

Exhibit A

No. 20–1422

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA, *Appellant*,

v.

SAFEHOUSE, a Pennsylvania nonprofit corporation; and JOSÉ BENITEZ,
President and Treasurer of Safehouse, *Appellees*.

SAFEHOUSE, a Pennsylvania nonprofit corporation, *Appellee*,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, in his official capacity as Attorney General of the
United States; and WILLIAM M. MCSWAIN, in his official capacity as U.S.
Attorney for the Eastern District of Pennsylvania, *Appellants*.

Appeal from the United States District Court for the Eastern District of
Pennsylvania (Hon. Gerald A. McHugh), Civ.A. No. 19–0519

**BRIEF OF *AMICI CURIAE* MAYOR JIM KENNEY AND HEALTH
COMMISSIONER DR. THOMAS FARLEY
IN SUPPORT OF PETITION FOR REHEARING *EN BANC***

March 5, 2021

CITY OF PHILADELPHIA LAW DEPARTMENT
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I. INTEREST OF *AMICI CURIAE*

Jim Kenney is the mayor of Philadelphia, the city in which Safehouse intends to open one or more overdose prevention sites. Dr. Thomas Farley is the 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.

Philadelphia’s opioid crisis is one of the most severe of any big city in the nation. The Kenney Administration has made it a priority to mobilize a coordinated, evidence-based response to what is truly a public health emergency. Mayor Kenney and Commissioner Farley support an overdose prevention site in Philadelphia because decades of public health research have shown that these facilities save lives and reduce the harms associated with opioid use.¹

II. INTRODUCTION

The urgency of Philadelphia’s opioid crisis presents a “question of exceptional importance” under Federal Rule of Appellate Procedure 35 warranting *en banc* review.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no party’s counsel authored this brief in whole or in part, and no party or party’s counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to this filing.

More than 1,000 of our people are dying of overdoses every year. Before COVID-19, overdoses were the third-leading cause of death in our city, after heart disease and cancer. And despite the best efforts of City government, healthcare providers, and nonprofits, the death toll remains stubbornly high.

There is a simple, proven public health measure that would help save lives: overdose prevention sites like Safehouse. Decades of experience in Canada, Europe, and Australia have conclusively demonstrated that these facilities save lives. They are also proven to mitigate other harms caused by opioid use, such as HIV and other infections, and they offer a gateway to recovery for a very hard-to-reach population. The evidence is so strong that both the American Medical Association and the Pennsylvania Medical Society have voted to endorse overdose prevention facilities,² and the Philadelphia Board of Health – the City’s health regulatory body comprised of doctors and public health experts – passed a resolution in support of these facilities.³

² American Medical Association Press Release: 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; Pennsylvania Medical Society Press Release: PAMED Endorses Pilot Program of Safe Injection Sites to Combat Opioid Crisis (Nov. 20, 2019), pamedsoc.org/detail/article/endorse-safe-injection-sites.

³ Phila. Bd. of Health, Resolution in Support of Operation of Overdose Prevention Facilities in Philadelphia, approved July 9, 2019, available at

Since Mayor Kenney's first term, the City of Philadelphia has made historic investments in other best practices for fighting this epidemic, but Philadelphia is still losing over a thousand lives each year to overdoses. Overdose prevention sites are a crucial missing link in the continuum of care for people struggling with the disease of addiction. The City needs this proven life-saving resource.

III. ARGUMENT

Opioids and overdose deaths are one of the biggest problems facing this City. Even though the City is doing everything in its power to combat this crisis, the death toll is still climbing. Mayor Kenney and Commissioner Farley support Safehouse's petition for rehearing because Philadelphia cannot afford to do without this important harm-reduction measure.

A. Philadelphia is Battling its Two Worst Public Health Crises in a Century: COVID and the Opioid Epidemic

Until COVID-19 hit, the opioid epidemic was Philadelphia's most serious public health crisis in living memory. Now our City finds itself struggling to contain the damage wrought by two historic crises at once, with our healthcare and social services systems stretched past their limits.

<https://www.phila.gov/media/20190710144627/BOH-Resolution-Overdose-Prevention-Facilities-Approved-July-9-2019.pdf>.

In 2019, the last year for which complete data are available, over 1,000 people lost their lives to overdose.⁴ Preliminary data indicate that 2020 will likely be the worst year on record for overdose deaths: as of September 30, 2020, the City had seen 950 overdose deaths.⁵ Overdoses are the third leading cause of death in Philadelphia, killing almost three times as many people as homicides.⁶ 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.⁷

The victims are overwhelmingly working-age people cut down in the prime of their lives.⁸ And while opioid users have historically been predominantly white,

⁴ CHART, Phila. Dep't of Pub. Health, Vol. 5 No. 4, at 2 (May 2020), <https://www.phila.gov/media/20200511105852/CHART-v5e4.pdf>.

⁵ Press Release: "Health Department Warns That 'Fentanyl Is In Everything'", Phila. Dept. of Public Health, Jan. 20, 2021, available at <https://mailchi.mp/phila.gov/health-department-warns-that-fentanyl-is-in-everything>.

