



Reducing Harm or Enabling Substance Abuse? Supervised Injection Sites Under Federal Drug Law

November 22, 2019

To mitigate the effects of the opioid crisis in Philadelphia, in 2018 a nonprofit called [Safehouse](#) announced plans to open a supervised injection site where illicit drug users could consume opioids under the supervision of trained staff, receive medical intervention in case of an overdose, and access services including addiction treatment. The U.S. Department of Justice (DOJ) [sued Safehouse](#) to block the proposed facility, arguing that the supervised injection site would violate a [provision](#) of the Controlled Substances Act (CSA) known as the “crack house statute,” which prohibits making facilities available “for the purpose of unlawfully . . . using a controlled substance.” On October 2, 2019, a district court judge in [United States v. Safehouse](#) ruled that the planned facility would not violate the CSA because the provision in question does not apply to supervised injection sites such as Safehouse. The district court’s ruling could have significant implications for supervised injection sites in Philadelphia and beyond: although supervised injection sites exist in ten countries worldwide, none currently operate openly in the United States, due in part to concerns about their legality.

This Sidebar discusses the Safehouse litigation’s importance for Congress by first providing relevant factual and legal background, before identifying select considerations for Congress related to the treatment of supervised injection sites under the CSA.

The Opioid Crisis and Safehouse’s Plan of Operation

The opioid epidemic has caused a public health crisis in the United States, with the Centers for Disease Control and Prevention (CDC) [reporting](#) that overdoses on prescription and non-prescription opioids claimed a record 47,600 lives in 2017. According to one report, in 2017 over [1,100 people died of overdoses](#) in Philadelphia alone. Safehouse was founded in 2018 to mitigate the effects of the opioid crisis in that city.

A key feature of Safehouse’s response to the opioid crisis is the organization’s plan to operate a supervised injection site. [Supervised injection sites](#) are locations where controlled substance users can consume their own illicit drugs using sterile equipment under the supervision of trained medical staff who

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LSB10364

can intervene in the event of an overdose. Supervised injection sites generally also provide other medical and wraparound services, and may direct interested individuals to substance use disorder treatment. As one commentator has [explained](#), supervised injection sites aim to reduce harm to individual controlled substance users by preventing overdose deaths and the transmission of diseases such as HIV. The sites are also intended to [reduce harm to the public](#) by decreasing public consumption and attendant hazards such as improperly discarded needles. [Opponents](#) of supervised injection sites counter that such sites sanction illicit drug use and worry that the sites may attract drug traffickers and increase drug-related violence and property crime. Supervised injection sites [currently operate in ten countries](#). No such facilities operate openly in the United States.

Safehouse plans to serve opioid users through a [multi-step process](#), one component of which is a supervised injection site. As Safehouse [explained to the district court](#), the organization itself would not provide illicit drugs to participants; however, Safehouse has also stated that it does not intend to try to dissuade participants from using illicit drugs, other than by providing voluntary referrals to treatment. Safehouse originally [planned](#) to begin operation in early 2019, but has postponed its opening pending resolution of the litigation discussed below.

Legal Background and *United States v. Safehouse*

The statute at the heart of the Safehouse litigation is [21 U.S.C. § 856](#) (Section 856). Section 856 is colloquially called the “crack house statute” because Congress first added the provision to the CSA in 1986 in response to [concerns about “crack houses”](#)—houses or other buildings where illicit drugs such as crack cocaine are manufactured, stored, distributed, and used. Congress [amended](#) the provision in 2003 to target facilities hosting raves where attendees distributed and used party drugs such as MDMA. Section 856 contains two related criminal prohibitions. First, Section 856(a)(1) provides that it is unlawful to “knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.” Second, Section 856(a)(2) imposes criminal penalties on those who “manage or control any place . . . 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.” In essence, the first provision prohibits an entity from maintaining premises for its own drug-related activities, while the second prohibits making premises available for drug-related activity by third parties. Because Safehouse states it will not produce, distribute, or otherwise handle drugs, only Section 856(a)(2) is at issue in the current case.

