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 JOSE 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 FEBRUARY 25, 2020 ORDER GRANTING FINAL DECLARATORY JUDGMENT, IN CIVIL ACTION NO. 19–519, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (HON. GERALD A. McHUGH)

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this civil action filed by the United States seeking declaratory relief under the Controlled Substances Act (CSA), 21 U.S.C. §§ 843(f)(1), 856(e), and the Declaratory Judgment Act, 28 U.S.C. § 2201. *See also* 28 U.S.C. § 1331. Safehouse's[1] counterclaims invoked jurisdiction under 28 U.S.C. § 1331, and sought remedies under 28 U.S.C. §§ 2201 and 2202.

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 because the United States filed a timely notice of appeal from the district court's February 25, 2020 order that granted final declaratory judgment in favor of Safehouse and denied the United States' motion for summary judgment. Appx001.[2]

On February 27, 2020, this Court ordered the parties to address its jurisdiction, noting that the district court had dismissed one of Safehouse's counterclaims without prejudice as moot. *See* C.A. Doc. 3.[3] The parties submitted letter responses on March 12, 2020, with both sides agreeing that this Court has jurisdiction to consider the appeal. *See* C.A. Docs. 10, 18.

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[1] Except where necessary to distinguish them, appellees Safehouse and Jose Benitez are collectively referred to as "Safehouse."

[2] "Appx" citations refer to pages of the Joint Appendix.

[3] "C.A. Doc." citations refer to numbered docket entries in this appeal.

On April 10, 2020, the Court referred the jurisdictional question to a merits panel, and directed the parties to address appellate jurisdiction in their briefs. *See* C.A. Doc. 26. Section I of the argument, below, explains why this Court has jurisdiction.

STATEMENT OF ISSUES

1. Appellate Jurisdiction.

The district court's February 25, 2020 order that entered final judgment: (a) found in favor of Safehouse on its primary argument (that its proposed Consumption Room would not violate the CSA); and (b) dismissed without prejudice, as moot, Safehouse's counterclaim (made in the alternative) that enforcement of the CSA against Safehouse would violate the Religious Freedom Restoration Act (RFRA).

Does this Court have jurisdiction over the district court's orders and judgment in this matter?

2. The Legality of Safehouse's Consumption Room.

Safehouse is a nonprofit organization that intends to establish and operate a facility in Philadelphia at which members of the public will use illegal controlled substances such as heroin and illegally obtained fentanyl under medical supervision. Pursuant to 21 U.S.C. § 856(a)(2), it is unlawful to "manage or control any place…and knowingly and intentionally…make available for use, with or without compensation, the place for the purpose of unlawfully…using a controlled substance."

Did the district court err in entering final judgment that Safehouse's intended conduct will not violate 21 U.S.C. § 856(a)(2)?

STATEMENT OF RELATED CASES

The United States is not aware of any other related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

STATEMENT OF THE CASE

I. Relevant Material Facts and Background

Safehouse, a privately funded, non-profit corporation, seeks to open the nation's first "safe injection site" in the City of Philadelphia. Appx683 (Stipulation of Facts (SOF) ¶ 1). Safehouse plans to open a place called a "Consumption Room" where it will permit individuals, called "participants," to consume (*i.e.*, to inject, orally ingest, or inhale) illegal drugs, primarily heroin and illegally obtained fentanyl, under Safehouse supervision. Appx683-84 (SOF ¶¶ 1-3, 11). Safehouse contends that, by providing a place for the use of these illegal drugs, its staff would be able to intervene with medical care and resuscitation in the event of a drug overdose. Appx684 (SOF ¶ 3).

In addition to providing a Consumption Room, Safehouse plans to offer a range of addiction treatment, social, and medical services, including providing sterile syringes, medical care, injection and overdose-prevention education, overdose reversal kits, medication-assisted treatment, and addiction recovery referrals. *Id.* SOF ¶ 9.

With the singular exception of the Consumption Room, all the services Safehouse plans to offer are currently available elsewhere in Philadelphia; Prevention Point Philadelphia, a Safehouse partner

organization with overlapping leadership, has offered them for years. Appx684 (SOF ¶¶ 5-6).

Safehouse will provide access to the Consumption Room to participants who register and undergo a brief physical and behavioral health assessment. Appx684 (SOF ¶¶ 7-8). Once there, each Safehouse participant may be assigned an individual station and 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." Appx648-85 (SOF ¶¶ 11, 13-14).

While Safehouse states that it intends to encourage participants to enter drug treatment, there is nothing in its medical protocol that suggests Safehouse will specifically caution against drug use. Appx684 (SOF ¶¶ 9-10). Safehouse will not limit the number of times participants may use its Consumption Room, and will not require participants to enter treatment or accept a treatment referral as a condition of using the Consumption Room. Appx685 (SOF ¶ 23).

Safehouse staff will be available to advise Consumption Room participants on sterile injection techniques. *Id.* (SOF ¶ 16). They will also supervise participants' consumption and, if they deem it necessary,

intervene with medical care, including administering overdose reversal agents, such as naloxone. *Id.* (SOF ¶ 17). Safehouse will direct its staff not to provide, administer, or dispense any controlled substances, and Safehouse intends that its staff will not handle controlled substances. *Id.* (SOF ¶ 15).

After participants have consumed illegal drugs, Safehouse staff will direct Consumption Room participants to a post-use "observation room." Appx684-85 (SOF ¶¶ 6, 19). Safehouse will not require participants to remain in the observation room for any length of time. Appx685 (SOF ¶¶ 19-20). In the observation room and at checkout, Safehouse plans to provide certified peer counselors, recovery specialists, social workers, and case managers to offer services and treatment. *Id.* (SOF ¶ 21).

Safehouse asserts that supervised consumption will aid potential treatment based on its belief that its participants will be more likely to engage in counseling and accept offers of medical care after they have consumed drugs and are not experiencing withdrawal symptoms. *Id.* (SOF ¶ 22).

Safehouse plans to open at least one facility in Philadelphia as soon as possible, *id*. (SOF ¶ 24), and demonstrated that intent immediately after the district court entered declaratory judgment in its favor.[4]

II. Procedural History and Rulings on Review

On February 5, 2019, the United States filed a Complaint for Declaratory Judgment against Safehouse. Appx107. Subsequently, it filed an Amended Complaint naming Jose Benitez, Safehouse's president and treasurer, as a defendant. Appx161. The Amended Complaint seeks a declaration that Safehouse's Consumption Room would violate 21 U.S.C. § 856(a)(2), which makes it unlawful to "manage or control any place…and knowingly and intentionally…make available for use, with or without compensation, the place for the purpose of unlawfully…using a controlled substance." Appx164-65.

Safehouse answered and filed counterclaims, seeking a declaration under 28 U.S.C. § 2201 that its Consumption Room would not violate 21

[4] Safehouse was prepared to open a facility immediately after the district court entered judgment in its favor, but delayed opening due to widespread community outrage and the condemnation of several members of Philadelphia City Council and the Pennsylvania state legislature. *See, e.g., https://www.npr.org/2020/02/26/809608489/philadelphia-nonprofit-opening-nations-first-supervised-injection-site-next-week; https://whyy.org/articles/safehouse-hits-pause-on-plan-to-open-supervised-injection-site-in-south-philly*.

U.S.C. § 856 and a declaration that prohibiting its contemplated conduct would violate the Commerce Clause of the U.S. Constitution and RFRA. Appx115, Appx158, Appx194.

The United States moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Appx205. The district court then conducted an evidentiary hearing, *see* Appx345,[5] and subsequently heard oral argument. Appx589.

On October 2, 2019, the district court issued a memorandum opinion and order denying the United States' Motion for Judgment on the Pleadings. Appx013, Appx015. The ruling addressed whether § 856(a)(2) prohibited Safehouse's proposed Consumption Room, but did not reach Safehouse's affirmative defenses asserted under the Commerce Clause and RFRA.

In pursuit of a final appealable order, the parties stipulated to a set of facts upon which the district court could enter final declaratory judgment. Appx683-686. On February 25, 2020, the district court issued an order, Appx004, and a memorandum opinion, Appx006, ruling on the parties' cross-motions, entering final judgment in favor of Safehouse and against

[5] In deciding the parties' motions, the district court "disregarded all witness testimony presented at the evidentiary hearing." Appx018.

the United States, and holding that "the establishment and operation of [Safehouse's] overdose prevention services model, including supervised consumption in accordance with the parties' stipulated facts…does not violate 21 U.S.C. § 856(a)." Appx005.

The United States filed a timely notice of appeal on February 26, 2020. Appx001.

SUMMARY OF ARGUMENT

1. This Court Has Appellate Jurisdiction.

Although the district court's February 25, 2020 order dismissed Safehouse's counterclaim without prejudice as moot, the order was nonetheless final and appealable. Having granted Safehouse the primary relief it sought (a declaratory judgment that its Consumption Room would not violate the CSA), it was unnecessary for the district court also to decide Safehouse's moot counterclaim for alternative relief.

2. Safehouse's Consumption Room Will Violate the CSA.

A plain meaning application of § 856(a)(2) to the stipulated facts yields a clear result: that the CSA forbids making a place available for repeated and continuous illegal drug use and, therefore, prohibits Safehouse's Consumption Room. The CSA makes it unlawful to manage any place where people use such drugs, regardless of compensation or the property owner's purported ultimate motive.

Even while ruling against the Government, the district court held that Safehouse: (1) will commit the requisite *actus reus*, making a place available for illegal drug use, Appx028 ("Safehouse will manage or control a place and make that place available to participants [who]….undisputedly will use drugs on Safehouse's property."); and (2) will possess *mens rea* in

that it will do so with knowledge and intent, Appx050 ("Safehouse knows and intends that some drug use will occur on its property[.]").

It is also plain that Safehouse would make the place available "for the purpose" of illegal use under § 856(a)(2). For one thing, all of the five federal circuits to examine the question of *whose* purpose matters under § 856(a)(2) have concluded that liability attaches against a defendant when the *user* of a property—not the defendant who makes it available—has the purpose of using illegal drugs (as long as the defendant making the property available has knowingly permitted the user to engage in the illegal activity). The participants whom Safehouse intends will use its Consumption Room will undisputedly do so "for the purpose" of unlawful drug use, and thus Safehouse is squarely within the prohibition of § 856(a)(2).

Even were Safehouse's purpose the relevant "purpose" under § 856(a)(2), the statutory prohibition would still apply: the core premise of Safehouse's model is that members of the public will come to its property to use drugs illegally. Although Safehouse contends that its ultimate motive is beneficent, this Court has held that an "end motive" cannot negate the intent or purpose to perform illegal acts–namely, here, making a place available for illegal drug use.

In reaching a contrary conclusion, the district court gave short shrift to this Court's controlling precedent that the plain language analysis of the statute must come first, and that the inquiry must cease if the statutory language is unambiguous. Instead, the district court explored the legislative history, taking as its first and guiding principle of interpretation that "facilities such as safe injection sites were [not] within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003." Appx016-17. This principle is both incorrect and irrelevant.

