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*.	:	

ORDER

AND NOW, this ___ day of _____, 2020, upon consideration of the United States' Motion for Stay Pending Appeal, it is hereby ORDERED that the motion is GRANTED IN PART. The effect of the Court's Order, dated February 25, 2020 (ECF No. 142) is hereby STAYED pending full briefing on the Government's motion, subject to further order of this Court.

BY THE COURT:

_____
GERALD A. McHUGH
United States District Judge

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
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ORDER

AND NOW, this ___ day of _____, 2020, upon consideration of the United States' Motion for Stay Pending Appeal, and any response thereto, it is hereby ORDERED that the motion is GRANTED. The effect of the Court's Order, dated February 25, 2020 (ECF No. 142) is hereby STAYED until this Court or the U.S. Court of Appeals for the Third Circuit enters an order lifting the stay or until any appeal in this case is finally resolved.

BY THE COURT:

_____
GERALD A. McHUGH
United States District Judge

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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
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[ALTERNATIVE] **ORDER**

AND NOW, this ___ day of _____, 2020, upon consideration of the United States' Motion for Stay Pending Appeal, and any response thereto, it is hereby ORDERED that the motion is GRANTED IN PART. The effect of the Court's February 25, 2020 Order (ECF No. 142) is hereby STAYED pending a decision by the United States Court of Appeals for the Third Circuit on the Government's application to that Court for a stay pending appeal.

BY THE COURT:

_____
GERALD A. McHUGH
United States District Judge

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*.	:	

UNITED STATES' EMERGENCY MOTION FOR STAY PENDING APPEAL OR FOR AN ADMINISTRATIVE STAY

Plaintiff and Counterclaim Defendant the United States of America moves this Court pursuant to Federal Rule of Civil Procedure 62, and consistent with Federal Rule of Appellate

Procedure 8(a)(1), to enter a stay of this Court's Order, issued on February 25, 2020, as ECF No. 142 pending the resolution of the government's appeal. The government also requests this Court immediately grant an administrative stay of that order while the parties submit expedited briefing on the United States' motion. In the alternative, the government requests this Court enter an administrative stay of the February 25 Order until the Third Circuit considers and rules upon the government's application for a stay pending appeal.

On February 25, 2020, this Court ruled, as a matter of first impression, that Defendant Safehouse's operation of a "Consumption Room," in which participants will be invited to inject illegal drugs under supervision of Safehouse volunteers and staff, does not violate § 856 of the Controlled Substances Act. (*See* ECF No. 142 at ¶ 4.) Section 856(a)(2) makes it a crime to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance." Safehouse has represented that "upon entry of a declaratory judgment in its favor," it plans to open at least one consumption room in Philadelphia as soon as possible. (See ECF No. 137 at 8.)[1]

Yesterday, on February 26, 2020, the United States filed a notice of appeal of the Court's decision. The government respectfully requests that this Court issue a stay of its February 25 Order until any appellate proceedings are completed. In the alternative, should the Court deny the government's motion for a stay pending appeal, the United States moves this Court to impose a temporary administrative stay while the United States moves for a stay pending appeal in the

[1] And, in a press conference yesterday, Safehouse announced that it will open next week at a South Philadelphia location near Broad and Passyunk. Anna Orso, *et al*, "*South Philadelphia Greets News of First Supervised Injection Site with Outrage, but Also Hope*," Philadelphia Inquirer, https://www.inquirer.com/health/opioid-addiction/supervised-injection-site-philadelphia-safehouse-community-reaction-opioids-20200226.html

Third Circuit, up to and including the date the Third Circuit rules on the government's stay motion. The government conferred with counsel for Safehouse regarding this motion, and counsel advised that Safehouse will evaluate the government's request for a stay upon the filing of this motion.

In support of this motion, the United States relies upon its attached memorandum of law, which shows that the government has met the requirements for imposing a stay pending appeal. The United States has a substantial case on the merits regarding the application of § 856(a)(2) to Safehouse's conduct because this is a novel issue of first impression with nationwide impact and because the government's suggested interpretation of § 856(a)(2) is consistent with the holding of five federal circuit courts.

