UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAFEHOUSE, a Pennsylvania nonprofit corporation;

and

JOSE BENITEZ, as Executive Director 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; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; JACQUELINE C. ROMERO, in her official capacity as U.S. Attorney for the Eastern District of Pennsylvania,

Third-Party Counterclaim Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF
EXPEDITED MOTION TO INTERVENE AS PARTY-PLAINTIFFS

This Court should grant the expedited motion to intervene because the Community Groups[1] have timely asserted substantial legal interests implicated by this case and because the Government is no longer adequately representing those interests. Indeed, the Government did not oppose or otherwise respond to the Groups' motion. Safehouse's opposition brief does little to challenge this conclusion, and all but ignores the governing legal framework. Rule 24 focuses not on the overlap of the parties' interests but on their divergence—and the Government's apparent about-face now leaves the Community Groups' interests unprotected. The Community Groups have thus identified substantial legal interests—which Safehouse does not challenge—that will be affected by this case's resolution. That is enough to satisfy Rule 24, especially given the Third Circuit's policy "favor[ing] intervention." *Kleissler v. Forest Serv.*, 157 F.3d 964, 970 (3d Cir. 1998) (citation omitted). The motion should be granted.

ARGUMENT

I. Mandatory And Permissive Intervention Are Appropriate.

Federal Rule of Civil Procedure 24 "provides that a 'court must permit anyone to intervene' who, (1) '[o]n timely motion,' (2) 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest,' (3) 'unless existing parties adequately represent that interest.'" *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2200–01 (2022) (quoting Fed. R. Civ. P. 24(a)(2)); *see* Br. in Support of Mot. to Intervene ("Community Groups Br."), Doc. 192-1 at 4–10. The same rule permits intervention by any party that "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see* Community Groups Br. at 11–12. The Community Groups satisfy both modes

[1] Capitalized terms are defined in the Community Groups' opening brief, *see* Doc. 192-1.

of intervention.

A. The Community Groups Qualify for Mandatory Intervention.

With respect to mandatory intervention, Safehouse does not question the motion's timeliness, the Groups' substantial legal interests, or the likelihood that this case will affect those interests. *See* Opp. to Mot. to Intervene ("Safehouse Br."), Doc. 204 at 7. As to Rule 24(a)(2)'s third prong, Safehouse asserts in a single sentence, with no supporting legal authority, that only the Government "may determine the enforcement of federal law" and is thus "the designated entity to represent the asserted interests." *Id.* This assertion rests on the assumption that an intervenor's interests must align identically with the federal government. But the law is precisely the opposite: an intervenor can satisfy this prong by showing that its interests now "*diverge*" from the existing party's. *Brody*, 957 F.2d at 1123 (emphasis added; citation omitted); *Pennsylvania v. United States*, 888 F.3d 52, 57–58 (3d Cir. 2018) (noting that intervenor's interest must only be "directly *affected* in a substantially concrete fashion by the relief" the existing party seeks (quoting *Kleissler*, 157 F.3d at 972) (emphasis added)).

That is exactly what has happened here. The Government, due to a change in administration, appears poised to abandon its previous, winning position, leaving no one to effectively defend against Safehouse's counterclaims. *See* Community Groups Br. at 9–10. Until its change in course, the Government's litigation strategy sufficiently aligned with the Community Groups' interests. If the Government abandons that strategy, the Groups' interests will be harmed by the relief Safehouse seeks by way of its counterclaims: to effectively nullify the Third Circuit's decision with a declaration that notwithstanding the prior ruling it may nevertheless legally operate drug-consumption sites in Philadelphia. The Government's failure to answer the Groups' motion only goes to reinforce this conclusion. And its apparent consideration of a settlement even after

what Safehouse terms a "final" resolution of its initial claims, Safehouse Br. at 3, reinforces that the Government is no longer interested in defending federal law and protecting Philadelphians' safety and property.

