

**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.: 2:19-cv-00519

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.

**SAFEHOUSE'S MEMORANDUM OF LAW IN OPPOSITION TO THE
GOVERNMENT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants Safehouse and Jose Benitez (collectively, “Safehouse”) respectfully submit this memorandum of law in opposition to the cross-motion for partial summary judgment filed by Plaintiff-Counterclaim Defendant United States and Third-Party Defendants U.S. Department of Justice, U.S. Attorney General William P. Barr, and U.S. Attorney for the Eastern District of Pennsylvania William M. McSwain. *See* ECF No. 139 (“Gov’t Summ. J. Mot.”).

INTRODUCTION

Again advancing an erroneous interpretation of 21 U.S.C. § 856(a), the government has cross-moved for partial summary judgment on the parties’ claims and counterclaims for declaratory relief. At bottom, the government asks this Court for approval to prosecute Safehouse for providing lifesaving overdose-prevention services, even though this City is in the midst of an unprecedented overdose crisis. But this Court has already correctly concluded that Section 856(a) does not prohibit Safehouse from providing those services. The parties have now stipulated to each of the material facts, which confirm that Safehouse is entitled to declaratory judgment in its favor that Safehouse’s proposed overdose-prevention model will not violate Section 856(a). Nothing in the government’s partial summary judgment motion warrants a departure from that conclusion. Accordingly, this Court should deny the government’s motion, and apply its well-reasoned interpretation of Section 856(a) to the stipulated facts to grant Safehouse’s motion for final judgment.

DISCUSSION

I. THE GOVERNMENT’S MOTION CONFIRMS THAT SAFEHOUSE IS ENTITLED TO FINAL JUDGMENT IN ITS FAVOR

This Court has already rejected each of the government’s arguments and concluded that federal law does not prohibit Safehouse from providing overdose-prevention services, including supervised consumption. ECF No. 133 (“October 2 Order”), at 56. The government’s motion

provides no basis for this Court to depart from that conclusion. In fact, the government concedes that it already “set forth its position regarding the law that governs this case” in its motion for judgment on the pleadings, which this Court denied on the merits. Gov’t Summ. J. Mot. at 2. The government also does not meaningfully dispute that a straightforward application of the stipulated facts to this Court’s interpretation of Section 856(a) establishes that Safehouse is entitled to judgment as a matter of law, stating in its motion that the government agrees that, “[g]iven the parties’ stipulation, there is no genuine issue as to any material fact in this case bearing on the question of statutory interpretation.” *Id.* at 5. Rather, the government’s futile motion for summary judgment simply rehashes the same incorrect interpretation of Section 856(a).¹ This Court’s correct interpretation of Section 856(a) controls the outcome of the parties’ motions and warrants judgment in Safehouse’s favor.

Since there are no remaining disputes of material fact separating the parties, this Court should deny the government’s motion and grant final declaratory judgment in Safehouse’s favor.

II. THE GOVERNMENT’S PROCEDURAL ARGUMENTS LACK MERIT

Without a substantive basis for the relief it seeks, the government raises several misguided procedural arguments—presumably because it believes those arguments will provide some advantage on appeal. At the same time, the government ignores the procedural defects in its own motion and appears to suggest it could prosecute Safehouse notwithstanding this Court’s ruling.

¹ The government does, however, contradict some of the concessions it made about the scope of Section 856(a) during oral argument. For instance, the government argues in this motion that “if heroin use is illegal, it cannot be permissible to make a place available for heroin use.” Gov’t Summ. J. Mot. at 9. But the government has already admitted that applying Section 856(a) is far from that simple. At argument, the government unequivocally stated that Section 856(a) *would not be violated* by parents who invite their adult child to move back home and “then instruct the child to inject drugs there, in the parents’ presence, to allow for resuscitation.” October 2 Order at 41 (citing oral argument transcript). The government’s concession at argument cannot be reconciled with its overly simplified view in this motion, which contends that it is per se unlawful “to make a place available for heroin use.” Gov’t Summ. J. Mot. at 9.

