

No. 21-276

In the Supreme Court of the United States

SAFEHOUSE,

Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF OF AMICI CURIAE PHILADELPHIA
MAYOR JAMES KENNEY AND ACTING
HEALTH COMMISSIONER CHERYL
BETTIGOLE IN SUPPORT OF PETITIONER**

CITY OF PHILADELPHIA LAW
DEPARTMENT
Diana P. Cortes, City Solicitor

By: Jane L. Istvan
Counsel of Record
Jennifer E. MacNaughton
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
(215) 686-3000
jane.istvan@phila.gov

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE¹

James Kenney is the mayor of Philadelphia, the city in which Safehouse intends to open one or more overdose prevention sites. Dr. Bettigole is the Acting Commissioner of the Philadelphia Department of Public Health, the agency that responds to public health emergencies, tracks public health data, and recommends and implements health policy for the city.

The benefits of overdose prevention sites are well studied and well documented: they save lives, provide a valuable gateway to treatment, and reduce other harms associated with opioid use. As the highest city officials directly responsible for the city's public health policy, Mayor Kenney and Acting Commissioner Bettigole have an interest in ensuring that Safehouse can provide its services in Philadelphia free of the risk of criminal prosecution.

¹ Pursuant to Supreme Court Rules 37.3(a) and 37.6, Amici Curiae certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties were timely notified and have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Safehouse's petition for certiorari asks the Court to determine whether the Controlled Substances Act criminalizes a valuable health care service: overdose prevention sites. Amici support this petition because the Third Circuit's ruling deprives Philadelphia of a powerful tool in its battle against the opioid epidemic.

Philadelphia desperately needs Safehouse's help. Opioids are one of the city's worst public health crises in a century. Overdose deaths have been climbing since the early 2000s, but reached new highs around 2017 as fentanyl increasingly infiltrated the drug supply. Today, overdose is the third-leading cause of death in Philadelphia.

In response, our city has mobilized a historic initiative to combat this epidemic. But despite our best efforts, our overdose death toll is still unacceptably high. Overdose prevention sites have the potential to catch those individuals who are still falling through the gaps in our current safety net.

Overdose prevention sites like Safehouse are a well-studied, proven harm-reduction tool. Even a *single* overdose prevention site in Philadelphia could save up to an estimated 76 lives *per year*, as well as saving millions of dollars in unnecessary emergency medical costs and preventing blood-borne illnesses and other health issues.

Amici urge this Court to grant the petition because, contrary to the Third Circuit's ruling, Safehouse is not a criminal enterprise. Rather, it would be a powerful ally in the city's fight against the opioid epidemic.

ARGUMENT

Safehouse seeks to operate one or more overdose prevention sites in Philadelphia. At these facilities, individuals who use drugs can do so under medical supervision, with trained staff ready to intervene in case of overdose to administer naloxone (Narcan) and provide emergency care. Rapid medical attention is critical to an overdose victim's chances of survival. Safehouse will also offer sterile injection equipment and safe disposal, as well as access to medical and social services. And Safehouse will provide a trusted gateway to addiction treatment for individuals who decide to take that next step.

The Third Circuit's ruling that Safehouse's overdose prevention site would violate the Controlled Substances Act, 21 U.S.C. § 856(a), goes against both the letter and the spirit of the Act. Section 856(a), also known as the "crack house" statute, was intended to help communities contain nuisance behavior and crime associated with the drug trade. There is no evidence that Congress intended for Section 856(a) to encompass a life-saving medical service. Safehouse's purpose is to provide overdose reversal and access to a panoply of wraparound social and medical services intended to reduce drug addiction – not foster it.

Below, we explain why Safehouse is vitally important to Philadelphia's efforts to combat the opioid crisis. First, we demonstrate the severity of Philadelphia's overdose crisis and provide an overview of the evidence-based approaches we have already deployed to fight this epidemic. Next, we show how overdose prevention sites have proven their worth in

other countries and provide estimates of the concrete impact Safehouse would have in Philadelphia in terms of deaths prevented and dollars saved.