In doing so, the district court largely skipped over plain meaning analysis and instead sought to divine what Congress contemplated when the statute was passed, a method that this Court has specifically eschewed. *In re Armstrong World Indus.*, 432 F.3d 507, 513 (3d Cir. 2005) ("If the meaning is plain, we will make no further inquiry unless the literal application of the statute will end in a result that *conflicts* with Congress's intentions.") (emphasis added). Even were the Court to consider legislative history here, such history supports the Government's view because Congress intended the statute to prohibit congregated drug activity, which threatens the safety and security of neighborhoods and the community, and which is exactly what Safehouse proposes.

Without question, our nation presently faces a crisis arising from the illegal use and abuse of opioids, which has caused misery and an intolerable number of deaths throughout the United States. The United States is dedicated to using all lawful means to address this problem. But all actions to address the issue must comply with the law. The law applicable to consumption sites is clear: Safehouse's proposed operation of a Consumption Room is illegal, with no relevant exceptions. The remedy for those who disagree with this law lies with Congress, not in the courts. Accordingly, the United States requests that this Court reverse the district court's judgment and instruct it to enter judgment for the United States.

ARGUMENT

I. This Court Has Appellate Jurisdiction.

A. Standard of Review

This Court exercises plenary review in considering whether it has jurisdiction before reaching the merits of an appeal. *State Nat'l Ins. Co. v. Cty. of Camden*, 824 F.3d 399, 404 (3d Cir. 2016).

B. The District Court's Order Is Final and Appealable.

This Court directed the parties to address appellate jurisdiction in their briefs, noting that the district court had dismissed Count II of Safehouse's counterclaims without prejudice as moot. *See* C.A. Doc. 3.

The district court's February 25, 2020 order granting final judgment in Safehouse's favor is a "final decision[] of [a] district court of the United States," appealed by the United States, and this Court therefore has jurisdiction under 28 U.S.C. § 1291. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (a "final decision" is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

The district court's dismissal, without prejudice, of Safehouse's counterclaim under RFRA does not deprive this Court of jurisdiction. The district court dismissed that counterclaim as moot because it had granted Safehouse the full relief it sought based on the district court's construction

of the CSA; therefore, it was unnecessary to decide whether Safehouse would be entitled to that same relief on an alternative basis.

A district court need not reach every claim if its decision as to one claim clearly moots another. *See* 15A Wright & Miller, *Fed. Prac. & Proc.* § 3914.7 ("A pragmatic approach is often taken…if the only claims not decided have been abandoned or *are clearly mooted by the matters expressly decided*.") (emphasis added). "In short, a plaintiff can win only once, and so it does not matter how many other theories are left on the table if the claim itself has been resolved." *Hamm v. Ameriquest Mortg. Co.*, 506 F.3d 525, 526-27 (7th Cir. 2007). This is true even though, "should such a judgment be reversed on appeal, the lawsuit would not be over, because the plaintiff had an alternative theory of liability." *Ind. Harbor Belt RR v. Am. Cyanamid Co.*, 916 F.2d 1174, 1183 (7th Cir. 1990); *see also Analect LLC v. Fifth Third Bancorp*, 380 F. App'x 54, 55-56 (2d Cir. 2010) (unpublished) (finding jurisdiction although certain claims were dismissed "without prejudice," which meant they could be revived "only if they cease to be moot, which would occur only if this court reverses…and reinstates plaintiff's claim").

"Where the effect of a district court decision is to accomplish all that the parties asked the court to accomplish, and where the parties agree there

cannot be—and, by court order, there will not be—any further proceedings in the district court as part of the same action, the district court's decision must be considered final for purposes of § 1291." *Alcoa v. Beazer E.*, 124 F.3d 551, 560 (3d Cir. 1997).

Here, the district court granted Safehouse the full relief it sought—a declaratory judgment stating that § 856(a)(2) does not prohibit its proposed operation of a Consumption Room. The district court's order thus "ended the litigation on the merits," and "[t]he District Court had nothing left to do." *Bryan v. Erie Cty. Office of Children & Youth*, 752 F.3d 316, 320-21 (3d Cir. 2014).

Count II of Safehouse's counterclaims necessarily seeks relief in the alternative—*i.e.*, Safehouse contends that *if* its proposed conduct violates § 856(a)(2), *then* enforcement of the CSA against it would violate RFRA.[6] Because the district court held that § 856(a)(2) does not bar Safehouse's proposed conduct, it would make little sense also to address whether that statute burdens Safehouse's exercise of religion.

[6] RFRA prevents the federal government from "substantially burden[ing] a person's exercise of religion" unless it "demonstrates that application of the burden to the person–(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. §§ 2000bb-1(a), (b).

The finality of the district court's judgment is even clearer because it arises under the Declaratory Judgment Act. A district court considering a dispositive motion seeking entry of declaratory judgment "may decide some of the issues raised and refuse to rule on others[.]" *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 210-11 (3d Cir. 2001). Once it "has ruled on all of the issues submitted to it, either deciding them or declining to do so, the declaratory judgment is complete, final, and appealable." *Id.* at 211.

Finally, this appeal does not present the finality concerns raised in the cases cited in this Court's February 27, 2020 Order:

(a) In *Weber v. McGrogan*, 939 F.3d 232 (3d Cir. 2019), the *pro se* plaintiff attempted to appeal the district court's dismissal of her complaint without prejudice by invoking the "stand on the complaint" doctrine, despite not meeting its requirements; the district court's order was therefore not final. *Id.* at 234-41. Here, the district court gave Safehouse the relief it sought, obviating the need to decide whether a prosecution of Safehouse under the CSA would violate RFRA.

(b) In *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the appellants sought relief under two claims. The district court granted summary judgment for the appellees, extinguishing the first; the appellants initially withdrew the second "without prejudice." *Id.* at 201. After this Court questioned its jurisdiction under 28 U.S.C. § 1291, the appellants "represent[ed] that they withdraw finally and with prejudice" the second claim, which this Court held cured any potential jurisdictional defect. *Id.* at 202. There, dismissal with prejudice affected appellate jurisdiction because, in its absence, the appellants had not received

the relief requested and had another path they could still pursue before the district court. Here, Safehouse received the relief it sought, rendering moot its alternative count for relief under RFRA (which had assumed that § 856 prohibits its plan). Thus, the district court's order ended the litigation on the merits.

(c) Finally, *National Union Fire Insurance Co. of Pittsburgh v. City Savings F.S.B.*, 28 F.3d 376 (3d Cir. 1994), examined whether the district court's order barring an affirmative defense was final for purposes of appeal where the counterclaim to which the defense applied had not been fully adjudicated. *Id.* at 382. This Court held that the order barring the affirmative defense was not final because the counterclaim remained in controversy. *Id.* Here, the United States does not appeal an order barring an affirmative defense; it appeals a final declaratory judgment against it, where nothing remains in controversy unless this Court were to reverse. The district court's determination is thus a final order over which this Court has jurisdiction. *See Doe v. Hesketh*, 828 F.3d 159, 166 (3d Cir. 2016).

In sum, the district court's order entering declaratory judgment for Safehouse was a final and appealable order, and this Court has jurisdiction over the United States' appeal under 28 U.S.C. § 1291.

II. The District Court's Judgment Should Be Reversed Because Safehouse's Proposed Consumption Room Will Violate 21 U.S.C. § 856(a)(2).

A. Standard of Review

This Court reviews a district court's decision to grant a declaratory judgment for abuse of discretion. *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 138 (3d Cir. 2014). However, in reviewing a grant of declaratory judgment, this Court exercises plenary review over the district court's conclusions of law. *Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 30 (3d Cir. 1995). The parties have stipulated to all material facts. Thus, the parties' dispute is purely one of law, over which this Court exercises plenary review.

B. Safehouse's Proposed Consumption Room Will Violate the Plain Meaning of 21 U.S.C. § 856(a)(2).

Safehouse's proposed Consumption Room would violate 21 U.S.C. § 856(a), which makes it a crime and an offense subject to civil remedies to either:

> (1) knowingly open…or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; [or]
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

21 U.S.C. § 856(a). Because Safehouse will manage or control a place in which people will be invited to use illegal drugs, and Safehouse knows and intends that those people will illegally use drugs within its facility, Safehouse's conduct falls squarely within the prohibition of § 856(a)(2) under the statute's plain language. As the district court found, Safehouse "will manage or control any place" and "knowingly and intentionally" make it available to people "who undisputedly will use drugs on Safehouse's property." Appx028. The sole dispute, in the district court's view, was whether Safehouse would take those actions "for the purpose of" unlawful drug use. *Id.*; *see also* Appx684-85 (SOF ¶¶ 11, 13, 14, 17, 23).

1. Section 856(a)(2) Prohibits Safehouse from Opening a Consumption Room Because the People Who Use It Will Have the Purpose of Illegal Drug Use.

In evaluating § 856(a)(2), a court must begin with the language of the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* The inquiry "must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (internal citations

omitted). "Where the statutory language is unambiguous, the court should not consider statutory purpose or legislative history." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010).

As noted, the district court agreed that (1) Safehouse would "manage" and "control any place" as either an "owner" or "lessee" and (2) Safehouse would "knowingly and intentionally" "make available" a place for people to use illegal drugs. Appx033. But the district court believed Safehouse would not be doing so "for the purpose of unlawfully…using a controlled substance," incorrectly concluding that Safehouse (rather than the people who enter its premises to use drugs) is the actor that must have the requisite "purpose" to violate § 856(a)(2). *See* Appx033.

All five federal circuits that have previously addressed the issue have held, unanimously, that the relevant "purpose" under § 856(a)(2) is not that of the property manager (Safehouse), but that of the so-called "participants" (the people who would use illegal drugs at Safehouse's facility).[7] And all these circuit courts have found the language of § 856(a)(2)

[7] Other than the district court's outlier decision in this case, district court decisions in this Circuit are in full accord with the other circuit court decisions. *United States v. Blake*, 2009 WL 1124957, at *2 (D.V.I. Apr. 24, 2009) (holding, in rejecting a challenge to conviction under § 856(a)(2), "the Government has proven that [the defendant] knowingly and intentionally allowed her home to be used for the purpose (albeit [her

unambiguous. This Court should join its sister circuits in holding, too, that the meaning of § 856(a)(2) is plain.