⁶ *Health of the City 2020*, Phila. Dep't of Public Health, at 7, available at <https://www.phila.gov/media/20201230141933/HealthOfTheCity-2020.pdf>

⁷ Eichel, Larry and Pharis, Meagan, *Poll Shows Impact of Opioid Crisis on Philadelphians and Their Neighborhoods*, Pew Charitable Trusts (Aug. 6, 2019), available at <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/08/06/poll-shows-impact-of-opioid-crisis-on-philadelphians-and-their-neighborhoods>.

⁸ CHART, May 2020, at 3; Phila. Dep't of Public Health chart, "Unintentional Overdose Deaths by Age Category, 2019", available at <https://www.substanceusephilly.com/unintentional-overdose-deaths>.

recently we have seen an alarming increase in opioid overdose deaths among Black and Hispanic Philadelphians.⁹ One factor behind this shift may be that fentanyl – a powerful synthetic opioid that can kill within minutes – has been seeping into the supply of other illicit drugs like stimulants.¹⁰

Further, for every person who dies of overdose, there are many more non-fatal overdoses that are straining our health care system, first responders, and communities. First responders administered the overdose-reversal drug naloxone to over 3,600 individuals in 2020.¹¹ That same year, over 6,000 people were seen in City emergency rooms for overdoses.¹²

Philadelphia's persistently high overdose numbers are even more disturbing because the City has been pouring resources into every other proven tactic to fight the opioid epidemic. Mayor Kenney has made opioids a priority of his administration. The City's strategy is based on a broad range of best practices

⁹ CHART, May 2020, at 3.

¹⁰ Jan. 20, 2021 Press Release, *supra* note 5.

¹¹ City of Philadelphia Dep't of Pub. Health data, available at <https://www.substanceusephilly.com/naloxone>.

¹² Phila. Dep't of Public Health, Chart: Number of Emergency Department Visits for Overdoses from Opioids or Unspecified Substances, 2016 – 2020, available at <https://www.substanceusephilly.com/opioids>.

recommended by a task force of experts and stakeholders in 2017.¹³ The City has invested in a range of solutions, including opening a 24/7 walk-in center where people can get immediate stabilization with medication-assisted treatment (MAT); increasing funding for recovery housing and inpatient services; aggressively distributing naloxone to first responders, community groups, and people who use drugs; and working with health care providers to prevent over-prescribing of opioid pain medications.¹⁴ Unfortunately, these historic efforts have only managed to keep our overdose death rate from increasing *further*. After a peak of 1,217 deaths in 2017, the death toll has remained steady at over 1,000 lives lost per year.¹⁵

¹³ Final Report & Recommendations, Mayor's Task Force to Combat the Opioid Epidemic in Philadelphia, at 6 (May 19, 2017), www.phila.gov/documents/opioid-task-force-report/.

¹⁴ For an overview of the City's progress on meeting the opioid task force's recommendations, see Dep't of Public Health & DBHIDS, *The Opioid Epidemic in Philadelphia: Implementation of the Mayor's Task Force Recommendations* (Jan. 9, 2019) ("Jan. 9, 2019 Status Report"), available at <https://www.phila.gov/media/20190110101212/The-Opioid-Epidemic-in-Philadelphia-.pdf>.

See also Whalen, Aubrey, *24-hour center opens for opioid treatment: Its purpose is to be there whenever people seek help*, Phila. Inquirer (Jul. 12, 2018); Phila. Dep't of Public Health data, Naloxone Doses Distributed, July 1, 2017 – December 31, 2020, available at <https://www.substanceusephilly.com/naloxone>.

¹⁵ CHART, May 2020, at 2.

COVID-19 has exacerbated our substance abuse crisis, in addition to straining City resources all on its own. After the stay-at-home order was implemented, Philadelphia saw an uptick in overdose-related EMS responses and emergency visits.¹⁶ Our experience is not unique: nationwide, overdoses spiked during lockdowns, likely due to more people using alone, disruptions in the drug supply chain, and increased drug use triggered by economic hardship and social isolation.¹⁷

Though the end of COVID-19 appears to be on the horizon, the opioid epidemic will persist. Philadelphia needs access to any and every public health measure that can help contain this crisis.

B. An Overdose Prevention Site in Philadelphia Will Save Lives, Improve Health Outcomes, and Save on Health Care Costs

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

It seems obvious that, if individuals are going to consume drugs, it is much safer for them to do so under the supervision of medical personnel who are trained

¹⁶ Phila. Dep't of Pub. Health, CHART, Vol. 5 No. 6 (Aug. 2020), https://www.phila.gov/media/20200826103905/CHART_v5e6-1.pdf.