Safehouse' argument also runs contrary to several cases that allow intervention to replace or supplement government litigation. The U.S. Supreme Court has recently addressed motions to intervene by private parties that assert a "related interest to that of . . . existing government part[ies]" and rejected any "presumption" that the existing government actor's efforts were sufficient. *Berger*, 142 S. Ct. at 2203–04 (citing *Trbovich v. Mine Workers*, 404 U.S. 528 (1972)). *Kleissler*, too, recognizes that governments' litigation strategies can be "colored by [their] view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it." 157 F.3d at 972. Nor does the fact that the Government must "bear in mind broader public-policy implications" mean that intervenors' more specific interests cannot align with the Government's. *Id.* (citation omitted); *accord Chester Water Auth. v. Susquehanna River Basin Comm'n*, 2014 WL 3908186, at *5 (M.D. Pa. Aug. 11, 2014).

In sum, Safehouse's argument ignores the Government's apparent divergence from its previous litigation strategy and the likelihood that it will fail to protect the Community Groups' unquestioned legal interests. The Groups have therefore clearly overcome the "minimal challenge" of this prong. *Berger*, 142 S. Ct. at 2203. And Safehouse has now waived any argument that the other two prongs of mandatory intervention are not met. *See, e.g.*, *Markert v. PNC Fin. Servs. Grp., Inc.*, 828 F. Supp. 2d 765, 773 (E.D. Pa. 2011) ("Where an issue of fact or law is raised in an opening brief, but it is uncontested in the opposition brief, the issue is considered waived or abandoned by the non-movant in regard to the uncontested issue." (citations omitted)).

B. Permissive Intervention Is Appropriate.

Rule 24(b)(1)(B) permits intervention by any party that "has a claim or defense that shares with the main action a common question of law or fact." Here, among other things, the Community Groups will have claims under Pennsylvania's nuisance law should drug-consumption sites be allowed to open, which will share common questions with this action. *See* 42 Pa. Cons. Stat. § 8382. Safehouse argues that the Groups should have to plead a nuisance claim in order to intervene. Safehouse Br. at 4, 7. But the Groups seek to intervene now to defend against Safehouse's counterclaims, not to advance their own nuisance claims at present. Moreover, any nuisance claim would not be ripe unless and until Safehouse were allowed to operate drug-consumption sites despite the Third Circuit's clear ruling that doing so would be a federal crime.

Safehouse next states only that Safehouse's counterclaims "do not implicate any of the questions of law or fact" raised in the motion. Safehouse Br. at 7. Safehouse again ignores the relevant legal standard, and it cites no authority for its conclusory, false assertion. At minimum, a nuisance claim would implicate similar questions of fact regarding Safehouse's activities and the externalities they will inevitably create. And the Third Circuit's decision that drug-consumption sites violate Section 856(a) would be no doubt be imperative to any claim that the sites are illegally injuring the Groups and their members. Moreover, Safehouse mounts no argument that intervention would "unduly delay or prejudice the adjudication of the original parties' rights," waiving any such argument. *Virgin Islands*, 748 F.3d at 524.

II. Safehouse's Counterarguments Fail.

The remainder of Safehouse's arguments all fail. Safehouse first argues that because the Community Groups' motion aligns itself with "Plaintiffs," it must fail, given that Government's "lawsuit is now final." Safehouse Br. at 3. Safehouse is correct that the Third Circuit's holding

that drug-consumption sites violate Section 856(a) is not up for reconsideration. But the Community Groups seek to intervene to protect the Third Circuit's decision which vindicated the Groups' interest and to defend the Government's *whole* position, including its opposition to Safehouse's counterclaims. The Government advanced arguments against the counterclaims in this Court and even in its briefing to the Third Circuit, arguing that Safehouse's Religious Freedom Restoration Act ("RFRA") claim failed as a matter of law. *See* Reply Br., *United States v. Safehouse*, No. 20-1422, Doc. 104 at 28–30; Answer of Pl./Counterclaim Def., Doc. 46; Mot. for Judgment on the Pleadings, Doc. 47 at 22–35. The Groups seek nothing more than to present these arguments, in support of the Government or in place of the Government should it decide to abandon their previous position.