The Fifth Circuit was the first to address § 856(a)(2)'s purpose requirement. *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990). The defendant, Chen, had purchased a motel that became an area for illegal drug dealing and use. *Id.* at 185. Chen conceded awareness that drug transactions were taking place in her motel and a jury convicted her under both 21 U.S.C. § 856(a)(1) and (a)(2). The trial court charged the jury to find Chen guilty under both § 856(a) provisions if she deliberately ignored unlawful conduct that should have been obvious. The Fifth Circuit reversed with regard to § 856(a)(1), holding it requires the defendant to have the purpose or intention to manufacture, distribute, or use a controlled substance. *Id.*

In contrast to § 856(a)(1), the Fifth Circuit held that § 856(a)(2)—the provision at issue here—"is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug

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brother's] purpose) of manufacturing cocaine base and storing cocaine powder"); *United States v. Butler*, 2004 WL 2577631, at *3 (E.D. Pa. Oct. 6, 2004) (upholding conviction for violation of § 856(a)(2), reasoning that "the evidence linking [the defendant] to the apartment was enough for a jury to conclude that he was the lessee or occupant and that he had made the space available for drug distribution").

activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use…for the purpose of unlawfully'" engaging in such activity. *Id*. Affirming the § 856(a)(2) conviction, the court held that "under § 856(a)(2), the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose)." *Id*. (internal citation omitted).

The *Chen* court noted that "any other interpretation would render § 856(a)(2) essentially superfluous." *Id*. at 190. If "purpose" referred to the property owner in both subsections, then (a)(2) would say nothing different than (a)(1). As the court explained, it "is well established that a statute should be construed so that each of its provisions is given its full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided." *Id*. (internal quotations omitted); *see also Pomper v. Thompson*, 836 F.2d 131, 133 (3d Cir. 1987) ("The cardinal principle of statutory construction" requires courts to "give effect, if possible, to every clause and word of [a] statute.") (internal citations omitted).

Soon after the decision in *Chen*, the Ninth Circuit, in *United States v. Tamez*, upheld a conviction under § 856(a)(2) of a defendant who allowed his employees to use his car dealership to distribute cocaine. 941 F.2d 770

(9th Cir. 1991). While there was no evidence that Tamez himself sold cocaine, the government presented evidence of undercover cocaine purchases at the dealership from Tamez's employees and that other witnesses had delivered and purchased cocaine there. Like Safehouse, Tamez contended that a violation of § 856(a)(2) required that he personally had the purpose to use the place for manufacturing drugs or other prohibited activities. He argued that the statute could not apply to him because his sole purpose was to run a car dealership.

The Ninth Circuit rejected Tamez's claim, holding that the meaning of "purpose" in § 856(a)(2) is "not ambiguous." *Id.* at 773. As the court explained, "Tamez' assertion that the statute requires that he *intend* to use the building for a prohibited purpose under section 856(a)(2)…ignores the plain meaning and interrelation of the two § 856 provisions." *Id.* at 774 (emphasis in original). Section 856(a)(1) "applies to purposeful activity and as such, if illegal purpose is, as Tamez suggests, a requirement of 856(a)(2), the section would overlap entirely with 856(a)(1) and have no separate meaning." *Id.*

The *Tamez* court found it "clear" that "[§ 856](a)(1) was intended to apply to deliberate maintenance of a place for a proscribed purpose, whereas (a)(2) was intended to prohibit an owner from providing a place

for illegal conduct, and yet to escape liability on the basis of either lack of illegal purpose, or of deliberate indifference." *Id.* Even though there was "no evidence that the business or its buildings were established or maintained for the purpose of drug activities, section 856(a)(2) requires only that proscribed activity was present, that Tamez knew of the activity and allowed that activity to continue." *Id.*; *see also United States v. Ford*, 371 F.3d 550 (9th Cir. 2004) (reaffirming distinction between § 856(a)(1) and (a)(2)).

The other three circuit courts that have considered the same issue have cited the well-reasoned holdings of *Tamez* and *Chen*. The Second Circuit has held it is the purpose of the drug dealer who used the property, not the property owner's purpose, that matters under § 856(a)(2). *United States v. Wilson*, 503 F.3d 195, 197-98 (2d Cir. 2007). As the court explained, "[t]he phrase 'for the purpose,' as used in this provision, references the purpose and design *not* of the person with the premises, but rather of those who are permitted to engage in drug-related activities there." *Wilson*, 503 F.3d at 197-98 (emphasis in original).

The Seventh Circuit has observed that, "[s]everal circuits, including this one, have held that knowing or 'remaining deliberately ignorant' satisfies the knowledge component of § 856(a)(2)." *United States v.*

Ramsey, 406 F.3d 426, 431 (7th Cir. 2005) (citing, *inter alia*, *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) ("In (a)(2) the 'purpose' may be that of others; the defendant is liable if he manages or controls a building that others use for an illicit purpose, and he either knows of the illegal activity or remains deliberately ignorant of it.")).

Most recently, the Eighth Circuit explored the issue in depth in *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013), agreeing with the other circuits' unanimous views. *Tebeau* concerned a campground owner who held music festivals where drug use was widespread. Tebeau, the owner, was aware of the drug activity and, echoing Safehouse's proposal here, even operated a medical facility on the campground known as "Safestock," where campers who had overdosed during the festival could go for medical treatment. *Id.* at 958.

Tebeau argued on appeal that § 856(a)(2) required proof that he had the purpose that illegal drugs would be stored, distributed, manufactured, or used on his property. The Eighth Circuit rejected this argument, agreeing with its sister circuits that § 856(a)(2) requires only that a defendant know and intend that drug sales and use were taking place on his property. *Id.* at 959-61. Considering that the drug sellers openly marketed their products and campers who overdosed were taken to "Safestock," the court held that

"[s]uch open and obvious drug use is precisely the conduct prohibited by § 856(a)(2)'s plain language[.]" *Id*. It would be hard to imagine a statement more tailored to what Safehouse proposes here.

These five circuit courts' reading of § 856(a)(2) is correct as a textual matter. Moreover, this reading accords with the statutory structure of § 856 and its meaning within the CSA as a whole.

First, as these circuit cases warned, the district court's interpretation of § 856(a) functionally collapses its subsections, rendering § 856(a)(2) superfluous. Under the district court's reading of § 856(a), Appx040, any conduct that subsection (a)(2) prohibits would also fall under subsection (a)(1). Under (a)(1), the analysis would be whether Safehouse would "maintain [a] place…for the purpose of" illegal use. Under (a)(2), the analysis would be whether Safehouse would "manage or control any place" that it would "make available…for the purpose of" illegal use. If Safehouse's "purpose" is the relevant one under both subsections, (a)(2) would be redundant.

The district court attempted to avoid this problem by speculating–without any textual support–that (a)(1) exclusively covers a person who uses his property for his own unlawful drug activity, whereas (a)(2) concerns a person who makes the property available to others for the

purpose of *those* individuals engaging in unlawful drug activity. Appx040. But nothing in the text of (a)(1) excludes possible scenarios involving third-party use; in other words, (a)(1) could also cover a situation in which the property owner has the purpose of engaging in illegal drug activity, but does so by making the property available (leasing it, renting it, *etc.*) to others so that they can engage in illegal activity. Instead, as the five circuits correctly concluded, the provisions are distinguished by the person *whose purpose is at issue*.

Moreover, the five circuits' interpretation logically attaches "purpose" in both subsections with the person performing the illegal drug activity, while "knowingly" and "knowingly and intentionally," respectively, refer to the person controlling the property. *See* 21 U.S.C. § 856(a).

Second, § 856(a)(2) cannot refer to the property possessor's purpose in the same way as (a)(1) because, if it did, the statute would be self-defeating, permitting illegal conduct to occur. As long as the property possessor could assert an alternative purpose, despite his knowledge and intention that illegal drug activity take place at his property, he would escape liability. This would lead to all sorts of absurdities.

For example, a drug dealer who allows "clients" to use his property to inject drugs could say that his purpose is to make money, not foster drug

use. Under the district court's analysis, this dealer's conduct would not be prohibited under § 856(a)(2), even if he concedes that drug use effectuates or is a necessary pre-condition to his ultimate aim of making a living. Closer to the facts at hand, the district court's interpretation would sanction a concerned neighbor who makes his property available for large-scale drug use, drug dealing, or even manufacturing, as long as his ultimate purpose is a supposedly benevolent desire to bring the conduct off the streets and make the community safer.[8]

The district court waved away such hypotheticals on the basis that a court would not be "duped" into believing a defendant's assertion regarding his primary purpose. Appx034-35 n.15. But, under the district court's reading of the statute, a defendant could seek to escape liability by introducing evidence that its overriding purpose for the property was not unlawful (for example, operating a hotel, running a car dealership, or holding a music festival). In short, the district court's erroneous

[8] Such a hypothetical is not far from reality in Canada, where injection facilities have been legalized. As the COVID-19 pandemic set in, the British Columbia government considered delivering hydromorphone directly to addicts over fears that the virus will shrink the illegal market for heroin. *See, e.g.*, Eva Uguen-Csenge, "B.C. releases plan to provide safe supply of drugs during COVID-19 pandemic," CBC, Mar. 27, 2020, available at https://www.cbc.ca/news/canada british-columbia/safe-supply-drug-plan-covid-1.5511973.

interpretation would have undone the convictions that each of the five circuit courts affirmed.

Third, the district court's reading of the statute makes the word "intentionally" and the phrase "for the purpose of" redundant. Section 856(a)(2) contains three words or phrases relating to the required mental state: "knowingly," "intentionally," and "for the purpose of." By comparison, section (a)(1) contains only two of those words or phrases, "knowingly" and "for the purpose of."

Under the district court's reading of (a)(2), "intentionally" serves no function if "for the purpose of" applies to the property owner's purpose. Indeed, the district court acknowledged that, under its reading, the word "intentionally" would do nothing more than "further emphasize[] that the actor allowing others to use the property must do so 'for the purpose of' drug activity." Appx037, Appx043. By contrast, the correct reading makes each phrase operative. In (a)(2), "knowingly and intentionally" defines the property manager's requisite *mens rea* and "for the purpose of" defines the third party's required mental state. Accordingly, the district court erred when it stated that the five circuits' reading of the statute "fail[s] to assign any meaning to the term 'intentionally.'" Appx043.

In sum, the statutory language of § 856(a)(2) is not ambiguous. The Government is not required to show that the defendant itself has the purpose to manufacture, distribute, store, or use illegal drugs on its own premises to establish a § 856(a)(2) violation. Instead, the Government must show merely that Safehouse knowingly and intentionally would allow people onto its property who themselves have the purpose to use illegal drugs. This Court should join its five sister circuits in so holding, and reverse the district court's outlier, atextual interpretation of the statute.

2. Even Were Safehouse's Purpose Relevant Under § 856(a)(2), Safehouse Would Still Violate the CSA Because Safehouse Has a "Conscious Object" to Allow Illegal Drug Use Within Its Consumption Room.

As explained above, the district court's reading of § 856(a)(2) is erroneous. But even assuming, for the sake of argument, that the district court's interpretation were correct, Safehouse's conduct would still violate § 856(a)(2). This is because, applying binding Third Circuit precedent to the stipulated facts, Safehouse *would* be making its property available for use by others "for the purpose" of illegal drug use.