In November 2018, soon after Safehouse announced its plan of operation, the U.S. Attorney for the Eastern District of Pennsylvania wrote a letter to the organization [expressing the view](#) that Safehouse’s supervised consumption rooms would violate Section 856. Safehouse, by letter, disputed that its planned operation would violate the CSA. On February 5, 2019, DOJ [sued Safehouse](#) seeking a judicial declaration that the “establishment and operation of any Consumption Room, or similar sites made available for the unlawful use of controlled substances, will violate” Section 856. Safehouse [responded](#) by seeking a declaration that its proposed operation would *not* violate the CSA.

Following briefing and a hearing on the parties’ motions, on October 2, 2019, the district court [ruled](#) that Section 856 “does not prohibit Safehouse’s proposed medically supervised consumption rooms because Safehouse does not plan to operate them ‘for the purpose of’ unlawful drug use within the meaning of the statute.” The court’s opinion analyzing the statute’s text, history, and prior interpretations totaled over fifty pages. The court began by acknowledging that “no credible argument can be made that facilities such as safe injection sites were within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003,” because there was no national discussion of such sites at either time. The court further recognized that Section 856 “neither expressly prohibits nor authorizes” supervised injection sites, and no court had considered whether the provision applies to such sites. The

court thus turned to the text and history of the statute to consider (1) who must act “for the purpose of” unlawful drug use to produce liability under Section 856(a)(2) and (2) whether that purpose must be the defendant’s sole motivation, its ultimate motivation, or merely play some role in motivating the defendant’s actions.

With respect to the first issue, the question before the court was whether liability could arise under Section 856(a)(2) if a defendant maintained premises knowing that *third parties* would enter the premises with the purpose of using illegal drugs, or whether the statute requires *the defendant itself* to have the purpose of facilitating illegal drug use. The court adopted the latter, narrower reading, construing the statute to require a defendant in a Section 856(a)(2) to itself have acted “for the purpose of” facilitating illicit drug use, not simply with the knowledge that others are using the place for that purpose. Although the district court acknowledged that multiple federal appeals courts in other jurisdictions have interpreted Section 856(a)(2) to require “mere knowledge of an unidentified third party’s purpose” to use illegal drugs on premises the defendant maintains, the court declined to follow those non-binding precedents. The district court stated that most of the out-of-circuit decisions relied with limited original analysis on a decision of the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) in *United States v. Chen*, which interpreted the purpose requirement expansively. As for *Chen* itself, the district court identified several “concerns” with that opinion, disagreeing with the Fifth Circuit’s approach to statutory interpretation and asserting that the appellate court’s decision conflicted with the legislative history of Section 856(a).

Having determined that a Section 856(a)(2) defendant must itself have the purpose of facilitating illicit drug use, the district court next examined what it means to make a place available “for the purpose” of unlawfully using a controlled substance. The court acknowledged a range of possible interpretations of “purpose”—under the narrowest reading, the word could apply only to an actor’s sole purpose, while in its broadest reading it could apply to “any purpose (however insignificant).” Ultimately, the court settled on an intermediate interpretation: while the statute does not require that facilitating illicit drug use be an actor’s sole purpose, the proscribed purpose must, in the view of the court, be a “‘significant’ purpose or ‘one of the primary’ purposes of the defendant.” The court also considered and rejected “the Government’s view that an intermediate purpose of allowing drug use on one’s property, even as one component of an overall effort to combat drug use, could fall within the scope of the statute.” Looking to the legislative history of Section 856, the court emphasized that Congress enacted the provision in response to concerns about crack houses, then amended it to combat drug-fueled raves. The court thus concluded, “The evidence indicates that the statute targets exploitive behavior like that of crack house operators, rave promoters, and others creating spaces to facilitate drug use and access to drugs. A common denominator . . . is the goal of enabling drug use and supporting the market for unlawful drugs.”