A. Safehouse Is Entitled to Final Declaratory Relief under Both Rules 56 and 57

The government incorrectly argues that Safehouse’s motion for final declaratory judgment is governed by Federal Rule of Civil Procedure 56, not Rule 57, because “a motion for declaratory judgment under [Rule] 57 would be procedurally improper.” Gov’t Summ. J. Mot. at 5 n.3. Final declaratory relief is proper under Rule 57 where an actual legal controversy exists and the parties have stipulated to all material facts and cross-moved for declaratory relief on a single, dispositive question of law. In any event, Rule 56’s summary judgment standard yields the same result: Safehouse is entitled to judgment as a matter of law on its request for declaratory relief.

Contrary to the government’s contention, a Rule 57 motion for final judgment seeking only declaratory relief is not “procedurally improper” where, as here, the parties have stipulated to all facts and simultaneously sought declaratory relief on the same question of law. That conclusion is consistent with the purpose of the Rule. The Advisory Committee note on Rule 57 at the time of its adoption explained: “A declaratory judgment is appropriate when it will ‘terminate the controversy’ giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion.” Fed. R. Civ. P. 57, Notes on Advisory Committee on Rules (1937).

This is precisely the type of proceeding contemplated by Rule 57. The government and Safehouse agree on all material facts, have accordingly agreed to forego discovery and evidentiary hearings, and both simultaneously seek a final declaratory judgment on the question of whether Safehouse would violate Section 856(a). The government does not dispute that there is a “substantial controversy” between the parties or that this controversy is of such immediate concern to warrant the issuance of a declaratory judgment. *See, e.g., Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *see also* 28 U.S.C. § 2201. In these circumstances, Rule 57

allows the disputed legal issues to be resolved on the merits, without requiring the Court to draw inferences in favor of either party, and prevents either party from gaining a procedural advantage through strategic maneuvering to manipulate the standard of review on appeal.

In support of its contention that such a request for relief is “improper,” the government relies on distinguishable case law in which the movant sought declaratory relief by way of filing a Rule 57 motion, *without* first seeking relief under the Declaratory Judgment Act in its initial pleading. *See, e.g., Arizona v. City of Tucson*, 761 F.3d 1005, 1010 (9th Cir. 2014) (“Here, Intervenor’s request for declaratory relief was not properly before the district court. Intervenor did not request this relief in their complaints.”); *I.E.C. v. Minneapolis Public Schs. SSD No. 1*, 970 F. Supp. 2d 917 (D. Minn. 2013), ECF No. 1 (complaint referenced “declaratory and injunctive relief” but did not affirmatively bring suit pursuant to Declaratory Judgment Act); *Johnson v. Ryan*, No. CV-18-00889, 2018 WL 6573228, at *5 n.1 (D. Ariz. Dec. 13, 2018) (finding plaintiff could not pursue declaratory judgment absent filing pleading initiating declaratory judgment action); *Centrifugal Acquisition Corp., Inc. v. Moon*, No. 09-C-327, 2010 WL 152074, at *1 (E.D. Wisc. Jan. 14, 2010) (noting movant “failed to include a request for declaratory relief in any of her pleadings”). Unlike those cases, Safehouse sought a declaration pursuant to the Declaratory Judgment Act in its Counterclaims and Third-Party Complaint. *See* ECF Nos. 3, 45. And unlike those cases, the parties here have stipulated to all material facts and have both sought declaratory relief on the same issue of law. A final declaratory judgment under Rule 57 is the appropriate vehicle to conclusively resolve the immediate and actual legal controversy on that question.

In any event, Safehouse is entitled to a final declaratory judgment under the Rule 56 summary judgment standard. As explained above, the parties agree, in light of their stipulation, there is no dispute of material fact remaining between the parties and the stipulation provides a

pathway to final judgment as a matter of law. *See* Fed. R. Civ. P. 56(c)(1)(A); ECF No. 137-1 (Stipulation of Facts).

B. This Court Should Reject the Government’s Attempt to Seek a Procedural Advantage on Appeal

The government’s insistence that Safehouse’s motion be resolved under summary judgment standards appears calculated toward obtaining a more favorable standard of review on appeal. In particular, the government disputes this Court’s appropriate determination that “[t]he ultimate goal of Safehouse’s proposed operation is to reduce drug use, not facilitate it,” October 2 Order at 56, arguing that this Court cannot “make this factual inference in Safehouse’s favor” under Rule 56—even if it could do so under Rule 12(c). Gov’t Summ. J. Mot. at 7 n.4. This argument is both substantively and procedurally flawed.

