

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

SAFEHOUSE, a Pennsylvania nonprofit
corporation,
Counterclaim Plaintiff,

v.
UNITED STATES OF AMERICA,
Counterclaim Defendant,

U.S. DEPARTMENT OF JUSTICE; WILLIAM P.
BARR, in his official capacity as Attorney General
of the United States; WILLIAM M. MCSWAIN, in
his official capacity as U.S. Attorney for the Eastern
District of Pennsylvania,
Third-Party Defendants.

Civil Action No.: 2:19-cv-00519

UNITED STATES OF AMERICA,
Plaintiff,

v.
SAFEHOUSE, a Pennsylvania nonprofit
corporation; JOSE BENITEZ, as President and
Treasurer of Safehouse,
Defendants.

MOTION FOR FINAL DECLARATORY JUDGMENT

Safehouse and Jose Benitez (collectively “Safehouse”), by and through their attorneys, move for declaratory judgment pursuant to Federal Rules of Civil Procedure 56 and 57, and 28 U.S.C. § 2201. The specific bases for this Motion, which are incorporated here by reference, are set forth in greater detail in the accompanying Memorandum of Law.

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Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF SAFEHOUSE’S
MOTION FOR FINAL DECLARATORY JUDGMENT**

Safehouse and Jose Benitez (collectively, “Safehouse”) respectfully move this Court pursuant to Federal Rules of Civil Procedure 56 and 57, and 28 U.S.C. § 2201 for a final declaratory judgment, declaring as a matter of law that 21 U.S.C. § 856 does not prohibit the establishment and operation of Safehouse’s proposed overdose prevention services model, including supervised consumption, as described in the stipulated facts.

I. INTRODUCTION

On October 2, 2019, after extensive briefing and argument, this Court denied the government's motion for judgment on the pleadings and concluded that 21 U.S.C. § 856 does not prohibit Safehouse from providing overdose prevention services, which will include supervised consumption. (ECF No. 133 ("October 2 Order"), at 56). That ruling resolved the case-dispositive question of statutory interpretation on which both the government and Safehouse have sought judicial relief.

This Court's October 2 Order was a non-final interlocutory order, based solely on the pleadings. The parties have now agreed to a stipulated set of facts, attached as Exhibit A, which include stipulations to all material pleaded facts relied upon in this Court's October 2 Order. These agreed-upon facts establish that Safehouse is entitled to final declaratory judgment in its favor in accordance with this Court's prior legal ruling. Accordingly, Safehouse respectfully requests that this Court enter a final declaratory judgment declaring that, as a matter of law, 21 U.S.C. § 856 does not prohibit Safehouse from providing the proposed overdose prevention services.

II. BACKGROUND

The government instituted this action on February 5, 2019, seeking a declaration that Safehouse would be in violation of 21 U.S.C. § 856(a)(2). (ECF Nos. 1, 45). Safehouse answered and filed its counterclaims, seeking, *inter alia*, a declaration, pursuant to 28 U.S.C. § 2201, "that Safehouse's establishment and proposed operation of its overdose prevention services model will not violate 21 U.S.C. § 856." (ECF No. 3, at 44; ECF No. 45). On June 11, 2019, the government filed a Motion for Judgment on the Pleadings under Federal Rule of Civil

Procedure 12(c). (ECF No. 47). The motion was fully briefed, and this Court heard oral argument on September 5, 2019. (ECF No. 129).

On October 2, 2019, this Court issued a memorandum opinion and order denying the Government's motion for judgment on the pleadings.¹ The Court engaged in a well-reasoned analysis of the proper interpretation of Section 856, as applied to the novel circumstances presented by this case, and held that "[t]he ultimate goal of Safehouse's proposed operation is to reduce drug use, not facilitate it, and accordingly, [Section] 856(a) does not prohibit Safehouse's proposed conduct." (October 2 Order, at 56).

This Court's ruling resolved the primary legal issue presented by the parties' dueling declaratory judgment actions. But the Court's denial of the government's Rule 12(c) motion was an interlocutory ruling. To enable the Court to move ahead to final judgment, the parties have agreed to stipulated facts that address each of the factual predicates for this Court's October 2 Order. By stipulating to these facts, the parties have obviated the need for discovery or an evidentiary hearing. These stipulations therefore clear the way for the Court to declare as a matter of law that Safehouse would not be in violation of Section 856.