The motion makes this abundantly clear. *See, e.g.*, Community Groups Br. at 11 ("All that is missing is a plaintiff or plaintiffs willing to enforce [the Third Circuit's mandate] and *defend against Safehouse's counterclaims*." (emphasis added)). The Groups' interests will obviously be impaired if the Government's hard-fought win is rendered meaningless by a successful counterclaim allowing drug-consumption sites to operate in Philadelphia. Whether the Community Groups are called "plaintiffs," "counterclaim defendants," or both is irrelevant to the substance of the motion.

Safehouse next argues that the motion should be rejected because it did not attach a formal pleading. *See* Safehouse Br. at 3–4. But Intervenors are not required to propose an additional, redundant pleading when they simply seek to defend positions previously pleaded (but now abandoned) by an existing party. Safehouse does not cite a single case suggesting otherwise. On the contrary, the case law makes clear that such a pleading is not required when the motion itself "provide[s] adequate notice to the parties and sufficiently set[s] forth the nature of [the proposed

intervenor's] position and its interest in the litigation." *Phil. Recycling & Transfer Station, Inc. v. City of Phil.*, 1995 WL 517644, at *3 (E.D. Pa. Aug. 29, 1995). Here, the motion very clearly identified the Groups' interests. *See* Community Groups Br. at 5–9. Safehouse's brief does not challenge these interests as false or insufficient.

Safehouse also argues that the failure to attach a freestanding pleading "is not a minor procedural defect." But this Court's precedents hold otherwise. This Court has engaged in "[l]iberal construction" of Rule 24(c)'s pleading requirement, *Phil. Recycling*, 1995 WL 517644, at *3, and have granted motions that "clearly notify the original parties of the position the applicant intervenor will assert," *New Century Bank v. Open Sols., Inc.*, 2011 WL 1666926, at *3 (E.D. Pa. May 2, 2011). The leading treatise on federal procedure thus notes that several cases have "disregarded" altogether the failure to attach a pleading. 7C Wright & Miller, Fed. Prac. & Proc. § 1914 (3d ed. 2023); *see also Conforti v. Hanlon*, 2023 WL 2744020, at *3 (D.N.J. Mar. 31, 2023) (refusing to deny a motion to intervene on Rule 24(c) grounds and noting that this "technical deficiency . . . is not a prejudicial defect and not grounds for denying intervention"); *Chao v. Loc. 234, Transp. Workers Union*, 2008 WL 11491589, at *3 (E.D. Pa. Nov. 12, 2008) (granting motion to intervene despite failure to attach a pleading), *rev'd and remanded on unrelated grounds sub nom. Solis v. Loc. 234, Transp. Workers Union*, 585 F.3d 172 (3d Cir. 2009); *In re Fidelity America Mortgage Co.*, 15 B.R. 70, 72 (E.D. Pa. 1981) (same).

Even courts that have construed Rule 24(c) in the strictest possible terms have held that "failure to file an accompanying pleading can be rectified when . . . the court requires a supplemental pleading to be filed within a short period of time." *Phil. Recycling*, 1995 WL 517644, at *3 (quoting *WJA Realty, Ltd. P'ship v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989)). Here, out of an abundance of caution, and to save this Court the hassle of requesting a

pleading, the Community Groups attach a proposed intervening answer to Safehouse's amended counterclaims.[2]

Finally, Safehouse argues that the Community Groups lack standing to intervene. This argument ignores black-letter law and the interests identified in the Groups' opening brief. As explained in the Groups' brief, a proposed intervenor must establish independent Article III standing only if it seeks further relief beyond that requested by the original party. *Pennsylvania*, 888 F.3d at 57 n.2; *see* Community Groups Br. at 6 n.2. Here, the Groups seek no more relief than the Government did: a declaration that Safehouse's operation of drug-consumption sites is illegal, unencumbered by a contrary declaration that the RFRA or the First Amendment somehow shield Safehouse's activity.