¹⁷ Wan, William and Long, Heather, '*Cries for help*': Drug overdoses are soaring during the coronavirus pandemic, Washington Post (Jul. 1, 2020).

to recognize and reverse overdoses. These facilities have existed since the 1980s in other countries, with not a single reported overdose death on-site.¹⁸ Vancouver's Insite, which was North America's first overdose prevention facility, has demonstrated this life-saving potential: Insite logged more than 3.6 million visits between 2013 and 2019, and it intervened in 6,440 overdoses, with not a single overdose death.¹⁹ Likewise, an "underground" site in an unnamed U.S. city has been operating since 2014, and in its five-year history there were 33 overdoses on-site that were reversed, with no deaths.²⁰

In addition to saving lives, overdose prevention facilities generate other health and public safety benefits when paired with clean needle exchange, peer counseling, and social services (as Safehouse intends to operate). By providing sterile injecting equipment, education, and wound care, overdose prevention sites help prevent death and disability due to HIV, Hepatitis B and C, and skin and soft

¹⁸ Armbrecht E, et al., *Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value; Final Evidence Report*, Institute for Clinical and Economic Review, Jan. 8, 2021, https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821-1.pdf, at 32.

¹⁹ Vancouver Coastal Health, Insite User Statistics, www.vch.ca/public-health/harm-reduction/supervised-consumption-sites/insite-user-statistics.

²⁰ Kral, Alex H., et al., *Evaluation of an Unsanctioned Safe Consumption Site in the United States*, 383 N. Engl. J. Med. 589 (2020).

tissue injury and infection.²¹ These facilities can also offer a valuable onramp to recovery services at the critical moment when a client may be ready to accept treatment. Several independent studies have found that Insite clients are more likely to access drug treatment.²² Additionally, there is no evidence that overdose prevention sites cause any increase in opioid use; instead, their clients are overwhelmingly people who have already been using for many years.²³ These facilities reduce public injecting and unsafe syringe disposal.²⁴ They do not bring more crime or nuisance behavior to the neighborhood.²⁵

²¹ Potier, Chloé et al., *Supervised injection services: What has been demonstrated? A systematic literature review*, 145 *Drug & Alcohol Dependence* 48 (2014), at 62.

²² 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 (2010); Wood, Evan et al., *Rate of detoxification service use and its impact among a cohort of supervised injecting facility users*, 102 *Addiction* 916 (2007); Wood, Evan et al., *Attendance at supervised injecting facilities and use of detoxification services*, 354 *N. Engl. J. Med.* 2512 (2006).

²³ 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).

²⁴ Wood, Evan 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); Salmon, Allison M., et al., *Five years on: What are the community perceptions of drug-related public amenity following the establishment of the Sydney Medically Supervised Injecting Centre?*, *Int'l J. of Drug Pol'y*, Vol. 18 Issue 1, at 46-53 (2007). Potier, Chloé et al., *supra* note 21, at 63.

²⁵ Kilmer, Beau et al., *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States* (Rand Corporation, 2018), at 33-34; Potier, Chloé et al., *supra* note 21, at 63; Evan Wood et al., *Impact of a medically*

Two studies have attempted to quantify some of these proven benefits for Philadelphia specifically. One independent analysis by the Main Line Health System and Thomas Jefferson University estimated that just a single site would have substantial impacts, including:

- Prevention of 24 to 76 overdose deaths per year;
- Prevention of 1 to 18 new HIV infections and 15 to 213 new cases of hepatitis C annually;
- Reducing health care costs for skin and soft tissue injuries associated with injecting drugs by \$1.5 million to \$1.8 million annually; and
- Saving \$123,776 each year on ambulance costs related to overdoses, \$280,683 yearly in emergency room costs, and \$247,971 yearly in reduced hospitalizations.²⁶

Another study that modeled the effect of having one overdose prevention site in Philadelphia predicted a somewhat more modest number of deaths prevented (around 15 deaths per year) but much higher health care savings

supervised safer injecting facility on drug dealing and other drug-related crime, Substance Abuse Treatment, Prevention, & Policy (May 8, 2006), at 13.

²⁶ Larson, Sharon et al., *Supervised Consumption Facilities – Review of the Evidence* (Main Line Health Center for Population Health Research, December 2017), available at https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf.

(\$376,800 in ambulance costs, \$1.9 million in emergency department costs, and nearly \$1.7 million in hospitalization costs).²⁷

The City of Philadelphia cannot afford to do without a service that could save up to 76 lives per year. Overdose prevention facilities are a 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 panel's decision on Philadelphia and other communities that are desperate for any and every tactic that could help turn the tide against the opioid epidemic.

IV. CONCLUSION

For the foregoing reasons, Philadelphia Mayor Jim Kenney and Health Commissioner Dr. Thomas Farley respectfully request that the Court grant rehearing *en banc*.

Respectfully submitted,

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²⁷ Armbrecht E, *supra* note 18, at ES14, 51, 57.

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Dated: March 5, 2021

**CERTIFICATION OF COMPLIANCE WITH RULES 29(b)(4) AND 32(a)
AND REQUIREMENTS FOR ELECTRONIC FILING**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because this brief contains 2,305 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

4. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using *McAfee Endpoint Security version 10.7.0.2000*, and that no virus was detected.

March 5, 2021

/s/ Jennifer MacNaughton
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief via the Court's ECF system,
which will accomplish service on all parties.

March 5, 2021

/s/ Jennifer MacNaughton
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