rooms were operating "with limited oversight" and suggested the creation of a regulatory body that could create "standard operating procedures and regulations addressing conduct, treatment standards, patient identifiers, medical records and outcomes to ensure quality control and accountability" for the sites. *Id.* at 37. Of additional concern, the report noted that, though no overdoses were reported within Calgary's consumption facilities, there was an alarming *increase* of overdose deaths in the area surrounding the facilities. *See id.* at 34.

concerning the factors that the district courts may consider" in exercising equitable discretion. 532 U.S. at 495 (applying another section of the CSA, 21 U.S.C. § 882(a)). The Court ruled that a district court exercising equitable discretion under the CSA *should not* consider "any and all factors that might relate to the public interest or the convenience of the parties, *including the medical needs of the Cooperative's patients.*" *Id.* at 408 (emphasis added). The Court admonished that a district court sitting in equity cannot overrule Congress' policy choice that certain behavior should be prohibited.

While the *Cannabis Buyers* case is distinct in that Safehouse professes no intention to itself distribute or handle illegal drugs, the public interest argument it is making—that its participants must be permitted to use these drugs within Safehouse's facility—is a clear override of Congressional legislation outlawing heroin and illegal fentanyl use. This reflects the fundamental tension in this case: even if this Court is correct and Safehouse's activity does not violate the CSA, its operations will invite many others to do so, which Congress has prohibited.

The Religious Freedom Restoration Act (RFRA) also does not provide a basis to deny a stay in this case. RFRA prevents the federal government from "substantially burden[ing] a person's exercise of religion" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(a), (b). Here, the government is not asking for an injunction against Safehouse and is not threatening prosecution against Safehouse pending appeal. Suspending *the effect of this Court's order*—effectively, in this case, the Court's stamp of approval for Safehouse's conduct—is not the

equivalent of federal government action that could be deemed to burden Safehouse, under any understanding of RFRA.[8]

Last, Safehouse will not be substantially harmed by a stay of this Court's order, which would merely preserve the status quo until appellate review is complete. As Safehouse references in its brief, it faces additional obstacles to opening, beyond this Court's entry of a stay. This includes vocal opposition by community groups, the cancelation of its lease in South Philadelphia, and a pending Philadelphia City Council bill that would amend the city's health code to classify supervised injection sites as "nuisance health establishments" and prevent a supervised injection site from opening without providing six-months advance notice and obtaining approval from the surrounding community. Thus, this Court's imposition of a stay will not substantially harm Safehouse. Nevertheless, even though City Council or the Pennsylvania legislature may act to hamper Safehouse's opening, the government maintains that a stay is appropriate in this case to ensure that the status quo remains in place while both parties await a conclusive determination on appeal about the legality of Safehouse's activity.

The government and the public have an interest in maintaining the status quo while the Third Circuit considers whether Safehouse's radical, unproven, and unprecedented facility is illegal. Because the government has strong arguments and a substantial case on the merits, the United States respectfully requests this Court stay the effect of its judgment pending appeal and preserve that status quo.

In the alternative, should the Court deny the government's motion for a stay, the United States moves this Court to impose a temporary stay while the United States moves for a stay in

[8] The United States maintains its arguments that, in any event, RFRA is not applicable to Safehouse or its proposed conduct in this case as a matter of law, as set forth in the government's motion for judgment on the pleadings. *See* ECF No. 47.

the Third Circuit, up to and including the date that the Third Circuit rules on the government's stay motion.

Dated: March 27, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a true and correct copy of the foregoing Reply in Support of the United States' Emergency Motion for Stay Pending Appeal or for an Administrative Stay, which was filed electronically and is available for viewing and download from the court's CM/ECF system, to be served upon all counsel of record.

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Dated: March 27, 2020