The balance of harms and the public interest likewise favor a stay. By forbidding the use of heroin under all circumstances and the use of fentanyl without a valid prescription, Congress has already declared that the public interest is served when use of these drugs is prohibited. But this Court has interpreted the Controlled Substances Act to not prohibit the first supervised injection site in the United States, thereby authorizing a place where these illegal drugs will be consumed. A consumption room also radically alters the approach to opioid addiction treatment in the Commonwealth of Pennsylvania, without first providing an opportunity for the U.S. Secretary of Health and Human Services, the U.S. Surgeon General, the Pennsylvania General Assembly, the Pennsylvania Board of Medicine, or the Philadelphia City Council to provide input or suggest safeguards or regulations for such unprecedented activity.

Safehouse has publicly announced its intention to open next week at a site in South Philadelphia that it had not previously disclosed, affording the neighborhood community no opportunity to provide input regarding the selection of that site or other issues related to

Safehouse's contemplated operations. The citizens of Philadelphia risk imminent harm through allowing this experimental and unproven activity to begin within their neighborhoods. Safehouse will not be harmed by maintaining the status quo during the limited period of an appeal; it first announced its formation more than 18 months ago, and a stay pending appeal would merely extend this period for a modest amount of time. Indeed, its interests are likely best served if it does not commence an activity that the Third Circuit may ultimately determine is illegal.

Accordingly, this Court should enter a stay pending appeal to maintain the status quo until appellate proceedings regarding the legality of Safehouse's planned activity are completed. Alternatively, the Court should grant a temporary administrative stay while the Third Circuit considers the United States' motion for a stay pending appeal.

Dated: February 27, 2020

Respectfully submitted,

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

I. BACKGROUND

Defendant Safehouse is a nonprofit organization that plans to open the first "safe injection site" in the United States in the City of Philadelphia where, among other things, intravenous drug users will be permitted to use illegal controlled substances (primarily, heroin and fentanyl) in "Consumption Rooms" under medical supervision. (*See* Parties' Stipulation of Facts, ECF No. 139-1 at ¶¶ 1-3.) Congress placed heroin in Schedule I of the Controlled Substances Act, *see* 21 U.S.C. § 812(c), the most restrictive category, because it found that heroin has a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision," *id.* § 812(b)(1). Congress placed fentanyl in Schedule II, which denotes "a high potential for abuse," "a currently accepted medical use in treatment . . . or . . . with severe restrictions," and a risk that abuse "may lead to severe psychological or physical dependence." *Id.* § 812(b)(2). Except under narrow circumstances that do not apply here, it is a federal crime to knowingly or intentionally possess a Schedule I or II substances such as heroin or fentanyl. It is undisputed that people will use fentanyl without medical authorization at Safehouse. (*See* ECF No. 137-2 ¶ 2.) Additionally, the Controlled Substances Act makes it unlawful to

> manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(a)(2).

Safehouse asserts that, "[i]f the Court were to enter a declaratory judgment in its favor, [it] plans to open at least one facility in Philadelphia as soon as possible." (*See* Parties'

Stipulation of Facts, ECF No. 137-1 at ¶ 24; *see also* Ex. 137 at 5.) At a press conference on February 26, 2020, Safehouse announced its intent to open a facility next week at a location in South Philadelphia that it had not previously disclosed. *See, e.g.*, Katherine Scott, "*We Were Ambushed. Residents Outraged at Plans for Safe Injection Site in South Philadelphia*," 6ABC Action News (Feb. 26, 2020).[2]

II. PROCEDURAL HISTORY

The United States filed this civil action seeking a declaration that Safehouse's Consumption Rooms would violate § 856(a)(2) and would therefore be illegal under federal law. (*See* Compl. ECF No. 1 (Feb 5, 2019).) Safehouse answered and filed counterclaims, seeking a declaration that its activity would not violate § 856(a)(2). (*See* Ans., ECF No. 3.) On June 11, 2019, the United States filed a Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c), contending that even if all allegations made by Safehouse in its Answer and Counterclaims to the government's Amended Complaint were true, Safehouse's operation of a Consumption Room would still plainly violate federal law, and therefore this Court should enter judgment in the United States' favor on the pleadings. (*See* Mot. for J. on the Pleadings, ECF No. 47.) On August 19, 2019, this Court held an evidentiary hearing on the government's Motion for Judgment on the Pleadings, at which defendant Safehouse presented the testimony of three witnesses. The Court ultimately decided to disregard the evidence introduced at this hearing for purposes of ruling on the government's Rule 12(c) motion. (*See* Mem., ECF No. 133 at 4, n. 4.)