After construing the statute in that manner, the court proceeded to consider how it applied to Safehouse. Because the organization “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,” the district court could not “conclude that Safehouse has, as a significant purpose, the objective of facilitating drug use.” To further support that conclusion, the court cited the [rule of lenity](#), the canon that penal laws must be construed strictly because “legislatures and not courts should define criminal activity.” Because supervised injection sites were almost unheard-of when Section 856 was enacted and amended, “Congress has not had the opportunity to decide whether . . . moral condemnation and punishment should extend to consumption facilities that are components of medical efforts to facilitate drug treatment.” The court therefore declined “to expand the reach of a criminal statute to include conduct” that Congress, in the view of the court, never contemplated.

Considerations for Congress

Litigation in *United States v. Safehouse* is likely to continue following the district court’s decision, and it is unlikely that Safehouse will open a supervised injection site in the near future. DOJ intends to appeal

the district court's decision to the U.S. Court of Appeals for the Third Circuit (Third Circuit). DOJ has [announced](#) that if Safehouse begins operation before the appeals court hears the case, the agency will “use all enforcement tools” at its disposal to maintain the status quo, possibly including making arrests, seizing drugs, and initiating criminal forfeiture proceedings. Moreover, even if the legal barriers to operation are lifted, the founders of Safehouse recently published an [op-ed](#) in the Washington Post explaining that they “still have hurdles to clear” before beginning operations, including fundraising.

On appeal to the Third Circuit, there may be a number of hurdles to that court affirming the lower court's judgment. Certain aspects of the case weigh in favor of affirming. Specifically, as the district court noted, the legislative history of Section 856 does not suggest that Congress considered supervised injection sites when it enacted the provision, and there is no indication that Congress affirmatively intended to criminalize such facilities. However, the fact that Congress did not specifically intend to target the conduct at issue does not control if Safehouse's plan falls within the plain language of the statute. The Ninth Circuit considered a similar issue in *United States v. Tamaz*. In that case, a defendant convicted of distributing cocaine at his car dealership argued that Section 856(a)(2) did not apply to him “because the statute was intended only to apply to ‘crack houses’ or manufacturing operations,” and in his case “there was no evidence of storage, manufacturing or the kind of use associated with a crack house.” The Ninth Circuit [rejected that argument](#) in light of “the plain language of the statute,” finding “no reason to believe” that the broad statutory prohibition “was intended to apply only to storage facilities and crack houses.”

In addition, as noted above, the district court's holding in the current case departs from how multiple other circuits have construed Section 856's purpose requirement. The Safehouse litigation, involving a supervised injection site, might be distinguishable from prior cases, which all involved defendants who acquiesced to—or in many cases promoted—illicit drug-related activities with no purported intent to mitigate the harms of substance abuse. But it is unclear whether the Third Circuit would decline to follow its sister circuits in light of the different facts presented in those cases.

Regardless of how the Third Circuit rules, that court's decision could be significant as it would be the first major appellate precedent on the legality of safe injection sites. The ruling could also inform other entities similar to Safehouse. Local governments and other organizations outside Philadelphia have begun to [consider](#) similar facilities. In addition, there are [multiple reports](#) of a supervised injection site currently operating in secret in an undisclosed location.

Pending a decision by the Third Circuit, there is significant ambiguity surrounding the status of supervised injection sites under federal law. Congress could resolve that ambiguity, or endorse or reject any judicial interpretation of Section 856, by enacting legislation. If Congress decided to allow supervised injection sites to operate, it could consider the breadth of such authorization. For example, Congress might choose to exempt from federal prosecution only facilities operating in strict compliance with state and local law, as it has done with state-legal medical marijuana activities through a series of appropriations riders. Or Congress could impose specific registration requirements for supervised injection sites under the CSA, as it has done for entities that administer medication-assisted treatment for opioid addiction. In the alternative, if Congress decided not to permit the operation of supervised injection sites, it could amend Section 856 to more precisely prohibit those facilities (as it did in 2003 to combat drug-related activity at raves) or enact separate legislation to ban supervised injection sites.

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