I. Philadelphia Desperately Needs Every Effective Tool Available to Contain Its Overdose Epidemic

Even before COVID-19, Philadelphia was already struggling to contain another historic public health disaster: the opioid epidemic. Overdose deaths leapt to new heights in the 2010s, largely due to fentanyl, a powerful synthetic opioid that is increasingly contaminating the illicit drug supply. By 2019, overdoses were Philadelphia's third-leading cause of death, behind heart disease and cancer.²

Mayor Kenney has made tackling opioids a policy priority. Beginning in 2017, the city has launched a sweeping array of proven initiatives addressing prevention, treatment, and harm reduction. Yet despite this historic effort, we are still losing over 1,000 of our people every year to overdose. Safehouse provides a valuable harm-reduction service that will help keep people alive until they are ready to accept treatment.

² Phila. Dep't of Pub. Health, Health of the City 2020, at 7, <https://www.phila.gov/media/20201230141933/HealthOfTheCity-2020.pdf>.

A. Opioids Are One of Philadelphia’s Worst Public Health Crises in a Century

Philadelphia has one of the highest overdose rates among large U.S. cities. Last year alone, 1,214 people in Philadelphia lost their lives to overdoses.³ Nearly three times as many people die from overdoses in Philadelphia than from homicides.⁴

The victims of overdose are overwhelmingly working-age people cut down in the prime of their lives.⁵ This loss of life has left its mark across our community: in a survey of Philadelphia residents, fully 29% reported knowing someone who died from opioids.⁶

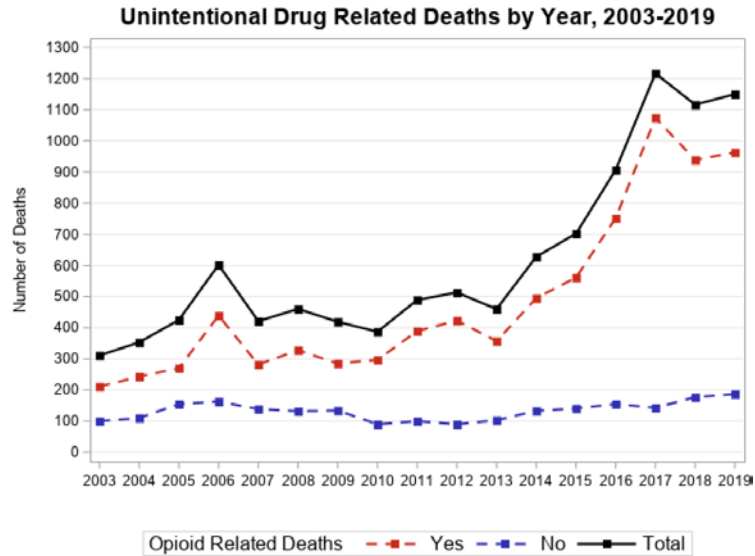
The vast majority of our overdose deaths involve opioids. This crisis arose from the confluence of two factors: overuse of prescription opioids and the rise of fentanyl.

³ Phila. Dep’t of Pub. Health, CHART, Vol. 6 No. 5, 2 (Jun. 3, 2021), <https://www.phila.gov/media/20210603100151/CHARTv6e5.pdf>.

⁴ *Id.*

⁵ CHART, *supra* note 3, at 4.

⁶ Larry Eichel & Meagan Pharis, *Poll Shows Impact of Opioid Crisis on Philadelphians and Their Neighborhoods*, PEW CHARITABLE TRUSTS (Aug. 6, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/08/06/poll-shows-impact-of-opioid-crisis-on-philadelphians-and-their-neighborhoods>.



Source: Phila. Dep't of Pub. Health, *Opioid Misuse and Overdose Report*, at 39 (Aug. 6, 2020).⁷

Philadelphia's overdose rate first began climbing in the 2000s as overprescribing of opioid medications led to more drug dependency and addiction.⁸ Because prescription drugs are expensive and difficult to obtain, users turned to heroin as a substitute.⁹

This influx of new users coincided with the arrival of fentanyl in the 2010s. Fentanyl is a cheap, powerful

⁷ <https://www.phila.gov/media/20200806162023/Substance-Abuse-Data-Report-08.06.20.pdf>.

⁸ City of Philadelphia, *Mayor's Task Force to Combat the Opioid Epidemic in Philadelphia: Final Report & Recommendations*, 6 (May 19, 2017), <https://www.phila.gov/media/20180606131257/Mayors-task-force-to-combat-the-opioid-epidemic-in-Philadelphia-final-report.pdf> [hereinafter *Mayor's Task Force Report*].