On October 2, 2019, this Court denied the government's motion for judgment on the pleadings, and held that Safehouse's operation of a Consumption Room would not violate § 856(a)(2) because "Safehouse does not plan to operate [consumption rooms] 'for the purpose

[2] Available at https://6abc.com/we-were-ambushed-residents-outraged-at-plans-for-safe-injection-site/5968400/

of' unlawful drug use within the meaning of the statute." (*See* Mem. Op., ECF No. 133 at 6.) In January of 2020, the parties cross-moved for entry of a final judgment. Safehouse moved for a declaratory judgment, (ECF No. 137), and the United States moved for summary judgment, seeking the entry of a declaratory judgment, (ECF No. 139).

On February 25, 2020, the Court issued a memorandum opinion ruling on the parties' cross-motions and entering judgment in favor of Safehouse and Benitez and against the United States, holding that "the establishment and operation of [Safehouse's] overdose prevention services model, including supervised consumption in accordance with the parties' stipulated facts (ECF 137, Ex. A), does not violate 21 U.S.C. § 856(a)." (ECF No. 142.) The Court did not address whether it would stay its judgment pending an appeal in this case.

III. STANDARD OF REVIEW

"It has always been held that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Nken v. Holder*, 556 U.S. 418, 421 (2009) (citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942) (internal alterations omitted)). "A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken*, 556 U.S. at 421.

Federal Rule of Civil Procedure 62 allows a district court to stay equitable relief pending appeal. Fed. R. Civ. P. 62 (c) and (d). While those provisions do not specifically address a declaratory judgment, both Rule 62 and a district court's "inherent authority" under the All Writs Act, 28 U.S.C. § 1651, empower it to maintain the status quo by staying a declaratory judgment pending appeal. "A declaratory judgment that merely adjudicates rights . . . falls within the Court's discretionary power to stay pending appeal." *Robertshaw v. Pudles*, 2014 U.S. Dist.

LEXIS 66779, at *5 (E.D. Pa. May 15, 2014) (O'Neill, J.) (citation omitted)). *Cf. United States v. Denver & Rio Grande W. R.R. Co.*, 223 F.2d 126, 127 (10th Cir. 1955) ("Apart from the Federal Rules of Civil Procedure, federal courts are empowered to temporarily stay the execution of their judgments whenever it is necessary to accomplish the ends of justice."); *Reefco Servs., Inc. v. Gov't of the V.I.*, 2018 U.S. Dist. LEXIS 199507, at *10 (D.V.I. Nov. 26, 2018) (ruling that the court has the discretionary authority to stay a declaratory judgment, though declining to do so).

Here, Safehouse said that "*upon entry of a declaratory judgment in its favor*," it plans to open at least one consumption room in Philadelphia as soon as possible. (*See* ECF No. 137 at 8 (emphasis added).) Accordingly, the United States requests this Court enter an order staying the effects of its declaratory judgment ruling under its inherent authority to do so. This will have the effect of maintaining the status quo pending resolution of the government's appeal.

In determining whether to grant a stay pending appeal, courts consider whether: (1) the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) the applicant will be irreparably injured absent a stay; (3) the stay would substantially injure other parties with an interest in the litigation; and (4) a stay is in the public interest. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991); *Revel AC, Inc. v. IDEA Boardwalk LLC*, 802 F.3d 558, 565 (3d Cir. 2015).[3] *See also Nken v. Holder*, 556 U.S. 418, 426, 434 (2009) (discussing "traditional" factors a court considers in determining whether to grant a stay pending appeal). Courts weigh and "consider the relative strength of the four factors." *Revel AC*, 802 F.3d 558 at 568 (citation omitted). In doing so, "if the balance of harms tips heavily" in favor of a stay applicant, then the showing of a likelihood of success need not be

[3] The factors for determining whether to enter a stay pending appeal are the same as the factors for granting a preliminary injunction. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 177 n.2 (3d Cir. 2017).

as strong, and *vice versa*. *Id.* (quoting 16A Charles Alan Wright et al., Federal Practice and Procedure § 3954 (4th ed. 2008)).[4]

IV. ARGUMENT

This Court should enter a stay pending appeal because the four factors for entering a stay weigh in the government's favor.

A. Because this case involves an issue of first impression concerning a legal issue of national importance, the Government has at least a reasonable chance of prevailing on appeal.