The government’s argument makes little sense in light of its puzzling decision to cross-move for summary judgment. Because the government has moved for summary judgment, this Court must draw all reasonable inferences from the stipulated facts *in Safehouse’s* favor for purposes of resolving the government’s motion. *See Thomas v. Cumberland Cty.*, 749 F.3d 217, 222 (3d Cir. 2014). Yet the government asserts this Court must draw all reasonable inferences in *the government’s* favor for purposes of resolving Safehouse’s motion. This procedural stalemate is precisely why Rule 57 is the appropriate procedural vehicle to resolve the parties’ motions. But in any event, no such inferences are required to conclude that Safehouse’s goals include reduction of drug use.

Given the government’s concession that there are no genuine disputes of material fact, it is unclear why the government has objected to the Court’s determination that the “ultimate goal of Safehouse’s proposed operation is to reduce drug use.” October 2 Order at 56. Although the government obviously disagrees with that determination, the government’s concerns are based on

a blatant misreading of the Court’s opinion. The government complains that the pleadings and the stipulation do not state that Safehouse “would reduce unlawful drug use,” Gov’t Summ. J. Mot. at 7 n.4, but that is not what this Court said. Rather, this Court properly determined that Safehouse’s “*ultimate goal . . . is to reduce drug use*” and that Safehouse’s “*program . . . ultimately seeks to reduce unlawful drug use.*” October 2 Order at 49, 56 (emphasis added). In other words, Section 856(a) focuses on the *purpose* of Safehouse’s public health intervention—not whether Safehouse is ultimately successful in achieving its goal of reducing overdose deaths and drug use (based on evidence of efficacy that can only be definitively established once Safehouse becomes operational).

This Court, not the government, has correctly framed the statutory inquiry to focus on Safehouse’s purpose. The question of whether Safehouse ultimately will *reduce* drug use is beside the point; the statutory question is whether Safehouse’s purpose is to *facilitate* unlawful drug use, and this Court’s opinion and the stipulated facts demonstrate Safehouse clearly does not have that prohibited purpose. *See* October 2 Order at 49 (“Safehouse plans to make a place available for the purposes of reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services. *None of these purposes can be understood as purpose to facilitate drug use.*” (emphasis added)).

To be clear, Safehouse maintains that one of its objectives is to reduce drug use and that it believes its program will be effective in encouraging its participants to seek treatment and cease use of illicit drugs. That can be determined from the stipulated facts, including that the “services [Safehouse] intends to offer are aimed at . . . encouraging drug users to enter treatment”; that Safehouse “intends to offer each participant its services, which include . . . on-site initiation of Medication Assisted Treatment [and] recovery counseling”; “Safehouse intends to encourage

every participant to enter drug treatment, which will include an offer to commence treatment immediately”; and, after participants use the supervised consumption room, “Safehouse plans to provide certified peer counselors, as well as recovery specialists, social workers, and case managers to offer services and encourage treatment” because “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.” Stipulation of Facts ¶¶ 1, 9, 21, 22, ECF No. 137-1. These agreed-upon facts show that Safehouse’s goal, at the end of the day, is to use harm reduction strategies that ultimately reduce drug use by offering and encouraging treatment for people struggling with addiction.

Because the government appears to have raised this issue in its motion for purposes of preserving it on appeal, clarity from the Court would facilitate the orderly resolution of this case and prevent its outcome from turning on the appellate standard of review, rather than the legal question of Section 856(a)’s application to Safehouse’s proposed overdose-prevention services.

C. Safehouse Has Not Relinquished Its RFRA and Commerce Clause Claims

The government seeks a *partial* judgment on only the parties’ dueling claims for declaratory judgments on the statutory question of whether Safehouse’s proposed overdose-prevention services model would violate Section 856(a); it does not seek judgment on Safehouse’s counterclaims pursuant to the Religious Freedom Restoration Act (“RFRA”) and the Commerce Clause of the U.S. Constitution. The Court’s Order at the pleadings stage did not resolve those counterclaims because it concluded that Section 856(a) *does not apply* to Safehouse. As a result, it concluded that “Safehouse’s Religious Freedom Restoration Action claim . . . is now moot.” October 2 Order at 56.