⁹ *Mayor's Task Force Report*, *supra* note 8, at 6.

synthetic opioid that dealers add to their products to increase their effects.¹⁰ The danger of fentanyl lies in its extreme potency: a fatal dose is around three milligrams.¹¹ Fentanyl can trigger a lethal overdose within minutes, well before the average EMS unit in Philadelphia can reach a victim.¹² In 2020, fentanyl was a factor in 81% of our overdose deaths.¹³

The “perfect storm” of prescription opioids and fentanyl is reflected in our overdose death rate: opioid-related deaths quadrupled from 2003 to 2019.¹⁴

Overdoses are also straining our health care system and emergency services. First responders (emergency medical services, police, and public transit employees) administered the overdose reversal drug naloxone (Narcan) over 3,600 times in 2020.¹⁵ That

¹⁰ Christine Vestal, *How Fentanyl Changes the Opioid Equation*, PEW CHARITABLE TRUSTS (Oct. 17, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/17/how-fentanyl-changes-the-opioid-equation>.

¹¹ Allison Bond, *Why Fentanyl Is Deadlier Than Heroin, in a Single Photo*, STAT (Sept. 29, 2016), <https://www.statnews.com/2016/09/29/why-fentanyl-is-deadlier-than-heroin/>.

¹² The average EMS response time is around eight and one-half minutes. See Phila. Fire Dep’t Fiscal Year 2019 Budget Testimony (May 1, 2018), http://phlcouncil.com/wp-content/uploads/2018/04/FY19-Testimony_Fire_submitted-to-Council-4.27.pdf.

¹³ CHART, *supra* note 3, at 2.

¹⁴ *Opioid Misuse and Overdose Report*, *supra* note 7, at 38.

¹⁵ Phila. Dep’t of Pub. Health, *Naloxone*, SUBSTANCE USE PHILADELPHIA, <https://www.substanceusephilly.com/naloxone>.

same year, hospital emergency departments logged over 6,000 visits for overdoses.¹⁶

Even ordinary people like restaurant workers and librarians have taken on the role of first responders, administering naloxone when people overdose in public places or restrooms. At McPherson Library in Kensington, a hotspot of public heroin use, one librarian reported that she had intervened in six overdoses in just a few months.¹⁷

Opioids are killing Philadelphians in record numbers, devastating families and neighborhoods. The city needs every effective resource available to fight this epidemic.

B. Philadelphia Has Poured Resources Into Evidence-Based Solutions, Yet We Have Been Unable to Turn the Rising Tide of Overdose Deaths

Philadelphia's overdose death rate has been stuck at just over 1,000 deaths per year since 2017.¹⁸ That it has not risen higher is likely due to the city's wide-reaching efforts to fight back against the opioid

¹⁶ Phila. Dep't of Pub. Health, *Emergency Department Visits – Opioids*, SUBSTANCE USE PHILADELPHIA, <https://www.substanceusephilly.com/opioids>.

¹⁷ Darran Simon, *The opioid epidemic is so bad that librarians are learning how to treat overdoses*, CNN (June 24, 2017), <https://www.cnn.com/2017/06/23/health/opioid-overdose-library-narcans/index.html>.

¹⁸ CHART, *supra* note 3, at 2.

epidemic. But despite our substantial investments, too many lives are still falling through the cracks.

Following recommendations of local experts, Philadelphia attacked this crisis aggressively on many fronts. First, Philadelphia has dramatically expanded access to treatment. For example, the city and a nonprofit partner opened a 24/7 walk-in center where people can receive stabilization with medication assisted treatment (“MAT”)¹⁹ and referral to longer-term treatment.²⁰ The city has also stepped up funding for residential and outpatient recovery services and safe recovery housing.²¹ In addition, the city has worked with emergency departments and recovery treatment providers to facilitate “warm handoffs” of people seen in the ED for overdose.²² Thanks to these and other efforts, the number of individuals receiving Medicaid-funded addiction

¹⁹ MAT, which involves the use of medication to relieve withdrawal symptoms and reduce cravings, is considered the gold standard for treatment of opioid use disorder.

²⁰ Aubrey Whalen, *24-hour center opens for opioid treatment: Its purpose is to be there whenever people seek help*, Phila. Inquirer (Jul. 12, 2018).