III. ARGUMENT

A. Entry of a Declaratory Judgment Is Procedurally Proper

The Declaratory Judgment Act is designed to "afford a speedy and inexpensive method of adjudicating legal disputes . . . to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." *Beacon Constr. Co., Inc., v. Matco Elec. Co., Inc.*, 521 F.2d 392, 397 (2d Cir.

¹ Under Federal Rule of Civil Procedure 12(c), the Court was required to accept the allegations in the pleadings and reasonable inferences therefrom as true. As a result, the factual background from which the Court issued its October 2, 2019 ruling was drawn from the allegations in the government's Amended Complaint (ECF No. 35), Safehouse's Answer to the Amended Complaint (ECF Nos. 3, 45), Safehouse's Counterclaims and Third-Party Complaint (ECF Nos. 3, 45), and the Answer to Safehouse's Counterclaims (ECF No. 46).

1975) (quoting *Aetna Sur. & Cas. Co. v. Quarrels*, 92 F.2d. 321, 325 (4th Cir. 1937)); *see also* 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2751 (4th ed. 2019). Federal Rule of Civil Procedure 57 further provides this Court with the procedural mechanism to resolve issues on declaratory judgment.

The Declaratory Judgment Act and Article III of the U.S. Constitution, require a declaratory judgment resolve an “actual controversy,” *i.e.*, “a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *see* 28 U.S.C. § 2201.²

A declaratory judgment is appropriate where, as here, the government threatens enforcement action pursuant to disputed statutory authority. The Supreme Court has observed, “where threatened action by government is concerned,” courts “do not require a plaintiff to expose [it]self to liability before bringing suit to challenge the basis for the threat.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). Rather, if a “genuine threat of enforcement” exists, courts do “not require, as a prerequisite to testing the validity of the law . . . , that the plaintiff bet the farm, so to speak, by taking the violative action.” *Id.* at 129 (citing *Terrace v. Thompson*, 263 U.S. 197, 216 (1923)); *see also Steffel v. Thompson*, 415 U.S. 452, 480 (1974) (holding that plaintiff need not distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution). “The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is ‘a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.’” *MedImmune*, 549 U.S. at 129

² The Declaratory Judgment Act is not jurisdictional in nature. *See Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 672 (1950). This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1345.

(quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (relying on *MedImmune* and *Steffel* to entertain a pre-enforcement action for declaratory and injunctive relief); *Seneca-Cayuga Tribe of Okla. v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019 (10th Cir. 2003) (affirming issuance of a declaratory judgment in pre-enforcement context, and finding that a particular set of gambling devices were not illegal under the Indian Gaming Regulatory Act); *Hispanic Leadership Fund, Inc. v. FEC*, 897 F. Supp. 2d 407 (E.D. Va. 2012) (issuing a declaratory judgment in pre-enforcement context, determining which particular advertisements were and were not covered by Federal Election Commission requirements).

The parties have stipulated that, upon entry of a declaratory judgment in its favor, Safehouse plans to open at least one overdose prevention services facility in Philadelphia as soon as possible. *See* Exhibit A, ¶ 24. Both before and during this lawsuit, the government has publicly threatened to utilize Section 856 to institute civil, and potentially criminal, enforcement actions against Safehouse if it provides supervised consumption services. Indeed, the government reiterated its threat of enforcement against Safehouse soon after the Court issued its October 2 Order. *See* Exhibit B, October 11, 2019 Letter from U.S.A.O. McSwain to I. Eisenstein. Safehouse seeks a declaration that it would not violate Section 856 by providing overdose prevention services that include supervised consumption. The parties’ legal dispute therefore establishes an immediate and actual controversy between the parties appropriate for declaratory relief.

B. In Light of the Parties’ Stipulation of Fact, This Court May Enter Final Declaratory Judgment in Safehouse’s Favor Pursuant to Rules 56 and 57

This Court’s October 2 Order decided the legal question in Safehouse’s favor and determined that, on the facts pleaded, Section 856 does not apply to Safehouse’s proposed

overdose prevention services model, including supervised consumption. October 2 Order, at 55 (“Section 856(a)(2) does not criminalize Safehouse’s proposed actions.”). Now that the parties have stipulated to the material facts on which that decision depended, this Court should enter a final declaratory judgment in Safehouse’s favor pursuant to Federal Rules of Civil Procedure 56 and 57.