The government incorrectly asserts that Safehouse has abandoned its RFRA and Commerce Clause counterclaims because Safehouse did not move for judgment on them. Gov't Summ. J. Mot. at 11-12 & n.8. Safehouse did not abandon these counterclaims. Rather, Safehouse's motion for declaratory judgment reflects only that if Section 856(a) is inapplicable to Safehouse, then Safehouse's RFRA and Commerce Clause claims are moot. If the Court (or a future appellate court) disagrees and finds that Section 856(a) does apply to Safehouse's proposed overdose-prevention services, Safehouse has expressly preserved its right to pursue its RFRA and Commerce Clause claims at that time. *See* ECF No. 138 ¶ 3. Safehouse's proposed order thus grants it motion for declaratory relief before dismissing the RFRA claim without prejudice as moot.

D. The Government Cannot Enforce Section 856(a) Against Safehouse in Light of this Court's Order

The government now argues that Safehouse did not move for an injunction against enforcement because this Court lacks authority to enjoin the enforcement of Section 856(a). Gov't Summ. J. Mot. at 11–12 & n.8. The implication is that even if this Court declares as a matter of law that Section 856(a) does not apply to Safehouse—thereby providing the legal clarity sought *by the government* when it filed this lawsuit—Safehouse has no way to obtain relief to avoid prosecution *for entirely lawful conduct*. In other words, the government implies it could prosecute Safehouse for lawfully operating its site, and there is nothing that Safehouse or this Court could do to prevent that from happening. It would be a startling proposition to suggest the government may not abide by the Court's binding interpretation of Section 856(a) in a declaratory judgment suit that the government initiated.

Safehouse could certainly seek injunctive relief and its counterclaims include a prayer for an injunction against enforcement. But Safehouse had heretofore deemed such relief unnecessary

in light of the government's prior assurances that it would adhere to the judgment in this case. An injunction against enforcement requires an actual and imminent threat of enforcement, *i.e.*, a threat that the government will prosecute or pursue civil enforcement based on alleged violations of Section 856(a). *See generally City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). No such threat should be present at the moment, in light of this Court's October 2 Order. Safehouse presumes that the government does not intend to ignore this Court's ruling by enforcing Section 856(a) against Safehouse. Indeed, after that ruling, Mr. McSwain clarified in a letter to Safehouse that his office "respects the Judge's decision" and intends to abide by this Court's October 2 Order. ECF No. 137-2, at 2. In fact, the same day as the ruling, the government implied that no such enforcement efforts would be appropriate in this District, cautioning that "any attempt to open illicit drug injection sites *in other jurisdictions* while this case is pending will continue to be met with immediate action by the department." *See* DEPARTMENT OF JUSTICE, *Statement from Deputy Attorney General Jeffrey A. Rosen on the United States v. Safehouse Ruling* (Oct. 2, 2019), <https://www.justice.gov/opa/pr/statement-deputy-attorney-general-jeffrey-rosen-united-states-v-safehouse-ruling> (emphasis added). Safehouse has to this point believed that, notwithstanding the government's disappointment with this Court's ruling, the government will respect the judicial process and the binding judgment of the Court. ECF No. 137-2.

To the extent the government intends to reverse course, defy this Court's ruling, and enforce Section 856(a) against Safehouse, the government should state its intention to do so, which would allow Safehouse to seek the appropriate relief with this Court, including an injunction against enforcement, which would be entirely appropriate to prevent such a disregard of the law. To be clear, Safehouse expects the government, which prudently chose to go to this Court for a declaratory judgment, to accept an adverse ruling in good faith and to act accordingly, just as the

government would rightly expect Safehouse to have done in the event it had prevailed on its motion for judgment on the pleadings. If the government nonetheless pursues enforcement measures against Safehouse, its founders, its staff, or its participants, Safehouse will strongly defend its lawful overdose-prevention program and participants by all available means, including by seeking recourse against threats or actions brought in retaliation for this Court's ruling or for the purpose of evading that ruling. Safehouse also will vigorously defend its claim-preclusion rights under *Montana v. United States*, 440 U.S. 14 (1979), in response to any threats against Safehouse or attempts to pursue remedies not sought in the original declaratory action that depend on legal arguments or claims that were made or could have been made by the government.

CONCLUSION

For these reasons, Defendants Safehouse and Jose Benitez respectfully request that this Court deny the government's cross-motion for partial summary judgment, apply the stipulated facts to its interpretation of Section 856(a), grant Safehouse's motion, and declare as a matter of law that Safehouse's proposed overdose-prevention service model, including supervised consumption, would not violate 21 U.S.C. § 856(a).

Dated: January 31, 2020

Respectfully submitted,

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