The first element of the standard for a stay pending appeal inquires whether the movant has a "substantial case on the merits." *Revel AC*, 802 F.3d at 571; *see also Hilton v. Braunskill*, 481 U.S. 770, 777-78 (1987). To satisfy that element, the United States must show a "reasonable chance, or probability, of winning" on appeal. *See Revel*, 802 F.3d at 568 (quoting *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). This standard does not require a showing that prevailing on appeal is more likely than not, but requires more than a "better than negligible chance" of success. *See id.*

Significantly, the Court need not determine that it ruled incorrectly for the government to demonstrate a likelihood of success on the merits, especially because this is a novel case of national importance. "[T]ribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo

[4] Although the United States' notice of appeal divests this Court of jurisdiction over those aspects of the case involved in the appeal, the Court retains the ability to rule on a motion for a stay. *See Venen v. Sweet*, 758 F.2d 117, 120-121 & n.2 (3d Cir. 1985); *Rakovich v. Wade*, 834 F.2d 673, 674 (7th Cir. 1987)("[A] notice of appeal does not deprive the district court of jurisdiction over a motion for stay of its judgment."). This is consistent with the rule requiring that the United States first move in the district court for a stay before seeking identical relief from the Court of Appeals. Fed. R. App. P. 8(a)(1). *See In re Miranne*, 852 F.2d 805, 806 (5th Cir. 1988).

should be maintained." *Wash. Met. Area Transit. Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977).

"Clearly, any trial judge is reluctant to find that a substantial likelihood exists that he or she will be reversed. As a result, trial courts have issued or stayed injunctions pending appeal where such action was necessary to preserve the status quo or where the legal questions were substantial and matters of first impression." *Sweeney v. Bond*, 519 F. Supp. 124, 132 (E.D. Mo. 1981) (collecting cases and finding the first criterion for a stay was satisfied where the case involved issues presenting "substantial and novel questions which are fair ground for litigation"). *See also Parks v. "Mr. Ford"*, 386 F. Supp. 1251, 1269 (E.D. Pa. 1975) (extending preliminary injunction pending appeal where "the legal questions in [the] case [were] substantial and complex and the precise issue ha[d] not been decided by the Court of Appeals for the Third Circuit"); *United States v. Eleven Vehicles*, 1995 U.S. Dist. LEXIS 15884, *9 (E.D. Pa. 1995) (Robreno, J.) (noting that the first factor for a stay pending appeal weighed in favor of the government where the issue for appeal was both nationally novel and an issue of first impression, and imposing a limited stay until the government determined whether to appeal); *Moutevelis v. United States*, 564 F. Supp. 1554, 1556 (M.D. Pa. 1983) (granting stay pending appeal, in part, because the case involved issues of first impression in this Circuit); *Cf. Robertshaw*, 2014 U.S. Dist. LEXIS 667790 at *8 (the issues the court anticipated being raised on appeal were "of sufficient substance" to grant a stay); *Combustion Sys. Servs., Inc. v. Schuylkill Energy Res., Inc.*, 153 F.R.D. 73, 74 (E.D. Pa. 1994) ("[A]lthough the Court will not concede that it committed error, this Court cannot conclude that Plaintiff has no reasonable possibility of success on the merits of its . . . appeals" where the issues presented were complex and "it is difficult for this Court to predict what the Court of Appeals might do").

This case presents important issues of first impression. Safehouse seeks to open the first consumption rooms in the United States and this Court is the first in the country to be presented with the issue of whether Section 856 of the CSA bars operation of supervised injection sites. That is indisputably a substantial legal question with far-reaching implications. As evidenced by the thirteen amicus briefs this Court received from various individuals and groups from around the nation, many people and organizations around the country are interested in the outcome of this proceeding. As reported publicly, contemplated consumption rooms that may open in New York, San Francisco, Denver, and Seattle await further action, depending on the outcome of this case.[5]