As set forth in its model jury instructions, this Court defines "purposely" as the "conscious object to cause a specific result." 3d Cir. Model Crim. Jury Instr. § 5 (citing *United States v. United States Gypsum*

Co., 438 U.S. 422, 445 (1978)). In this construction, "purposely" is often interchangeable with "intentionally." *Id.*; *see also Voisine v. United States,* 136 S. Ct. 2272, 2278 (2016) ("intentionally" and "purposefully" both mean "to have that result as a 'conscious object'"). Similarly, the district court referred to the dictionary definition of "purpose" as "an objective, goal, end, aim, or intention." Appx056.

It is indisputably Safehouse's intention that people will use illegal drugs in its Consumption Room. As publicized on its website and asserted before the district court, Safehouse seeks to open the first "safe injection site" in the United States, Appx684 (SOF ¶ 1), which is an operation that includes drug use directly in its description. *See also* Appx685 (SOF ¶ 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.") (quoting Safehouse Medical Protocol); *id.* (SOF ¶ 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.").

As Safehouse concedes, the *only* thing that distinguishes Safehouse from other public health programs offering services such as sterile syringes,

referrals to treatment, and social services, is that Safehouse will provide a place in which drug users can use illegal drugs. Appx685 (SOF ¶ 6). Accordingly, illegal drug use is Safehouse's distinguishing feature. Nevertheless, the district court found that Safehouse could escape liability under § 856(a)(2) because its supposed ultimate goal is to reduce unlawful drug use. This proposition is wholly inconsistent with the law.

This Court has rejected such ends-justify-the-means defenses, emphasizing that an "end motive" cannot negate the intent or purpose to perform illegal acts. *United States v. Romano*, 849 F.2d 812, 816 n.7 (3d Cir. 1988). In *Romano*, the defendant broke into a naval air station, damaging military aircraft, and was convicted of "entering a military installation for an unlawful purpose." *Id.* at 812-13. This Court rejected that the defendant's "end motive of protecting innocent lives could [] adequately negate or explain her specific intent to achieve this end through breaking into a military installation and disabling military aircraft." *Id.* at 816 n.7. The only relevant intent was her "intent in entering government land and damaging government property"–the intent that 18 U.S.C. § 1382 explicitly prohibits–"rather than her intent to save lives." *Id.*; s*ee also United States v. Epstein,* 91 F. Supp. 3d 573, 593 (D.N.J. 2015) ("motive cannot be used to negate specific intent"), *aff'd sub nom.*, *United States v. Stimler*, 864 F.3d

253 (3d Cir. 2017), *partially vacated on other grounds by United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2019). This longstanding distinction between intent and motive is recognized in this Circuit's Model Jury Instructions. *See* 3d Cir. Model Crim. Jury Instr. § 5.04 ("Motive is what prompts a person to act. Intent refers only to the state of mind with which the particular act is done.").

The Eighth Circuit has similarly drawn this distinction between "criminal intent" and "motive." In *United States v. Kabat*, 797 F.2d 580, 582 (8th Cir. 1986), the defendants broke into a military installation and damaged equipment. They were convicted of "willfully injur[ing], [or] destroy[ing]" national-defense material with "intent to injure, interfere with, or obstruct the national defense of the United States." *Id.* at 583-84. The defendants argued that they lacked "criminal intent" because they were "acting as required by their faith and the Bible by serving as 'peacemakers[.]'" *Id.* at 587. The Eighth Circuit rejected this argument, drawing a distinction between "criminal intent" and "motive":

> "Criminal intent" properly used refers to the mental state required by the particular statute which makes the act a crime. **Once that intent has been proven, it is immaterial that a defendant may also have had some secondary, or even overriding, intent. If the intent is overriding—that is, it reflects the ultimate end sought which compelled the defendant**

> **to act—it is more properly labeled a "motive."** This is true even with respect to a "specific intent" statute where the intent itself is stated in terms of an "end," for example, breaking and entering with intent to commit theft. The "end" of stealing money still could be just a means to another more valued consequence, such as giving to the poor; that ultimate goal, however, would not replace or negate the intent of stealing and would still be a "motive," while the intent to steal would still provide the "specific intent" required by the statute.

Id. at 587-88 (citations omitted) (emphasis added).[9] Thus, even though the *Kabat* defendants' "ultimate desire" was to "sav[e] lives," this motive could not negate their intent under the criminal statute. *Id.* at 588.

The principle that motive is not relevant when considering a person's purpose or intent under a criminal statute is well-established. *See, e.g., United States v. Platte*, 401 F.3d 1176, 1181-82 (10th Cir. 2005) (defendants' "high-minded motives" to raise awareness of the dangers of nuclear weapons "did not negate their intent" to disrupt military operations, and noting that "the worthiness of one's motives cannot excuse the violation in the eyes of the law"); *United States v. Ahmad*, No. 98-1480,

[9] *See also In re Weitzman*, 426 F.2d 439, 452 (8th Cir. 1970) ("One in his heart may believe, in the Robin Hood tradition, that it is proper to steal from the rich and give to the poor, but we still prosecute the thief for his stealing.").

1999 WL 197190, at *1 (2d Cir. Mar. 31, 1999) (defendant's "innocent motive…does not negate either his intent nor his knowledge"); *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (Stevens, J.) (emphasizing that "if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue").

Simply put, a defendant's "ultimate" motive does not excuse its intention to engage in illegal conduct. As then-Judge Stevens' opinion in *Cullen* pointedly explains:

> One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate. **A simple rule, reiterated by a peaceloving scholar, amply refutes appellant's arrogant theory of defense: "No man or group is above the law."**

Id. at 392 (emphasis added). This statement is acutely relevant to the situation here. Like the *Cullen* defendants, Safehouse does not stand above the law, and may not evade the democratic process of law-making. Accordingly, Safehouse's purported "end motive" to save lives does not

excuse the fact that by opening a consumption site, it would engage in the very conduct–and exhibit the exact intent–that 21 U.S.C. § 856(a) prohibits.

The district court failed to engage meaningfully with any of these cases. Instead, it attempted to dispatch them in a single sentence, stating that, "unlike the civil disobedience cases the Government cites, Safehouse does not concede that it is violating § 856(a) or any other law." Appx049. That is incorrect. The defendants in these cases did not concede that they were violating the law. To the contrary, they and Safehouse presented the exact same defense: they admitted the illegal act, but denied the *mens rea*.[10] In the cases above, the defendants conceded, for example, breaking into a government facility, but challenged whether they did so with the required purpose, *e.g.*, the "intent to…obstruct the national defense of the United States." *Kabat*, 797 F.2d at 583-84. Just like Safehouse, they contended that their only intent was, *e.g.*, to save lives.

According to its plan, Safehouse will commit the act that § 856(a)(2) prohibits: making a place available for illegal drug use. The only question, then, is whether Safehouse satisfies the *mens rea* component. And just like

[10] The district court conceded this distinction in a footnote. Appx048 n.35 ("Technically, certain defendants in *Romano* asserted they lacked the requisite mens rea[.]").

the cases above, the relevant inquiry is only Safehouse's intent to make the property available for illegal use, not its asserted motive for doing so. *Romano*, 849 F.2d at 816 n.7 (holding that the only relevant intent was her "intent in entering government land and damaging government property…rather than her intent to save lives"). Here, Safehouse intends that its Consumption Room will host illegal drug use—without such use, there would be no "consumption" and Safehouse's aim of being the first supervised injection site in the country would be unrealized.

Once the requisite intent is proven, "it is immaterial that a defendant may also have had some secondary, or even overriding, intent." *Kabat*, 797 F.2d at 587-88. Thus, even if Safehouse had the ultimate motive to resuscitate and potentially rehabilitate drug users, that is irrelevant under the law. That is because Safehouse still has the purpose to make its facility available for illegal drug use as a necessary predicate to the supposed ultimate motive.

In short, the district court improperly conflated Safehouse's "purpose" with its asserted ultimate motive. But Safehouse's ultimate motive cannot excuse what is otherwise intentional and purposeful illegal conduct. Property owners cannot avoid liability for an activity that they know and intend will happen on their property by asserting that the

ultimate purpose of their property is something else—a residence, a nightclub, a retail business, or even a place that hopes to reverse overdoses. *See United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995) (noting it is "highly unlikely" that anyone would openly maintain a place for the *sole* illicit purpose of illegal drug activity without an attendant legitimate purpose).

Under the district court's theory, the crack house operators and rave promoters, which the court viewed as "prototypical examples" of entities within § 856(a)(2)'s scope, could avoid culpability by arguing that their ultimate "objective, goal, or end" was to make money—and that providing a place for illegal drug use was only the *means* by which they achieved that end. Just as such a defense would fail those defendants, Safehouse cannot justify persistent illegal drug use on its property by relying on its supposed ultimate objective. Under established law, Safehouse's asserted beneficent motive is simply immaterial to whether it will violate the statute.

3. Even if Safehouse's Purpose Were Relevant Under § 856(a)(2), Safehouse Would Still Violate the Statute Because Safehouse's Purpose of Allowing Illegal Drug Use in Its Consumption Room Is More Than a Mere "Incidental" Purpose.

As explained above, the correct interpretation of the word "purpose" in § 856(a)(2) refers to the purpose of the drug users who will be invited

onto the property. Even if this Court were to adopt the district court's incorrect reading and look only to Safehouse's purpose, Safehouse would still violate § 856(a)(2) because it is Safehouse's "conscious object" to allow illegal drug use within its Consumption Room. Safehouse's ultimate motive of reducing drug use or saving lives is simply irrelevant to the statutory issue. But there is a second reason why–even under the district court's reading of the statute–Safehouse would still violate § 856(a)(2): Safehouse's purpose of allowing illegal drug use in its Consumption Room is not a mere "incidental" purpose that might allow it to escape liability.

Even while ruling in Safehouse's favor, the district court acknowledged that "Safehouse knows and intends that some drug use will occur on its property[.]" Appx050. The district court held, however, that this purpose was not significant enough to satisfy the statute, given that "[t]he statutory context supports the view that the purpose must be a significant, not incidental, purpose." Appx063.

Courts interpreting the words "for the purpose" under § 856(a)(1) agree that a defendant can have multiple purposes, only one of which need be illicit. A defendant's "purpose" need not constitute his sole, ultimate, or dominant purpose, *see United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995), but must be more than merely incidental (*e.g.*, one-time recreational

drug use at a residence). *See United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992); *United States v. Clavis*, 956 F.2d 1079, 1090, 1094 (11th Cir. 1992) ("[C]onstru[ing] the statute…to exclude a single, isolated act as a violation and to embrace some degree of continuity.").

Within those bounds, some courts have held that one purpose among many, even if not primary, may satisfy the statute. *Gibson*, 55 F.3d at 181 ("Liability under the statute does not require the drug related use to be the sole or even the primary purpose of maintaining the property.")*;* *United States v. Church*, 970 F.2d 401, 406 (7th Cir. 1992) (rejecting the proposition that the government cannot sustain a conviction under § 856 if drug distribution is "but one of several uses of a residence"). Other courts, including the district court, have held that the purpose must be a "primary" or "principal" purpose. *E.g.*, *Verners*, 53 F.3d at 296 (finding that the purpose must be "at least one of the primary or principal uses to which the house is put").