Federal Rule of Civil Procedure 56 permits summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The absence of a genuine dispute of fact may be established by stipulation. Fed. R. Civ. P. 56(c)(1)(A). Rule 57 provides for the entry of a declaratory judgment. Fed. R. Civ. P. 57 (“These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201.”).

No further discovery or proceedings are necessary for this Court to enter judgment for Safehouse as a matter of law.³ The parties have stipulated to case-dispositive facts that are consistent with the alleged facts on which the Court relied when denying the government’s motion for judgment on the pleadings. *Compare* Exhibit A, with ECF No. 133, at 4–5. The Court, moreover, has already held oral argument on the parties’ respective positions at the Rule 12(c) stage to resolve the issue of whether Section 856 applies to Safehouse’s proposed operations. This Court’s October 2 Order and the facts, as stipulated by the parties, now definitively establish that Safehouse’s proposed overdose prevention services model, which includes supervised consumption, is lawful under Section 856(a). Accordingly, a final declaratory judgment should be entered in Safehouse’s favor, incorporating the reasoning and

³ Rule 57 provides that “[t]he court *may* order a speedy hearing of an action for a declaratory judgment,” and therefore affords this Court discretion to determine whether a hearing is required. Fed. R. Civ. P. 57 (emphasis added); *see also* Wright & Miller, *supra*, § 2768 (noting that “[t]he provision of Rule 57 that the court ‘may order a speedy hearing of a declaratory-judgment action,’ . . . has been applied to effectuate the purpose of the rule and expedite a decision”).

holding of the Court's October 2 Order and stating that Section 856 does not apply to Safehouse's proposed overdose prevention services model, including supervised consumption.

C. Expedited Entry of Final Judgment Is Warranted

Safehouse respectfully requests that this Court enter judgment expeditiously in light of the urgent public health crisis that Safehouse seeks to address. Each day, in the City of Philadelphia, more lives are lost to the opioid epidemic.⁴ Safehouse's overdose prevention services will be a critical public health intervention that seeks to mitigate the opioid and overdose crises by providing urgent medical care to those at great risk of overdose death. An expedited final judgment from this Court, declaring that Safehouse's proposed services are not prohibited by Section 856, would allow Safehouse to open its doors as soon as possible, and begin providing life-saving medical care to a vulnerable population.

IV. CONCLUSION

For the reasons stated above, Safehouse respectfully requests this Court enter a final judgment in this matter, declaring that Section 856 does not apply to Safehouse and that Safehouse's proposed overdose prevention services model, including supervised consumption, is not prohibited by Section 856.⁵

⁴ See City of Philadelphia, Opioid Misuse and Overdose Report (Nov. 14, 2019), *available at* <https://www.phila.gov/media/20191126111554/Substance-Abuse-Data-Report-11.25.19.pdf>.

⁵ If this Court grants this Motion, it need not reach Safehouse's remaining claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, and the Commerce Clause of the U.S. Constitution. Safehouse reserves the right to press those claims if this Court's declaratory judgment on the underlying statutory question were vacated, reversed, or remanded by an appellate court or if changed circumstances otherwise established a ripe controversy as to those claims. Likewise, Safehouse reserves the right to seek further factual development of the record if this case were to be returned to the district court for additional proceedings, or if additional relief is required.

Dated: January 6, 2020

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,

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WILLIAM M. McSWAIN, in his official
capacity as U.S. Attorney for the Eastern
District of Pennsylvania,

Third-Party Defendants.

THE PARTIES' STIPULATION OF FACTS

1. According to its website, Safehouse "seeks to open the first 'safe injection site' in the U.S." in the City of Philadelphia and "is a privately funded, 501(c)(3) tax-exempt, Pennsylvania nonprofit corporation whose mission is to save lives by providing a range of overdose prevention services." According to Safehouse, the overdose prevention

services it intends to offer are aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment.