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[5] *See* Michaela Winberg, *Philadelphia Nonprofit Opening Nation's First Supervised Injection Site Next Week*, NPR (Feb. 26, 2019) http://www.npr.org/2020/02/26/809608489/philadelphia-nonprofit-opening-nations-first-supervised-injection-site-next-week ("Leo Beletsky, professor of law and health sciences at Northeastern University who studies supervised injection sites, said . . . [Safehouse] could spark a chain reaction. 'I think this will have broad ramifications. There are places around the country including Seattle, Boston, Denver, New York, where people have been closely watching these developments'"); Bobby Allyn, *Judge Rules Planned Supervised Injection Site Does Not Violate Federal Drug Laws*, NPR (Oct. 2, 2019) https://www.npr.org/2019/10/02/766500743/judge-rules-plan-for-safehouse-drug-injection-site-in-philadelphia-can-go-forwar ("Supervised injection sites exist in Canada and Europe, but no such site has gotten legal permission to open in the U.S. Cities like New York, Denver and Seattle have been publicly debating similar proposals, but many were waiting for the outcome of the court battle in Philadelphia."); Rick Sobey, *DA Rollins pushes for safe injection sites in Bay State after Philadelphia court ruling*, Boston Herald (Oct. 9, 2019) https://www.bostonherald.com/2019/10/09/da-rollins-pushes-for-safe-injection-sites-in-bay-state-after-philadelphia-court-ruling/; Anusha Roy, *The ruling that gave a jolt to the supervised injection site debate*, 9news.com Denver (Oct. 7, 2019) https://www.9news.com/article/news/local/next/the-ruling-that-gave-a-jolt-to-the-safe-use-site-debate/73-454de688-a9c1-4cca-af76-4ea28b29d066 ("Advocates who support a supervised injection site in Denver are finding motivation and hope after [this Court's] ruling."); Claire Stremple, *Court Ruling Could Pave Way for Safe Injection Sites In San Francisco*, kalw.org San Francisco (Nov. 7, 2019) https://www.kalw.org/post/court-ruling-could-pave-way-safe-injection-sites-san-francisco#stream/0 ("[E]arlier this fall, a federal judge ruled that a safe injection site in Philadelphia does not violate federal law. Now, a newly re-elected Mayor Breed wants to find out what that ruling could mean for San Francisco."); Rosa Goldensohn & Josefa Velasquez, *Safe Injection Ruling Boosts Hope State Will OK Drug Centers*, thecity.com New York (Oct. 4, 2019) https://thecity.nyc/2019/10/safe-injection-ruling-boosts-hope-state-will-ok-drug-centers.html (stating that the Cuomo administration had repeatedly pointed to the federal action in Philadelphia as a reason to wait before green-lighting supervised consumption rooms in New York); Suzanne Phan, *Seattle considers opening supervised mobile drug injection site*, komonews.com Seattle (Oct. 3, 2019) https://komonews.com/news/project-seattle/seattle-considers-opening-supervised-mobile-drug-injection-site ("There are big developments in the fight over supervised injection sites now that a federal judge says Philadelphia's plan does not violate federal law.").

The government also has a substantial case on the merits. The government has argued that Safehouse's proposal falls squarely within the text of § 856(a)(2). Safehouse would "manage or control" a "place . . . as an owner, lessee, agent . . . [or] occupant . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of unlawfully . . . using a controlled substance." 21 U.S.C. § 856(a)(2). Indeed, in its Order denying the United States' motion for judgment on the pleadings, this Court acknowledged that one could read the literal terms of the statute to apply to Safehouse's contemplated conduct, though the Court ultimately rejected that interpretation. (*See* ECF No. 133, at 14.)

As the United States has argued and five courts of appeals have held, Section 856(a)(2) does not call for an inquiry into the *owner's* purpose; the statute instead makes it unlawful for an owner to "make available" a facility "for the purpose of" illegal drug use. *Id.* The relevant "purpose" is thus the purpose of a facility's *users* because the person who maintains the property is making it available for *their* use. *See, e.g., United States v. Wilson*, 503 F.3d 195, at 197-98 (2d Cir. 2007); *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990); *United States v. Ramsey*, 406 F.3d 426 (7th Cir. 2005); *United States v. Tebeau*, 713 F.3d 955, 960 (8th Cir. 2013); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991). Thus, the *users'* purpose becomes the purpose for which the *facility* will be used within the meaning of the statute when the property owner knows and intends that visitors will use controlled substances there. The government respectfully maintains its argument that, as those courts of appeals have held, a contrary reading of Section 856(a)(2) would essentially render it superfluous in light of Section 856(a)(1).