In applying other criminal statutes containing language similar to § 856, this Court and others have likewise held that a compelling or significant illicit purpose will satisfy the statute's *mens rea* requirement even if the actor has multiple purposes. *See United States v. Schneider*, 801 F.3d 186, 194 (3d Cir. 2015) (violation of Mann Act, 18 U.S.C. § 2421,

occurs when illicit conduct is "a dominant or a compelling and efficient purpose" that need not be the most important of multiple reasons); *United States v. Jenkins*, 442 F.2d 429, 434 (5th Cir. 1971) (defendant violates the Mann Act even with "dual purposes," one of which is legitimate); *United States v. Torres*, 894 F.3d 305, 314 (D.C. Cir. 2018) (analyzing the purpose requirement of 18 U.S.C. § 2251(a) and rejecting "any such one-purpose-per encounter analysis").

United States v. McGuire addressed this issue as it applied to 18 U.S.C. § 2423(b), which criminalizes travel "in interstate commerce....*with a motivating purpose* of engaging in any illicit sexual conduct[.]" 627 F.3d 622, 625 (7th Cir. 2010) (emphasis added). The court adopted a "but for" test, asking whether the actor's behavior would have differed substantially or not occurred at all if the illicit motive was not present. *Id.*

Safehouse's purpose to make its property available for continuing and large-scale drug use easily satisfies any relevant standard. Safehouse has repeatedly told the public that the reason it was created is to provide the first heroin injection site in the country. *E.g.*, Appx683 (SOF ¶ 1) (holding itself out on its website as seeking to "open the first 'safe injection site'"). It goes without saying that there cannot be an injection site or a Consumption Room without the injection and consumption. The *only* feature

distinguishing Safehouse from its partner organization, Prevention Point Philadelphia, is Safehouse's Consumption Room, thus making drug consumption a primary purpose for Safehouse's creation and operation. *See* Appx684 (SOF ¶ 6). Indeed, "but for" its purpose to invite illegal drug use, Safehouse would not exist at all–thus, the illegal drug use is a "motivating purpose" and not a mere incidental one. *McGuire*, 627 F.3d at 625. This is all, to put it plainly, merely stating the obvious.

Safehouse's intention to allow illegal drug use is not "incidental" or an "isolated incident." Safehouse will permit participants to use illegal drugs in its Consumption Room indefinitely and as frequently as the participants like, without ever requiring that the participants commit to addiction treatment. Appx684-85 (SOF ¶¶ 10, 23). Safehouse also intends that illegal drug use in its Consumption Room will aid potential treatment, as Safehouse believes participants are more likely to engage in counseling and accept offers of medical care after they have consumed drugs. *See* Appx685 (SOF ¶ 22). Thus, illegal drug use by Safehouse invitees is a necessary prerequisite even to the treatment that Safehouse proposes.

For all of these reasons, Safehouse's purpose is sufficient to satisfy even the most stringent standard. Indeed, without the purpose of making

its Consumption Room available for illegal drug use, Safehouse simply would not exist.[11]

C. The Plain Language Reading of § 856(a)(2) that Prohibits Safehouse's Conduct Is also Consistent with the Broader Structure and Purpose of the Controlled Substances Act.

Safehouse's conduct will violate the plain language of § 856(a)(2). Notably, this interpretation is consistent and coherent with the CSA's statutory scheme. Section 856's ban on maintaining a place for the illegal use of drugs, especially a Schedule I drug such as heroin (or worse, heroin

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[11] Under the correct reading of § 856(a)(2), where "for the purpose of" applies to the purpose of the third party using the property, the inclusion of "intentionally" in (a)(2) prevents liability from attaching to drug activity that a property owner may know occurs within his property, but does not intend (or is too insignificant) to trigger liability.

For example, "intentionally" carves out space for the district court's hypothetical parent who maintains a home so that his family members may have a residence and who knows that, while living there, his son or daughter may use drugs –but who does not *intend* that his child use the home for drug use, despite that it may occur as an incident to the child's presence in the home. *See* Appx055. The word "intentionally" also likely prevents liability from attaching to the district court's hypothetical where parents instruct their child to inject drugs in their presence so that they may be able to resuscitate the child, as the hypothetical contains the caveat that the parents do not want their child to inject drugs at all, and again the use is merely incidental to the use of the home as a residence. *See id.* At oral argument, the Government stressed these points to demonstrate how different the hypotheticals were from Safehouse's proposed conduct, explaining that the parents would not be in violation of the statute because the drug use would be "only incidental and the parents are trying to stop the drug use." Appx626-628.

mixed with fentanyl), aligns with the CSA as a whole, which outlaws the illegal possession of heroin and street fentanyl. *See* 21 U.S.C. § 844. Visitors to Safehouse would necessarily illegally possess controlled substances in the Consumption Room because one must possess drugs in order to use them. Reading § 856(a)(2) to prohibit a place where multiple, concentrated violations of § 844 occur is therefore consistent with the statute as a whole.

Congress placed heroin on Schedule I of the CSA after determining that it has "no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B), and that "[t]here is a lack of accepted safety for use of the drug…under medical supervision," *id.* § 812(b)(1)(C). Accordingly, physicians cannot prescribe Schedule I drugs (with exceptions that do not apply here). *Id.* § 829. Thus, Safehouse's operation of a Consumption Room is in irresolvable tension with § 812(b)(1)(B).

While Safehouse contends that it will provide "assurance, to a medical certainty, that people within its care will not die of a drug overdose," Appx132 (Ans. ¶ 34); *see also* Appx130, 135 (Ans. ¶¶ 23, 46), this "assurance" suggests to the public that using lethal drugs such as heroin can be safe given the right environment and supervision. This is not only dangerous, but it also contradicts the determination that Congress has already made: that heroin use is not safe under *any* circumstances, even

"under medical supervision." 21 U.S.C. § 812(b)(1)(C). Similarly, Safehouse's "assurance" contradicts Congress's determination that the use of fentanyl is not safe unless the use is pursuant to a valid prescription. 21 U.S.C. §§ 812(b)(2), 829(a).

In sum, the district court's ruling should be reversed because it interprets § 856(a)(2) in a manner that is inconsistent with its plain language and with the CSA as a whole.

D. The District Court Improperly and Selectively Relied on Legislative History to Override the Statute's Plain Meaning.

The statutory language of § 856(a) is clear and unambiguous. Where the words of a statute are unambiguous the "judicial inquiry is complete" except in "rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430 (1981) (citation omitted). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *In re Phila. Newspapers*, 599 F.3d at 304 (quotation omitted). "Where the statutory language is unambiguous, the court should not consider statutory purpose or legislative history." *Id.* (citation omitted); *In re Armstrong World Indus.*, 432 F.3d at 513. "[T]he ordinary meaning of [statutory] language expresses the legislative purpose." *Lawrence v. City of Phila.*, 527 F.3d 299, 317 (3d Cir. 2008) (quotation omitted).

In the face of this authority, the district court committed error by not heeding this cardinal canon of statutory construction and instead placing undue emphasis on principles espoused in a book written by a law professor. Appx023-25, Appx036 (citing and discussing Victoria Nourse, *Misreading Law, Misreading Democracy* 5, 66, 68-69 (2016)). After a brief nod to the relevant case law on the plain meaning standard, the district court launched into an apparently more enlightened approach, sharing its discovery that "I find substantial merit to the observation that '[p]lain meaning is a conclusion, not a method.'" Appx026 (quoting Nourse). This conclusion was buttressed by a review of various secondary sources that characterized the canons as, among other things, "vacuous and inconsistent." Appx023-26 (quoting Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 802-05 (1983)).

The district court compounded this error by impermissibly using legislative history to divine "prototypical examples" of conduct covered by the statute, rather than conducting a plain meaning analysis of any purportedly ambiguous terms. Appx026. In response to the Government's position that legislative history played no proper role in the statute's analysis, the district court faulted the Government for supposedly

suggesting that the court engage in an "imaginative reconstruction" of how the enacting Congress would have viewed supervised injection sites. Appx066. Yet the court's own "baseline reality," Appx017, which framed its entire analysis, ultimately did the same thing. In doing so, the district court made the fundamental error of not letting the words of the statute itself determine that reality. This is explained more fully below.

1. The District Court Erred in Deriving "Ordinary Meaning" from Legislative History Rather than from the Statutory Language Itself.

Rather than consider the plain language of § 856, the district court framed its analysis at the outset through the lens of legislative history. The district court gave significant weight to its belief that Congress did not have "safe injection sites" in mind when it enacted and amended § 856 in 1986 and 2003, respectively. *See* Appx016-17 (setting forth the "baseline reality" 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"); Appx017 ("to attribute such meaning to the legislators who adopted the language is illusory"); Appx065 ("no question that Safehouse's approach…was not within the contemplation of Congress"); Appx067 ("indisputably beyond the contemplation of Congress"); *id.* ("Congress has not had the

opportunity to decide"); Appx070 ("beyond the comprehension of Congress"). Legislative history thus permeated the Court's opinion before it concluded that any terms within § 856 were ambiguous.

Importantly, the Supreme Court "frequently has observed that a statute is not to be confined to the particular application[s]…contemplated by the legislators." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (quotation marks omitted). To the contrary, "in the context of an unambiguous statutory text," what Congress envisioned at the time of enactment is "irrelevant." *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998).

Moreover, "a term in a statute is not ambiguous merely because it is broad in scope." *In re Phila. Newspapers,* 599 F.3d at 310. "The fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity"; rather, "[i]t demonstrates breadth.'" *Id.*; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 350 (2012) ("Although the legislators did not consider a particular circumstance, the text plainly applies or does not apply by its very words.").

Indeed, the broad language Congress employed in § 856(a)(2)—"*[e]xcept as authorized* by this subchapter it shall be unlawful to…manage

or control *any place*"—is itself meaningful. 21 U.S.C. § 856(a) (emphasis added); *see also Diamond*, 447 U.S. at 315 ("[b]road general language is not necessarily ambiguous when congressional objectives require broad terms"). In employing such broad language, "Congress avoids the necessity of spelling out in advance every contingency to which a statute could apply." *In re Phila. Newspapers, LLC*, 599 F.3d at 310 (citation omitted).

Simply put, the question before the district court was "not what Congress 'would have wanted' but what Congress enacted[.]" *Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). It was the district court's job, therefore, to "effectuate Congress's intent," which is "most clearly expressed in the text of the statute[.]" *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 257 (3d Cir. 2013); *see also Lawrence*, 527 at 317 (holding that a "court should not consider statutory purpose or legislative history" when the statutory text is unambiguous).