2. "Consumption" means the use, *e.g.*, via injection, oral ingestion, and/or nasal inhalation of illegal drugs including without limitation heroin and fentanyl.
3. Safehouse staff members will supervise participants' consumption and, if necessary, intervene with medical care, including reversal agents to prevent fatal overdose.
4. Jose Benitez is Safehouse's president and treasurer. He is also the executive director of Prevention Point Philadelphia (PPP).
5. PPP has been in operation for over 27 years. PPP offers clean syringe exchange services, primary medical care, an HIV clinic, a Hepatitis C clinic, wound care and education on safer injection techniques, overdose prevention education, overdose reversal kits and distribution, housing, meals, mail services, Medication-Assisted Treatment, and drug recovery and treatment services. PPP does not permit the use of controlled substances at its facility.
6. Safehouse plans to offer the same services that PPP currently provides. The only difference between what PPP currently offers and what Safehouse would offer is that Safehouse would allow participants to use its supervised consumption and observation rooms in which participants may engage in consumption and may remain under the supervision of Safehouse staff.
7. According to Safehouse's medical protocol, when a participant arrives at Safehouse, the first step is a registration process.
8. Safehouse intends to ask each participant to provide certain personal information and undergo a brief physical and behavioral health assessment.
9. Safehouse intends to offer each participant its services, which include use of supervised drug consumption and observation rooms, medical services, including wound care, on-site initiation of Medication-Assisted Treatment, recovery counseling, HIV and HCV counseling, testing and treatment, referral to primary care, and referrals to social services, legal services and housing opportunities. Safehouse intends to encourage every participant to enter drug treatment, which will include an offer to commence treatment immediately.
10. There is nothing in the medical protocol that suggests Safehouse will specifically caution against drug usage.
11. Safehouse participants may request access to all services, including the consumption room.

12. Safehouse plans to offer participants fentanyl test strips to test for the presence of fentanyl in their drugs.
13. Each Safehouse participant may be assigned an individual station where they may consume self-obtained drugs, including by injection, under the supervision of Safehouse staff.
14. "Safehouse [will] offer[] supervised consumption of self-obtained drugs that have the potential to cause serious adverse medical events for people who continue to use these drugs despite their known risks." *See* Safehouse Medical Protocol.
15. Safehouse staff will be directed not to provide, administer, or dispense any controlled substances, and Safehouse intends that its staff will not handle controlled substances.
16. Safehouse personnel will be available to advise participants on sterile injection techniques.
17. Safehouse staff members will supervise participants' consumption and, if necessary, intervene with medical care, including respiratory support and the administration of overdose reversal agents, such as naloxone.
18. Before leaving the supervised consumption room, Safehouse intends that its participants will safely dispose of used consumption equipment.
19. From the supervised consumption room, Safehouse staff will direct participants to the medically supervised observation room.
20. Safehouse's medical protocol does not require a participant to remain in the observation room for a specified period of time.
21. In the observation room, Safehouse plans to provide certified peer counselors, as well as recovery specialists, social workers, and case managers to offer services and encourage treatment. Safehouse plans to offer the same services to participants again at check out.
22. Safehouse believes that supervised consumption aids potential treatment in that its participants are more likely to engage in counseling and accept offers of medical care after they have consumed drugs and are not experiencing withdrawal symptoms.
23. Safehouse imposes no limits on the number of times that participants may use the consumption room and does not require participants to enter treatment or accept a treatment referral as a condition of using the consumption room.

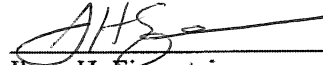
24. If the Court were to enter a declaratory judgment in its favor, Safehouse plans to open at least one facility in Philadelphia as soon as possible.

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EXHIBIT B



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October 11, 2019

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Re: United States v. Safehouse, et al.
Civil Docket No. 19-cv-00519

Dear Ms. Eisenstein:

In the wake of last week's decision by the District Court, your clients have made some public statements about Safehouse's intentions that I wanted to address with you. More specifically, Ronda Goldfein has stated that Safehouse hopes to open an injection site by the end of this year. She has also indicated that Safehouse will do so regardless of neighborhood support, stating that "I don't think that [the neighbors] will agree [with opening], so our best hope is that they will tolerate it, they will see that a change has come, and they will ultimately support it."