The United States will argue that the Third Circuit should align its reading of § 856(a)(2) with these other five Circuit Courts. The existence of this persuasive authority from sister

circuits establishes that the government has a reasonable chance of prevailing on its appeal of this Court's order.[6] The government acknowledges that this Court has rejected its interpretation of the statute. But even if the Court disagrees with the government's reading of Section 856(a)(2), the issues the government will present to the Third Circuit are indisputably novel and important, and they are of sufficient substance to warrant granting a stay. *See, e.g., Wash. Met. Area Transit. Com.*, 559 F.2d at 844-845; *Parks*, 386 F. Supp. at 1269.

B. Harm to the Government and to the Public Interest Weigh in Favor of Entering a Stay.

The second and fourth factors for granting a stay pending appeal also weigh in favor of the government. Those factors—harm to the stay applicant and the public interest—merge when the Government is the requesting party. *Nken*, 556 U.S. 418, 435. This is because "the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). The coincidence of interest between the government and the public is especially apparent where "the public interest in question has been formalized in a statute." *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) ("The enactment of a comprehensive regulatory scheme is a reflection of the Legislature's view of the importance of the interests at stake.").

[6] The government will also argue that, even if this Court's legal analysis is correct that Safehouse's purpose is relevant in determining whether a violation of § 856(a)(2) has occurred, Safehouse has the requisite purpose to violate the statute. (*See* Gov't's Mot. for Summ. J., ECF No. 139 at 7-8.) Because Safehouse holds itself out to the world as an organization that will explicitly provide a place for the use of heroin, illegal fentanyl, and other illegal drugs, one of Safehouse's purposes is indisputably to maintain a place for the use of illegal drugs. Even if its ultimate aim is overdose prevention, a necessary precondition to this goal, and therefore a significant purpose of Safehouse, is that individuals use illegal drugs within its facility. (*See* ECF No. 115 at 6-9.)

Where, as here, "a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant [equitable relief] on a showing of a statutory violation without requiring any additional showing of irreparable harm." *Gov't of V.I.*, 714 F.2d 283, 286. The Controlled Substances Act contains Congress's *explicit* finding that illegal drug use is harmful to the public at large. The Act begins with a declaration 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. § 801. Safehouse proposes to invite participants to use heroin and street-fentanyl (that is, fentanyl secured without a valid prescription) in its facility. But Congress has designated heroin as a Schedule I drug that has a high potential for abuse, no currently accepted medical use in treatment, and, contrary to Safehouse's position, a lack of accepted safety for use—even under medical supervision. 21 U.S.C. § 812(b)(l). It is therefore prohibited to use or possess heroin under *any* circumstances. Similarly, Congress has declared that fentanyl can only be legally possessed or used with a valid prescription because it is a Schedule II drug with a high potential for abuse and risks of severe psychological or physical dependence. *See* 21 U.S.C. § 812(b)(2). Safehouse concedes that people in its Consumption Rooms will not be using fentanyl with a prescription.

The Court's order, if implemented immediately by Safehouse, threatens to overturn Congress's determination that there is no legal use for heroin and that use of fentanyl is legal only with a valid prescription, *i.e.* a prescription issued by an authorized practitioner for a legitimate medical purpose in the usual course of medical practice issued in the ordinary course of medical practice. As conceded by one of Safehouse's witnesses—the medical director for a clinic within Prevention Point—the effect of Safehouse's facility would be "to decriminalize [drug] use within the walls of Safehouse." (*See* Tr. of Evidentiary Hrg. at 237:2-12 (Aug. 19,

2019).) A stay is therefore appropriate, considering the substantial tension between Safehouse's planned conduct and "Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (district court considering equitable remedies in a suit under the Controlled Substances Act cannot consider "any and all factors that might relate to the public interest," but must heed the judgment of Congress).

Furthermore, where Congress includes a provision for injunctive relief in a statute, this "establishes Congress' determination that irreparable harm *will result* if proscribed acts are not enjoined." *United States v. Berks County*, 277 F. Supp. 2d 570, 578 (E.D. Pa. 2003) (Baylson, J.) (emphasis added) (citing *Instant Air Freight*, 882 F.2d at 803; *Gov't of V. I.*, 714 F.2d at 286; *United States Postal Serv. v. Beamish*, 466 F.2d 804, 806 (3d Cir. 1972)). It is not the case that any statutory violation, especially a minor or technical violation, can be a substitute for the court's finding of irreparable harm. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *NRDC v. Texaco Ref. & Mktg.*, 906 F.2d 934, 941 (3d Cir. 1990). However, a violation *is* sufficient where the statutory text reveals the legislature's intent to guide or control the exercise of a court's traditional discretion by explicitly authorizing injunctive relief to remedy a violation of the statute. *NRDC*, 906 F.2d 934, 940 (explaining that statutes clearly circumscribe a court's traditional equitable discretion where the statute provides for injunctive relief). Thus, "a statutory provision authorizing injunctive relief upon a showing of probable cause to believe that the statute is being violated may be considered a substitute for a finding of irreparable harm." *Instant Air Freight*, 882 F.2d at 803. Here, 21 U.S.C. § 856(e) states that "[a]ny person who violates [856(a)] shall be subject to declaratory and injunctive remedies" as set forth in 21 U.S.C. §