As a logical matter, this has to be the case. Otherwise, obvious absurdities would follow. For example, social media did not exist when the federal wire fraud statute was passed in 1952. Does this mean that a defendant should be able to credibly argue that he cannot commit wire fraud on Twitter? Of course not. *See, e.g., Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("New technologies, all too soon, can become

instruments used to commit serious crimes. The railroad is one example…and the telephone another, *see* 18 U.S.C. § 1343. So it will be with the Internet and social media."); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (finding "no justification in the statutory language…for a categorical rule excluding same-sex harassment claims from the coverage of Title VII," even though "male-on-male sexual harassment…was assuredly not the principal evil Congress was concerned with when it enacted Title VII"); *id.* (as Justice Scalia explained for a unanimous Court, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). Or to be even more blunt about it, what about a murder statute that was passed before the invention of automatic weapons? Should a defendant be able to credibly argue that he should escape liability because his use of an automatic weapon was beyond the legislature's "contemplation" or "comprehension"? Under the district court's logic, the answer is yes–the invention of automatic weapons (or social media) would be an occasion for hand-wringing, accompanied by a deep dive into legislative history. That is not tenable.

Consistent with its revelation that "plain meaning is a conclusion and not a method," the district court focused on what it viewed as "prototypical

examples" of entities within § 856(a)'s scope, including places that "facilitate drug use, supporting the drug market as crack houses and raves do," while Safehouse, by contrast, "is not some variation on a theme of drug trafficking or conduct that a reasonable person would instinctively identify as nefarious or destructive" because its "ultimate goal…is to reduce drug use, not facilitate it." Appx067, Appx070.

This analysis is utterly untethered from the statutory text. The statute does not prohibit the "facilitation" of drug use; rather, it uses much broader language. The word "facilitate" appears nowhere in the relevant statutory language. And as explained above, courts have long understood that the language Congress used denotes a prohibition even when the actor has multiple purposes, some of which might be lawful or even public-minded.

In resorting to legislative history to divine "ordinary meaning," the district court invented from whole cloth a new requirement for liability under the statute: that a defendant's ultimate aim or purpose be nefarious or destructive or tend to "facilitate" drug use. This is precisely what this Court and others have repeatedly cautioned against in resorting to legislative history. *See*, *e.g.*, *S.H. ex rel. Durrell*, 729 F.3d at 259. In *Durell*, this Court explained that "[l]egislative history has never been permitted to override the plain meaning of a statute" and "may not be used to alter [its]

plain meaning." 729 F.3d at 259 (citations omitted). Any use of legislative history is meant to clear up ambiguity, not create it." *Id.* (quotation omitted). A court, then, "must not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Id.* (internal quotation omitted).

Under the plain language of § 856(a), conduct is either "authorized" under the CSA, or it is not. 21 U.S.C. § 856. Safehouse will either "manage or control" a place that it will "make available" for "unlawfully…using a controlled substance," or it will not. *Id.* at § 856(a)(2). But the question of whether Safehouse, or the "prototypical examples" to which the statute may apply, "facilitate" drug use is not found in the statutory text and was not before the district court. The district court's imputation of that imaginary intent—made possible by its improper resort to legislative history—is reversible error.[12]

Finally, one section of the district court's opinion merits further comment. At oral argument, the district court posited a hypothetical

[12] Even if the statute were written differently and required that the property owner "facilitate" the illegal drug act, Safehouse would still satisfy that requirement. By providing a designated space, equipment, and instruction on how to use that equipment, Safehouse will undoubtedly facilitate the use of illegal drugs by any individual who chooses to use drugs in the facility instead of receiving addiction treatment. *See* Appx684-85 (SOF ¶¶ 10, 23).

involving a "mobile van" that would "monitor[] drug use in public places." In response, the Government surmised that such an effort might not run afoul of § 856(a)(2) because it involved "no real property" and "'what matters [is] the statutory language.'" Appx064 (quoting counsel for the Government). The district court characterized this response as "myopic textualism that seeks to avoid the central issue." *Id.*

This exchange is illuminating because it lays bare the district court's preference for an extra-textual reading of the statute and helps to explain the district court's error. Given the actual words of the statute–words like "lease," "rent," "place," "owner," "lessee," "agent," "employee," "occupant," "mortgagee," *etc.*–it should be apparent that the existence (or non-existence) of any "real property" is an important threshold issue to consider in any hypothetical. Rather than "myopic textualism," such an approach is one that is faithful to the words of the statute and therefore respects and effectuates the will of the legislature. That is the proper approach. In contrast, the district court adopted an approach that essentially views the statutory language as an inconvenient impediment to some grand vision of what the court thinks the statute *should* be, and thus the plain language can be ignored.

2. Even if a Resort to Legislative History Were Proper Here, that History Confirms that Safehouse's Conduct Will Violate the Statute.

Even if this Court were to assume, for the sake of argument, that the district court had to examine the legislative history of the statute, the district court erroneously employed the legislative history in several ways. First, the district court placed disproportionate emphasis on legislative history regarding the 2003 amendments to § 856, which expanded the scope of liability under § 856(a)(2), but left the language in question untouched (which Congress had enacted in 1986). This Court has made clear that "post-enactment legislative history is not a reliable source for guidance." *Pa. Med. Soc. v. Snider*, 29 F.3d 886, 898 (3d Cir. 1994); *see also United States v. Price*, 361 U.S. 304, 313 (1960) ("[t]he views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one").

The district court repeatedly cited statements by then-Senator Joseph Biden that the 2003 amendments "would help in the prosecution of rogue promoters who **not only know** that there is drug use at their event but also **hold the event for the purpose of illegal drug use** or distribution." Appx036 (internal marks and citations omitted; emphasis in original). This, in the district court's view, illuminated that "the actor [*i.e.*,

the person charged with violating the statute] must make the place available for [the purpose of] drug activity[.]" *Id*. As previously discussed, it in fact does no such thing. Rather, it merely shows that the "actor" had the intent that others use the property for an illicit purpose.

But the district court did not stop there. It further noted, in the words of Senator Biden in 2003, that "[t]he bill [*i.e.*, the amendment] is aimed at the defendant's *predatory* behavior." Appx036 (emphasis added). Even if this were true of the 2003 amendment, which targeted "rogue" rave promotors, *id*. at 22, the Congress that drafted the statutory language 17 years earlier made no similar statements. Just as "facilitate" makes no appearance in the statute's plain language, nor does any requirement that the defendant have a "predatory" motive.

Even were the 2003 amendments relevant, they are relevant only to the extent that they may shed light on the reach of the statute at the time it was amended. In fact, Senator Biden's language supports the conclusion that Safehouse does *not* fall within any safe harbor. Biden explained that the statute does not apply to places—like stadiums, arenas, and other venues—where people purchase and consume drugs "without the knowledge or permission of" the owner or event promoter. 148 Cong. Rec. S10218-02 (Oct. 9 2002). Biden further explained that "incidental" drug

use at a location does not fall within § 856's prohibition, which applies to those who know that illegal drug use is occurring and also maintain a place where they intend for it to occur. *Id.* Here, rather than hosting a place where "incidental" drug use may occur or a place where more widespread use may occur without its "knowledge or permission," Safehouse will intentionally provide a place where users are permitted—indeed, invited—to use illegal drugs.

Furthermore, the statute's legislative history reveals that Congress made an intentional determination to prohibit "places where users congregate to purchase and use" illegal drugs. 132 Cong. Rec. 26447 (1986) (statement of Sen. Chiles). The statute thus reflects the Congressional determination that drug use negatively affects neighborhoods. *Id.*

Congress was also concerned that permitting illegal drug use in public would give the veneer of public acceptance for such acts. *See* 132 Cong. Rec. S13741-01, 1986 WL 793417. As Senator Moynihan said, "the fact that drug sales and use are taking place more frequently in public, and on our streets, is the most appalling single thing of the present crisis." *Id.* He stated that "[a] public act of an illegal nature is in effect a condoned act. And the children, and most early users of drugs are no more than children, see this going on in public and assume there is public approbation for these illegal

acts. *And, indeed, toleration is a form of approbation*." *Id.* (emphasis added).

This obvious motivation of the "crack house" statute–to deter the harm and sometimes ruin that comes to law-abiding residents of a neighborhood when a property invites drug abusers and the inevitable attendant crime that comes with them–is implicated by a facility such as Safehouse, just as it is by the most nefarious dealers' den. That, of course, is why Safehouse's efforts thus far to find an actual location to operate in Philadelphia have failed so miserably. The reaction of those who live in the places where Safehouse has suggested it may operate has been predictable outrage and protest.

Since its enactment, Congress has expanded § 856's scope each time it has revisited it, consistent with its intent to limit the establishment of places where illegal drug use occurs. In 2000, Congress increased the penalties by adding § 856(c). In 2003, Congress changed the title of § 856 to "Maintaining drug-involved premises," replacing the earlier title of "Establishment of manufacturing operations." *See* H.R. Rep. No. 108-66, at 43 (Apr. 9, 2003) (Conf. Rep.). The amendment also expanded the reach of the statute by replacing the phrase "open or maintain any place" with "open, lease, rent, use, or maintain any place, whether permanently or

temporarily." *See* H.R. Rep. No. 108-66, at 43 (Apr. 9, 2003) (Conf. Rep.). The 2003 amendment thus made it clear, to the extent that it was not already, that Congress intended § 856 to apply widely to anyone who provides a venue for illegal drug activity. *See id.* at 68 ("This expansion makes it clear that anyone who knowingly and intentionally uses their property, or allows another person to use their property, for the purpose of distributing or manufacturing or using illegal drugs will be held accountable.").

The Government's interpretation of the statute is also consistent with Congress' legislative intent to closely regulate controlled substances and with its determination that heroin use (and use of fentanyl procured without a valid prescription) is illegal and unsafe under *any* circumstances. 21 U.S.C. §§ 812(b)(1)(B), (C), (b)(2), 829(a), and 844.

Moreover, although it has amended the CSA multiple times, Congress has never sanctioned Consumption Rooms. In comparison, before authorizing funding for organizations that also provided needle exchange programs, Congress had debated the issue for *years*, *see, e.g.*, 155 Cong. Rec. H8727-01, at H8780 (July 24, 2009) (statement of Rep. Souder) (noting that Congress had "repeatedly, over and over, banned needle exchange programs, when given the opportunity"). Congress has also

recently enacted various measures to combat the opioid crisis, *see* Comprehensive Addiction and Recovery Act, Pub. L. No. 114-198, 130 Stat. 695 (2016); SUPPORT for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018).

In short, the opioid crisis obviously has Congress' attention. Yet, despite this attention, Congress has not enacted legislation authorizing facilities like Safehouse. And, the fact that no one in the United States has ever proposed an idea like this in the past 30 years—despite many innovative efforts to address the problem of drug addiction—suggests it is well understood that creating a haven for drug use is illegal. This Court should decline Safehouse's invitation to usurp congressional authority and overturn congressional policy judgments.