²¹ Phila. Dep’t of Pub. Health & Dep’t of Behavioral Health & Intellectual disAbility, *The Opioid Epidemic in Philadelphia: Implementation of the Mayor’s Task Force Recommendations*, 4 (Jan. 9, 2019), <https://www.phila.gov/media/20190110101212/The-Opioid-Epidemic-in-Philadelphia-.pdf> [hereinafter Jan. 9, 2019 Status Report].

²² *Id.* at 3.

treatment services rose from about 9,000 in 2010 to over 17,000 in 2019.²³

We have also made substantial progress on prevention, educating providers, insurers, and consumers alike on the risks of prescription opioids. Thanks in part to these and similar efforts by the state and by professional licensing organizations, prescription opioid sales have been reduced to early-2000s levels.²⁴

In the area of harm reduction, since 2014, the city has flooded the streets with naloxone, putting hundreds of thousands of doses into the hands of health care providers, first responders, concerned citizens, and people who use drugs.²⁵ Additionally, Mayor Kenney recently signed an executive order to decriminalize the distribution and use of fentanyl test strips, which should help boost availability of this life-saving tool.²⁶

Although Philadelphia is already taking the right steps to mitigate its opioid crisis, there are still holes

²³ *Opioid Misuse and Overdose Report*, *supra* note 7, at 63 (Aug. 2020).

²⁴ *Id.* at 5.

²⁵ In 2019 alone, the city distributed over 55,000 doses to health care providers and community organizations. *See* Phila. Dep't of Pub. Health, Naloxone Doses Distributed, July 1, 2017 - December 31, 2020, SUBSTANCE USE PHILADELPHIA, <https://www.substanceusephilly.com/naloxone>.

²⁶ Press Release, Office of the Mayor, Mayor Signs Executive Order to Decriminalize Fentanyl Test Strips (Aug. 2, 2021), <https://www.phila.gov/2021-08-02-mayor-signs-executive-order-to-decriminalize-fentanyl-test-strips/>.

in the safety net that overdose prevention sites can fill. Notably, naloxone distribution cannot help people who use drugs alone or in isolated locations, which is often the case for people experiencing homelessness. Overdose prevention sites are an important complement to Philadelphia's existing strategy.

II. Safehouse Offers a Proven, Life-Saving Medical Service; It Should Not Be Criminalized

Mayor Kenney and Acting Commissioner Bettigole support overdose prevention sites for the same reason that the American Medical Association and Pennsylvania Medical Society endorse them: because they work.²⁷

Overdose prevention sites have existed since the 1980s and are currently operating in Europe, Australia, and Canada. Yet, there has not been a

²⁷ Press Release, American Medical Association, AMA wants new approaches to combat synthetic and injectable drugs (June 17, 2017), www.ama-assn.org/press-center/press-releases/ama-wants-new-approaches-combat-synthetic-and-injectable-drugs; Press Release, Pennsylvania Medical Society, PAMED Endorses Pilot Program of Safe Injection Sites to Combat Opioid Crisis (Nov. 20, 2019), pamedsoc.org/detail/article/endorse-safe-injection-sites; Phila. Bd. of Health, Resolution in Support of Operation of Overdose Prevention Facilities in Philadelphia, approved July 9, 2019, <https://www.phila.gov/media/20190710144627/BOH-Resolution-Overdose-Prevention-Facilities-Approved-July-9-2019.pdf>.

single documented overdose death at any of these facilities.²⁸

North America's first overdose prevention site was Insite, in Vancouver, which opened in 2013. Insite has been thoroughly studied as a pilot for other potential locations in Canada. From its inception through 2019, Insite logged more than 3.6 million visits and its staff intervened in 6,440 overdoses, with not a single overdose death.²⁹ Similarly, an "underground" site in an unnamed U.S. city has been operating since 2014, and in five years there were 33 overdoses on-site that were reversed, with no deaths.³⁰

In addition to saving lives, overdose prevention facilities generate other health and public safety benefits when paired with sterile needle exchange, peer counseling, and social services (as Safehouse intends to operate). By providing sterile injecting equipment, education, and wound care, overdose

²⁸ Eric Armbrrecht et al., *Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value; Final Evidence Report*, 32 (Inst. for Clinical & Econ. Rev., Jan. 8, 2021), https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf.

²⁹ Vancouver Coastal Health, *Insite User Statistics*, www.vch.ca/public-health/harm-reduction/supervised-consumption-sites/insite-user-statistics.