843(f). This provision reflects a Congressional determination to limit the equitable discretion of a court by providing for injunctive relief upon showing a violation of the statute.

The public will also be harmed because the ruling will radically alter the approach to opioid addiction treatment in the Commonwealth of Pennsylvania without providing an opportunity for the U.S. Secretary of Health and Human Services, the U.S. Surgeon General, the Pennsylvania General Assembly, the Pennsylvania Board of Medicine,[7] or the Philadelphia City Council to provide input or suggest safeguards or regulations for such unprecedented activity. As the Supreme Court has recognized, it is the U.S. Secretary of Health and Human Services—not Safehouse, its medical directors, the Mayor, or the City's health commissioner[8]—who, "after consultation with the Attorney General and national medical groups, [shall] 'determine the appropriate methods of professional practice in the medical treatment of . . . narcotic addiction.'" *Gonzales v. Oregon*, 546 U.S. 243, 265, 266 (2006) (quoting 42 U.S.C. § 290bb-2a).)

Despite the fact that Congress has established the Secretary of Health and Human Services as the authority in the bounds of medical treatment of narcotic addiction, Safehouse would immediately open its supervised injection operation without any regulation whatsoever, and certainly without the regulation typical for opioid treatment programs. (*See* Tr. of Evid. Hrg. at 58:18-64:22; 69:21-70:3;71:3-5.) And while Safehouse repeatedly observes that supervised consumption sites operate in other countries, in no other country has a site operated without the formal approval of a governmental legislative body. (*See id.* at 49-51.) Yet, that is precisely what Safehouse proposes here.

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[7] This Court acknowledged, and Safehouse conceded, that no state medical board has issued standards governing the operation of consumption rooms. (*See* ECF No. 133 at 17.)

[8] Although Safehouse has the support of these public officials, this Court ruled that it would not recognize the support of individual public officials as equivalent to the formal support of a governmental entity. (*See id.* at 17, n.9.)

Not only does the Secretary of Health and Human Services have no contemplated role in the radical form of addiction treatment in which Safehouse proposes to engage, but federal medical authorities contest the effectiveness of consumption rooms with respect to persons with opioid use disorder. The U.S. Surgeon General, Vice Admiral Jerome Adams, has recently spoken against injection sites, and previously announced that neither he nor the Administration supports supervised injection.[9] Surgeon General Davis stated that his office's review of the data has led them to the conclusion that proven, front-line strategies such as medication assisted treatment should be optimized before "having conversations about more controversial interventions[.]" He has also stated that "safer doesn't mean safe."

A stay would also permit appellate review before the consequences of Safehouse's contemplated operations are visited on the people of Philadelphia and, in particular, the people of South Philadelphia and Kensington. Congress recognized the harms associated with illegal drug use in affected communities. *See, e.g.*, National Narcotics Act of 1984, Pub. L. No. 98-473, 98 Stat. 2168 (finding that "90 percent of heroin users rely upon criminal activity as a means of income" and "[m]uch of the drug trafficking . . . results in increased violence and criminal activity because of the competitive struggle for control of the domestic drug market"). Congress was also concerned that permitting illegal drug use in public would give the veneer of public acceptance for such acts. *See* 132 Cong. Rec. S13741-01, 1986 WL 793417.