Safehouse argues that the Groups seek relief beyond what the Government sought. *See* Safehouse Br. at 5. In particular, it argues that the Groups attempt to prevent operation of the proposed injection sites. *Id.* But this is precisely what the Government has always sought: a declaration that Safehouse's course of action is illegal. The Groups made clear in their motion that they hope only to defend the Government's Third Circuit victory against Safehouse's counterclaims. *See, e.g.*, Community Groups Br. at 11.

Safehouse is also wrong to argue that the Community Groups cannot intervene as counterclaim-defendants because they have labeled themselves "proposed intervenor-plaintiffs" rather than identifying themselves as counterclaim-defendants. *See* Safehouse Br. at 5–6.

[2] The Groups adopt and incorporate by reference the Government's answer to Safehouse's counterclaims, Doc. 46. *See* Wright & Miller, *supra* § 1914 (noting courts routinely "allow[] adoption of an existing pleading" in lieu of a new pleading). Because this Court suspended all filing deadlines shortly after Safehouse amended its counterclaims, the Government did not file an answer to Safehouse's operative countercomplaint. This countercomplaint is nearly identical to its first countercomplaint and adds only a Free Exercise claim, to which the Groups respond in the attached.

Safehouse speculates that in connection with these claims, the Groups may seek "affirmative relief" different from the Government's. But in the very next breath, Safehouse acknowledges that if the Groups "seek the same relief as the federal government, they need not demonstrate Article III standing." Safehouse Br. at 6 (citing *Pennsylvania*, 888 F.3d at 57–58). The Groups seek no more relief than the Government did in bringing this lawsuit and opposing Safehouse's counterclaims.[3]

Safehouse argues that if the Groups "seek[] the same relief," they would lack authority because the counterclaims "are based on the premise that [Section 856(a)] cannot apply to Safehouse." Safehouse Br. at 6. In support of this argument, Safehouse cites no cases involving motions to intervene, relying instead on authority demonstrating, at most, that private citizens cannot sue to enforce criminal statutes. *Bey v. La Casse*, 2021 WL 1143690, at *9 (S.D.N.Y. Mar. 22, 2021) ("Violation of a federal criminal statute . . . cannot provide the basis for a civil action . . . ."); *Walzer v. Town of Orangetown*, 2015 WL 1539956, at *6 (S.D.N.Y. Apr. 7, 2015) ("Plaintiff does not have standing to contest the non-prosecution of the alleged perpetrators."); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.").

But Safehouse has already acknowledged that the Third Circuit conclusively settled the

[3] Safehouse similarly claims without any authority that because some of the Groups' legal interests arise from state nuisance law, they should have to show subject matter jurisdiction. Safehouse Br. at 5. This argument fails for the same reason: jurisdiction already exists in this case. Moreover, the fact that the Groups invoked state nuisance law to demonstrate the legal interests that support their intervention, it does not follow that they must assert a nuisance claim in order to intervene. Indeed, any nuisance claim would only ripen if Safehouse is somehow permitted to operate despite the Third Circuit's ruling that doing so would violate federal criminal law—which is precisely what the Groups are seeking to prevent through their request to intervene here.

question of whether federal criminal law prohibits Safehouse's planned operations—which it does. *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021). Thus, the Groups are not seeking to step into an enforcement role. Instead, they seek to prevent the Government from converting its own victory into an avenue for authorizing the very conduct that the Third Circuit held was unlawful. The Groups have identified substantial legal interests that would be affected by the outcome of this lawsuit. And they have a right to enter this lawsuit to protect those interests. As the Third Circuit recognized, Section 856(a) was enacted to protect against "blighted . . . neighborhoods" by "target[ing] the owner or maintainer of the premises." *Id.* 230. The Groups' request no more than the Government previously obtained but now seems poised to abandon: a declaration that Safehouse's operation of drug-consumption sites is illegal.

CONCLUSION

The motion to intervene should be granted.

Dated: May 1, 2023

By: */s/ Michael H. McGinley*

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