Those involved in Safehouse are well-meaning, and have the laudable goal of preventing fatal drug overdoses. But they are not permitted to take the law into their own hands and override the Congressional judgment and direction that maintaining a property for the purpose of allowing use of

controlled substances is illegal. If they disagree, their remedy and proper forum lies in the legislative process. [13]

[13] In denying the Government's Motion for Summary Judgment, the district court did not reach Safehouse's affirmative defenses that RFRA entitles it to an exemption from the CSA or that the CSA is unconstitutional as applied under the Commerce Clause. While the district court did not reach Safehouse's affirmative defenses because it ruled for Safehouse on the merits, this Court can consider a question of law that the district court did not reach when the issue is "purely legal" and does not involve judicial discretion or fact finding. *Hudson United Bank v. Litenda Mortg. Corp.*, 142 F.3d 151, 159 (3d Cir. 1998) ("When a district court has failed to reach a question below that becomes critical when reviewed on appeal, an appellate court may sometimes resolve the issue on appeal rather than remand to the district court"); *see also Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999) (exercising discretion to avoid further delay). That is the situation here. The affirmative defenses were thoroughly briefed in the district court; the Government's position is that the affirmative defenses fail as a matter of law. Appx233-248, Appx299-315, Appx334-343. This Court can so rule on appeal. If necessary, the Government stands ready to provide additional briefing should the Court request it.

CONCLUSION

The district court erred in entering a declaratory judgment that Safehouse's intended conduct will not violate 21 U.S.C. § 856(a)(2). The Government respectfully requests that this Court reverse the district court's judgment and instruct it to enter judgment for the United States.

Dated: May 15, 2020

Respectfully submitted,

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CERTIFICATIONS

1. I certify that this brief contains 12,989 words, exclusive of the table of contents, table of authorities, signature blocks, and certifications, and therefore complies with the limitation on length of a brief stated in Federal Rule of Appellate Procedure 32(a)(7)(B), and was prepared in Microsoft Word using 14-point Georgia font, a proportionally spaced typeface, and therefore complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6).

2. I certify that the electronic version of this brief filed with the Court was automatically scanned by McAfee Data Exchange Layer, version 5.0.1.249, and found to contain no known viruses.

3. I certify that the text in the electronic copy of the brief will be identical to the text in the paper copies of the brief filed with the Court, to the extent any paper copies will be required.

/s/ Gregory B. David
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Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on this date this brief was served through the Electronic Case Filing (ECF) system on counsel for all parties.

/s/Gregory B. David
GREGORY B. DAVID
Assistant United States Attorney

Dated: May 15, 2020

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 JOSE 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 FEBRUARY 25, 2020 ORDER GRANTING FINAL DECLARATORY JUDGMENT, IN CIVIL ACTION NO. 19–519, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (HON. GERALD A. McHUGH)

JOINT APPENDIX
VOLUME I OF III
Appx001–070

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JOINT APPENDIX

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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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	:	

NOTICE OF APPEAL

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 (collectively, "the United States"), hereby appeal to the United States Court of Appeals for the Third Circuit from the Court's Memorandum and Order entered on February 25, 2020 (ECF Nos. 141 and 142, which incorporates by reference the district court's previous Memorandum at ECF No. 133), granting Safehouse and Jose Benitez's Motion for Final Declaratory Judgment (ECF No. 137) and denying the United States' Motion for Summary Judgment (ECF No. 139).[1]

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[1] As the United States previously communicated to the Chambers of the Hon. Gerald McHugh, it will move in district court to stay the Declaratory Judgment by no later than this Friday, February 28, 2020. Although the United States' Notice of Appeal divests this Court of jurisdiction over those aspects of the case involved in the appeal, the Court retains the ability to rule on a motion for a stay. *See Venen v. Sweet*, 758 F.2d 117, 120-121 & n.2 (3d Cir. 1985); *Rakovich v. Wade*, 834 F.2d 673, 674 (7th Cir. 1987) ("[A] notice of appeal does not deprive the district court of jurisdiction over a motion for stay of its judgment."). This is consistent with the rule requiring that the United States first move in the district court for a stay before seeking identical relief from the Court of Appeals. Fed. R. App. P. 8(a)(1). *See In re Miranne*, 852 F.2d 805, 806 (5th Cir. 1988).

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a true and correct copy of The United States' Notice of Appeal, which was filed electronically and is available for viewing and download from the court's CM/ECF system, to be served upon all counsel of record.

/s/Gregory B. David
GREGORY B. DAVID
Assistant United States Attorney
Chief, Civil Division

Dated: February 26, 2020

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	**No. 19-0519**
v.	:	
	:	
SAFEHOUSE, a Pennsylvania nonprofit Corporation; JOSE BENITEZ, as President and Treasurer of Safehouse,	:	
Defendants.	:	

SAFEHOUSE, a Pennsylvania nonprofit Corporation,	:	
Counterclaim Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Counterclaim Defendant,	:	
	:	
and	:	
	:	
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,	:	
Third-Party Defendants.	:	

ORDER

For the reasons set forth in the accompanying Memorandum, and in this Court's previous memorandum opinion of October 2, 2019, upon consideration of Defendants' Motion for Final Declaratory Judgment (ECF 137), the Government's Motion for Summary Judgment and Opposition to Defendants' Motion for Declaratory Judgment (ECF 139), and Defendants' Memorandum of Law in Opposition to the Government's Cross-Motion for Partial Summary

Judgment (ECF 140), this 25th day of February, 2020, it is hereby **ORDERED** that Defendants' motion is **GRANTED** and the Government's motion is **DENIED**, as follows:

1. Defendants' 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 Plaintiff's claims and on Count I of Safehouse's counterclaim.

3. Count II of Defendants' counterclaim is DISMISSED WITHOUT PREJUDICE as moot.

4. It is DECLARED that the establishment and operation of Defendants' overdose prevention services model, including supervised consumption in accordance with the parties' stipulated facts (ECF 137, Ex. A), does not violate 21 U.S.C. § 856(a).

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	**No. 19-0519**
v.	:	
	:	
SAFEHOUSE, a Pennsylvania nonprofit Corporation; JOSE BENITEZ, as President and Treasurer of Safehouse,	:	
Defendants.	:	
SAFEHOUSE, a Pennsylvania nonprofit Corporation,	:	
Counterclaim Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Counterclaim Defendant,	:	
	:	
and	:	
	:	
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,	:	
Third-Party Defendants.	:	

McHUGH, J. **FEBRUARY 25, 2020**

MEMORANDUM

This case arises out of Defendant Safehouse's proposal to open a safe injection site in Philadelphia to mitigate the harms resulting from unlawful opioid abuse, and the Government's determination that opening such a site would be unlawful. Previously, I denied a motion for judgement on the pleadings filed by the United States. ECF 134. In doing so, I concluded that,

"[a]ccepting the facts in the pleadings as true, as required under Rule 12 of the Federal Rules of Civil Procedure, 21 U.S.C. § 856(a)(2) would not prohibit Safehouse from establishing and operating an overdose prevention facility that provides medically supervised consumption services." ECF 134, at 1-2.

That ruling was a nonfinal interlocutory order because it represented nothing more than denial of a motion. Safehouse did not cross-move for relief, and thus the prior order did not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Following consultation with the Court, the parties agreed to a stipulated set of facts, *see* ECF 137, Ex. A, and filed cross-motions intended to produce a final, appealable order. To that end, Safehouse moves for final declaratory judgment under Federal Rules of Civil Procedure 56 and 57, ECF 137, and the Government opposes and cross-moves for summary judgment, ECF 139.

The recent filings recapitulate the arguments previously advanced by the parties. Safehouse argues that the establishment and operation of its overdose prevention services model, which would include supervised consumption rooms, does not violate Section 856(a)(2), which makes it unlawful for any person to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance." *See* ECF 137-3. Because Safehouse relies on a statutory argument, it suggests that the Court "need not reach Safehouse's remaining claims under the Religious Freedom Restoration Act . . . and the Commerce Clause of the U.S. Constitution." ECF 137, at 7 n.5. I agree that the Court can render a final judgment on the application of Section 856(a)(2) alone.[1]

[1] Safehouse requests the Court dismiss without prejudice its counterclaim under the Religious Freedom Restoration Act as moot, *see* ECF 3, at 42-43 (pleading counterclaim); ECF 137-3, ¶ 3 (proposing dismissal without prejudice),

In response, the Government principally restates its "core contention" that Safehouse's overdose prevention model "violate[s] § 856(a)(2)." ECF 139, at 3. To the Government, the plain text of Section 856(a)(2) demands this result—"(1) Safehouse would manage and control a place as either an owner or lessee, that (2) it would knowingly and intentionally make available, (3) for the purpose of unlawfully using a controlled substance." ECF 139, at 5. I addressed those arguments in my prior opinion and, even accepting an evolved standard of review, nothing warrants revisiting them now. ECF 133, at 49-55.

The Government also seeks to inject some procedural uncertainty into the dispute. First, the Government argues that Safehouse's motion for declaratory relief should be resolved pursuant to Rule 56 and not Rule 57 because "a motion for declaratory judgment under [Rule] 57 would be procedurally improper." ECF 139, at 5 n.3. To support its contention that declaratory relief is improper, the Government cites to *Arizona v. City of Tucson*, 761 F.3d 1005 (9th Cir. 2014), for the proposition that "[r]equests for declaratory judgment are not properly before the court if raised . . . by motion." ECF 139, at 5 n.3 (quoting *City of Tucson*, 761 F.3d at 1010). That misreads *City of Tucson*. In that case and the other cases relied upon by the Government for support, the movants sought declaratory relief by filing a Rule 57 motion without first seeking declaratory relief in their initial pleadings. Indeed, in *City of Tucson*, in the very sentence before the sentence quoted by the Government, the Court held that a "request for declaratory relief is properly before the court when it is pleaded in a complaint for declaratory judgment." *Id.* Here, Safehouse sought a declaration pursuant to the Declaratory Judgment Act in its counterclaims and third-party

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and, in doing so, seeks to "reserve[] 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." *Id.* The Government contends that by making this request Safehouse has "abandon[ed] its claim[s]" under RFRA and a related claim under the Commerce Clause. ECF 139, at 11-12, 12 n.8. I disagree. Given that Safehouse has won the declaratory judgment it seeks, there is no need to reach its additional claims, and its request that this Court dismiss the RFRA and Commerce Clause claims without prejudice is sensible. The claims are therefore deemed to be preserved.

complaint. *See* ECF 3, at 41; ECF 45, at 5. A final declaratory judgment under Rule 57 is the appropriate vehicle to conclusively resolve the immediate and actual legal controversy on the statutory question. *See* Fed. R. Civ. P. 57, Notes on Advisory Committee on Rules (1937). The parties maintain a live and actual legal controversy, have stipulated to all material facts, and have moved for declaratory relief as to the reach of Section 856(a)(2).