The U.S. Attorney's Office respects the Judge's decision, of course, but as you know, we intend to appeal it. It would be better for all concerned for your clients to respect the judicial process and stand down until the Third Circuit has an opportunity to rule on an appeal. Maintaining the status quo while the case is on appeal is in keeping with my Office's incremental approach that has facilitated the orderly and measured disposition of the litigation to this point, and it is necessary to respect the judicial process – particularly in a case regarding an issue of first impression that will likely have nationwide implications. Just as importantly, it is in deference to those citizens of Philadelphia who reasonably fear that their lives – and the lives of their children – will be irreparably harmed by the opening of an injection site in their neighborhood.

One of the main reasons that we filed this case in the first place was so that this controversy could be resolved in the courts in an orderly, dignified manner without a criminal confrontation on the streets. One of the best things about our country is that even the most passionate disagreements can be heard and decided by a fair and impartial decisionmaker – and that includes the right of appeal. Therefore, I hope that we can quickly come to an

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agreement that Safehouse will not attempt to open an injection site during the pendency of an appeal.

If you and your clients instead choose to move forward immediately, then you will force my hand and I will have no choice but to take the steps necessary to maintain the status quo. I hope you will not choose this unnecessarily confrontational and possibly chaotic path. But if you do not agree to preserve the status quo during an appeal, my Office would enforce existing federal law that is unaffected by the Court's ruling in a manner that would, as a practical matter, shut down the site and thereby preserve the integrity of the appellate process.

Last week's ruling was a narrow one that addressed only one specific part of the debate regarding injection sites: whether one particular section of the federal Controlled Substances Act applies to Safehouse's proposed conduct. Furthermore, as the Court observed, the ruling had nothing to do with whether injection sites are a good idea, and even the proponents of these sites cannot know whether they would do any good. If a site were to open, the whole thing would be, in the Court's words, purely "experimental."

What we do know, however, is that the possession and use of heroin are illegal – and last week's decision did nothing to change that. We will, of course, abide by any rulings of the District Court, but last week's decision addressed only Safehouse itself and not the issue of the visitors' possession and use of illegal drugs at the site, nor the issue of illegal drug distribution that will inevitably occur nearby.

The proponents of drug injection sites cannot make heroin use legal, nor can any court. As the District Court Judge observed during the case, it is self-evident that the visitors to a drug injection site would be committing a federal crime by shooting up at the site.

Thus, were a drug injection site to exist in Philadelphia, there would be rampant federal lawbreaking taking place under one roof. This conclusion is unaffected by the District Court's opinion. Moreover, such a site would not only be a haven for drug use but also a magnet for drug traffickers, who would be encouraged to prey upon users and would likely lead to increased criminal activity in areas around the site.

If Safehouse attempts to open an injection site in this District during the pendency of an appeal, federal law enforcement would consider all available enforcement tools at our disposal to enforce federal law in and around the site, as appropriate. We would do so in a way that treats those suffering from addiction as victims; however, we would take all necessary law enforcement action to respond to the expected concentration of drug activity, including seizure of all contraband and any applicable forfeiture.

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Again, I hope that the situation will not come to this and that you and your clients will do the right thing, choose to respect the judicial process and agree to stand down until the appeal is heard. That is what justice requires. I look forward to hearing from you.

Very truly yours,



WILLIAM M. McSWAIN
United States Attorney

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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 Motion for Declaratory Judgment (ECF No. 137) filed by Defendants and Counterclaim Plaintiff Safehouse and Jose Benitez, and any opposition and reply thereto, it is hereby ORDERED:

1. Safehouse's Motion for Declaratory Judgment is GRANTED;
2. JUDGMENT is ENTERED in favor of Safehouse and Jose Benitez and against the United States of America, U.S. Department of Justice, United States Attorney General William P.

Barr, and United States Attorney for the Eastern District of Pennsylvania William M. McSwain on all of the plaintiff's claims and on Count I of Safehouse's Counterclaim;

3. Count II of Safehouse's Counterclaim is DISMISSED WITHOUT PREJUDICE as moot; and

4. It is DECLARED that the establishment and operation of Safehouse's overdose prevention services model, including supervised consumption in accordance with the parties' stipulated facts (ECF No. 137, Exhibit A), does not violate 21 U.S.C. § 856.

IT IS SO ORDERED.

BY THE COURT:

Gerald Austin McHugh
United States District Judge