Echoing Congress's concerns, Kensington neighborhood associations submitted a powerful amicus brief about the likely effects of an injection facility on their neighborhood and the individuals and families residing there. (*See* ECF No. 97 at 7-8.) The Associations discussed

[9] *See* Steven Ross Johnson, *Surgeon General urges ER docs to advocate for evidence-based opioid treatment*, ModernHealthcare (May 23, 2018) (https://www.modernhealthcare.com/article/20180523/ NEWS/180529976/ surgeon-general- urges-er-docs-to-advocate-for-evidence-based-opioid-treatment)

the public disorder and crime that has accompanied consumption rooms in other countries. (*See id.* at 11-12 (citing articles describing enhanced crime around injection sites).) The Associations wrote that "Congress enacted 21 U.S.C. § 856(a), and subsequent amendments expanding its scope, precisely because it recognized that facilities that concentrate illegal drug use frequently represent the death knell for communities, especially those already struggling with the impact of drug abuse." (*See id.* at 2.)

As for South Philadelphia, Safehouse waited until after this Court entered its declaratory judgment to announce that—only days from now—it intends to open its first location in South Philadelphia. *See* Anna Orso, *et al*, "South Philadelphia greets news of first supervised injection site with outrage, and also hope," Philadelphia Inquirer (Feb. 26, 2020).[10]

Residents of South Philadelphia have expressed understandable "outrage," *see id.*, noting that they received no notice of this proposal and no time to provide input into the process, voice area-specific considerations, or raise opposition. Even though Safehouse was formed more than 18 months ago, it chose to give the residents of South Philadelphia no notice of its plans and no opportunity for a meaningful say in how it will operate. The citizens of Philadelphia thus risk likely harm, including increased drug use and drug dealing within and around Safehouse's location—activity which is a direct threat to public safety. As the Court has acknowledged, the efficacy of consumption rooms is disputed and any link to treatment they may provide is experimental, at best. Even though Safehouse has charitable intentions, and seeks to address the opioid epidemic by minimizing the risk of drug overdoses, Safehouse has selected a means that Congress has chosen to criminalize.

[10] Available at https://www.inquirer.com/health/opioid-addiction/supervised-injection-site-philadelphia-safehouse-community-reaction-opioids-20200226.html

Given the complexity of this legal issue, the citizens of Philadelphia should not be forced to contend with the downstream consequences of a consumption room in their neighborhood, especially without an appellate court issuing a ruling on the legality of such an operation.

C. Safehouse will not be harmed by the imposition of a brief stay preserving the status quo in this case.

The remaining factor also weighs in the government's favor: 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. Safehouse was formed in August of 2018. (*See* Am. Compl., ECF No. 25 at ¶ 5; Defs.' Ans., ECF No. 45 at ¶ 5 (admitting allegation).) For the last 18 months, both before and during the pendency of this case, Safehouse has not offered supervised consumption services. Safehouse has stated that, *upon entry of a declaratory judgment in its favor*, it plans to open at least one facility in Philadelphia as soon as possible. (*See* ECF No. 137 at 8; Ex. A, ECF No. 137-1 at ¶ 24.) Accordingly, it would maintain the status quo in this case for this Court to *stay* the effect of its declaratory judgment.

A stay pending appeal "simply suspends judicial alteration of the status quo" by suspending the source of authority to act—the order or judgment in question. *Nken*, 556 U.S. at 429 (citation omitted). Safehouse may claim that it is harmed by a delay in its ability to provide what it believes are important services. But, as the Supreme Court has established, it is the U.S. Secretary of Health and Human Services who has the authority to determine the "appropriate methods of professional practice in the medical treatment of . . . narcotic addiction.'" *Gonzales*, 546 U.S. 243 at 265, 266 (quoting 42 U.S.C. § 290bb-2a).)

Moreover, entering a limited stay pending the resolution of the appeal may well benefit Safehouse. It may avoid Safehouse having to take steps to close down its consumption rooms, redistribute or release its staff and volunteers, and unwind its activity, should the Third Circuit

ultimately determine that its consumption room facility is illegal—an outcome about which, as discussed above, there exists a substantial question.

CONCLUSION

The government and the public have an interest in maintaining the status quo in this City 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 the 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 pending appeal in the Third Circuit, up to and including the date the Third Circuit rules on the government's stay motion. *See, e.g., In re Chevron Corp.*, 633 F.3d 153, 160 (3d Cir. 2011) (explaining that, following the issuance of a district court order, appellants appealed to the Third Circuit and simultaneously filed a motion for a stay pending appeal, which the district court denied in part, issuing instead a temporary stay pending appellants' application for a stay to the Third Circuit, which the Third Circuit granted).

Dated: February 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 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: February 27, 2020