³⁰ Alex H. Kral et al., *Evaluation of an Unsanctioned Safe Consumption Site in the United States*, 383 N. Engl. J. Med. 589 (2020).

prevention sites help prevent HIV, Hepatitis B and C, and skin and soft tissue injury and infection.³¹

These facilities can also provide a valuable onramp to recovery services at the fleeting window of time when a client may be ready to accept treatment. Several independent studies have found that Insite clients are more likely to access addiction treatment.³²

There is no evidence that overdose prevention sites cause any increase in opioid use. Instead, data from the “underground” site in the U.S. reflect that the typical client had already been using for many years.³³

Additionally, these facilities reduce the public nuisance of people injecting in public or in restrooms and reduce injection-related litter.³⁴ They do not bring

³¹ Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 *Drug & Alcohol Dependence* 48, 62 (2014).

³² E.g. Kora DeBeck et al., *Injection Drug Use Cessation And Use Of North America's First Medically Supervised Safer Injecting Facility*, 113 *Drug & Alcohol Dependence* 176 (2011); Evan Wood et al., *Rate Of Detoxification Service Use and its Impact Among a Cohort of Supervised Injecting Facility Users*, 102 *Addiction* 916 (2007); Evan Wood et al., *Attendance At Supervised Injecting Facilities And Use Of Detoxification Services*, 354 *N. Engl. J. Med.* 2512 (2006).

³³ Thomas Kerr et al., *Circumstances of First Injection Among Illicit Drug Users Accessing a Medically Supervised Safer Injection Facility*, 97 *Am. J. Public Health* 1228 (2007).

³⁴ Evan Wood et al., *Changes in Public Order After the Opening of a Medically Supervised Safer Injecting Facility for Illicit Injection Drug Users*, 171 *Can. Med. Ass'n J.* 731 (2004); Allison M. Salmon et al., *Five Years On: What Are the Community Perceptions of Drug-Related Public Amenity Following the Establishment of the Sydney Medically Supervised Injecting*

more crime or nuisance behavior to their neighborhoods.³⁵

Two independent studies have attempted to quantify the effects of an overdose prevention site in Philadelphia. One analysis published in 2017 by the Main Line Health System and Thomas Jefferson University estimated that just a single site in Philadelphia could prevent 24 to 76 overdose deaths per year.³⁶ The authors also estimate that a single site could reduce the health care costs for skin and soft tissue injuries associated with injecting drugs by at least \$1.5 million annually, and save hundreds of thousands of dollars each year in ambulance, emergency department, and hospitalization costs.³⁷ Another study predicted that just one site would prevent 15 deaths per year and save over \$3 million

Centre?, Int'l J. of Drug Pol'y, Vol. 18 Issue 1, 46-53 (2007); Potier, *supra* note 31, at 63.

³⁵ Beau Kilmer et al., *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States* (Rand Corporation, 2018), at 33-34, https://www.rand.org/pubs/research_reports/RR2693.html; Potier, *supra* note 31, at 63; Evan Wood et al., *Impact of a Medically Supervised Safer Injecting Facility on Drug Dealing and Other Drug-Related Crime*, Substance Abuse Treatment, Prevention, & Policy, at 13 (May 8, 2006), <https://substanceabusepolicy.biomedcentral.com/articles/10.1186/1747-597X-1-13>.

³⁶ Sharon Larson et al., *Supervised Consumption Facilities – Review of the Evidence* (Main Line Health Center for Population Health Research, December 2017), https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf.

³⁷ *Id.*

dollars per year in ambulance, emergency department, and hospitalization costs.³⁸

Overdose prevention facilities are a proven, common-sense public health measure. They are worlds away from the true criminal behavior that the Controlled Substances Act, 21 U.S.C. § 856(a) was meant to target. We urge the Court to consider the impact of the Third Circuit's decision on Philadelphia and other communities that need this important life-saving measure.

CONCLUSION

Amici therefore ask this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

CITY OF PHILADELPHIA LAW
DEPARTMENT
Diana P. Cortes, City Solicitor

By: Jane L. Istvan
Counsel of Record
Jennifer E. MacNaughton
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
(215) 686-3000
jane.istvan@phila.gov

Counsel for Amici Curiae

September 21, 2021

³⁸ Armbrrecht, *supra* note 28, at ES14, 50, 57.