Such maneuvering by the Government at this late stage is not constructive. At no point until its latest filing did the Government suggest that consideration of a motion for declaratory judgment would be procedurally improper. From the inception of this case Safehouse requested a full trial on the merits to resolve whether its proposed operation comports with federal law, and with it the opportunity to develop a detailed factual record. And for just as long the Government has strenuously resisted such an approach. The Government has never argued there was a need for additional evidence, a fact of which they were reminded at oral argument. *See* ECF 133, at 6 n.4. The present motions were filed in consultation with the Court for the express purpose of creating a final appealable order, something sought by both sides. *See* ECF 137, at 3. And the parties' stipulation to specific facts—an approach first suggested by the Court to the parties in late August—was intended to complete the record to finally adjudicate a difficult and complex matter of first impression.

The Government further contends that inferences drawn in resolving a motion to dismiss under Rule 12 are not properly drawn in resolving the pending motions. Specifically, the Government protests that Safehouse "never said in its pleadings that it would reduce unlawful drug use, nor do the Stipulated Facts so state," and that, because Safehouse has moved affirmatively for final relief, "the Court cannot make this factual inference in Safehouse's favor." ECF 139, at 11 n.4. In advancing this argument, the Government continues to confuse purpose

with outcome. The reach of Section 856(a)(2) did not then and does not now depend to any degree on whether Safehouse's model actually "would reduce unlawful drug use." Section 856(a)(2)'s applicability turns on the *objective* of the relevant actor, not on the *effectiveness* of a proposed intervention model. In fact, my opinion of October 2, 2019, explicitly declined to address "whether safe injection sites are an appropriate means of dealing with the opioid crisis." ECF 133, at 2.

In any case, no inference is necessary at this stage because the parties have stipulated to various facts as recommended by the Court. These include that "Safehouse seeks to open the first safe injection site in the U.S. in the City of Philadelphia and is . . . [a] nonprofit corporation whose mission is to save lives by providing a range of overdose prevention services," and that "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." ECF 137, Ex. A, ¶ 1. Admittedly, that stipulation is prefaced by "according to Safehouse" or "according to [Safehouse's] website," but later stipulations remove any ambiguity. The parties agree that "Safehouse intends to offer each participant its services, which include use of supervised drug consumption and observation rooms, medical services, including wound care, onsite 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." *Id.* ¶ 9. The parties also agree that Safehouse "intends to encourage every participant to enter drug treatment, which will include an offer to commence treatment immediately." *Id.* Given those stipulations, the analysis in my memorandum opinion of October 2, 2019, applies with equal validity to the record before me, and there is nothing procedurally improper in granting the declaratory relief sought by Safehouse.

The Government's sudden focus on factual nuances overlooks the complexity of determining the proper application of the law. Safehouse does not hide that illegal substances will be used on its premises. To the Government, that alone is enough to resolve the statutory question. But that position depends upon an overly simplistic formulation of "purpose," one that it struggled to defend at oral argument. For instance, the Government acknowledged that Safehouse could skirt the proscriptions of Section 856(a)(2) if it operated essentially the same overdose prevention model out of a mobile van instead of a fixed piece of real property so long as no user "c[a]me into the mobile unit." ECF 131, at 42:4-43:5. And when confronted with a hypothetical about parents who instructed their child to use unlawful drugs in their home so that they could resuscitate the child if necessary, the Government—contrary to its previously avowed core reading of the statute—responded that Section 856(a)(2) would *not* apply to that conduct. It conceded the parents would not have an unlawful "purpose" in participating in such life-saving activity. ECF 133, at 41; *see also* ECF 131, at 38:17-42:3.

The Court's objective in encouraging the parties to supplement the record by stipulation and agree upon a mechanism for entering final judgment was to eliminate any factual ambiguity and thereby facilitate appellate review of difficult and subtle issues, including the meaning of "purpose." Such clarity and precision have particular importance here, where it is a criminal statute that the Government seeks to invoke in exercising its authority.

* * * * *

Given the history of this case, and the parties' supplementation of the record, there is nothing procedurally improper in granting the declaratory relief sought by Safehouse. The analysis in my memorandum opinion of October 2, 2019, applies with equal validity to the expanded record. I will therefore grant Safehouse's Motion for Final Declaratory Judgment and

deny the Government's Motion for Summary Judgment. An appropriate Order follows.

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
v.	:	**No. 19-0519**
	:	
SAFEHOUSE, a Pennsylvania nonprofit Corporation;	:	
JOSE BENITEZ, as President and Treasurer of Safehouse,	:	
Defendants.	:	
SAFEHOUSE, a Pennsylvania nonprofit Corporation,	:	
Counterclaim Plaintiff,	:	
v.	:	
UNITED STATES OF AMERICA,	:	
Counterclaim Defendant,	:	
and	:	
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,	:	
Third-Party Defendants.	:	

ORDER

This 2nd day of October, 2019, upon consideration of the Government's Motion for Judgment on the Pleadings (ECF No. 47), and Safehouse's response, it is hereby **ORDERED** that the Motion is **DENIED**. Accepting the facts in the pleadings as true, as required under Rule 12 of the Federal Rules of Civil Procedure, 21 U.S.C. § 856 (a)(2) would not prohibit Safehouse

from establishing and operating an overdose prevention facility that provides medically supervised consumption services.

/s/ Gerald Austin McHugh
United States District Judge

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
v.	:	**No. 19-0519**
	:	
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JOSE BENITEZ, as President and Treasurer of Safehouse,	:	
Defendants.	:	

SAFEHOUSE, a Pennsylvania nonprofit Corporation,	:	
Counterclaim Plaintiff,	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Counterclaim Defendant,	:	
	:	
and	:	
	:	
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,	:	
Third-Party Defendants.	:	

McHugh, J. **October 2, 2019**

MEMORANDUM

*****

This is a declaratory judgment action brought by the United States seeking to enjoin the operation of a proposed safe injection site for opioid users in the City of Philadelphia. The Government contends that its operation is unlawful under the Controlled Substances Act (CSA). As an initial matter, it is useful to delineate what is not before the Court. The question is not whether safe injection sites are an appropriate means of dealing with the opioid crisis, either as a matter of public policy or a matter of public health. Nor does this Court have jurisdiction to address the concerns raised by residents of the beleaguered neighborhood of Kensington in Philadelphia as to the appropriate location for the operation of such a facility, if it is lawful. It is also helpful to observe that, although both parties globally invoke various aspects of the Controlled Substances Act, a sprawling statute amended many times over many years, this case focuses on a single narrow provision of the Act, 21 U.S.C. § 856(a)(2)—colloquially known as the "Crack House" statute—as the legal basis for the injunction sought by the Government.

This narrowness of focus reflects a fundamental underlying reality, which is 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. And that baseline reality ultimately has substantive significance in determining whether this statute is properly applied to the safe injection site proposed by Safehouse.

Having examined the text and employed a number of tools of statutory construction, I conclude that the provision on which the Government relies is reasonably capable of more than one interpretation. This supports a further conclusion that consideration of the legislative evidence surrounding passage of this provision is appropriate. As discussed below, courts must exercise extreme care in discerning the objective sought by Congress in enacting a statute. That said, having reviewed materials I consider appropriate in discerning what Congress sought to address in enacting § 856(a)(2), there is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse. Although the language, taken to its broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site, to attribute such meaning to the legislators who adopted the language is illusory. Safe injection sites were not considered by Congress and could not have been, because their use as a possible harm reduction strategy among opioid users had not yet entered public discourse. Particularly in the area of criminal law, it is the province of Congress to determine what is worthy of sanction. A line of authority dating back to Chief Justice John Marshall cautions courts against claiming power that properly rests with the legislative branch.[1] A responsible use of judicial power under those circumstances is to decline to expand the scope of criminal liability under the statute and allow Congress to address the issue.

[1] *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)).

I. The Relevant Factual Background

Safehouse seeks to open an "Overdose Prevention Site," which will offer a variety of services aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment. According to Safehouse's representations about its protocol,[2] when one arrives at Safehouse, they will first go through a registration process. The participant will provide certain personal information and receive a physical and behavioral health assessment. Safehouse staff will then offer a variety of services, including medication-assisted treatment, medical care, referrals to a variety of other services, and use of medically supervised consumption and observation rooms. There is nothing in the protocol that suggests Safehouse will specifically caution against drug usage.

Participants who choose to use drugs in the medically supervised consumption room will receive sterile consumption equipment as well as fentanyl test strips once they enter the room. At no point will Safehouse staff handle or provide controlled substances. Staff members will supervise participants' consumption and, if necessary, intervene with medical care, including reversal agents to prevent fatal overdose. Before leaving the room, participants will dispose of used consumption equipment. After participants finish in the medically supervised consumption room, staff will direct them to the medically supervised observation room. Nothing in the Safehouse protocol appears to require that a participant remain in the observation room for a specified period of time. In the observation room, certified peer counselors, as well as recovery

[2] I base this summary of Safehouse's proposed operation and protocol only on the facts presented in the pleadings, including Exhibit A to the Government's Amended Complaint, which is a printout of a previous version of Safehouse's website. I have disregarded all witness testimony presented at the evidentiary hearing held on August 19, 2019.

specialists, social workers, and case managers will be available to offer services and encourage treatment. The same services will again be offered for the third time at check out.

II. Procedural Posture

After Safehouse announced its plans, the Government engaged in some correspondence with Safehouse's leadership. The parties could not reach agreement, and the United States then initiated this action against Safehouse and its President and Treasurer, Jose Benitez.[3] *See* Pl.'s Compl., ECF No. 1; Pl.'s Am. Compl., ECF No. 35. The Government seeks a declaratory judgment that the medically supervised consumption rooms violate 21 U.S.C. § 856(a)(2). I commend the Government for proceeding in this manner, rather than with criminal prosecution. Defendants answered the Government's Declaratory Judgment Complaint with several affirmative defenses, including an argument that application of the statute to their proposed site would be unconstitutional. Defs.' Answer to Compl., ECF No. 3; Defs.' Answer to Am. Compl., ECF No. 45. Safehouse also brought counterclaims and third-party claims, first seeking a declaratory judgment that its proposed operation will not violate § 856(a) and second seeking a declaratory judgment that the Department of Justice's efforts to enforce the statute, threats to prosecute Safehouse, and litigation against Safehouse violate 42 U.S.C. § 2000bb, the Religious Freedom Restoration Act. *Id.* The Government answered Safehouse's counterclaims and third-party complaint, Pl. & Third-Party Defs.' Answer, ECF No. 46, and then filed a Motion for

[3] The Government initially brought the action against Safehouse and Jeannette Bowles, whom it expected to be Safehouse's Executive Director. Pl.'s Compl., ECF No. 1. After it became clear that Jeannette Bowles had severed ties with Safehouse, the parties stipulated to her dismissal, Stipulation of Dismissal, ECF No. 30, and the Government amended its complaint, naming Jose Benitez instead. Pl.'s Am. Compl., ECF No. 35.

Judgment on the Pleadings as to its claim as well as the counterclaims and third-party claims. Pl. & Third-Party Defs.' Mot. for J. on the Pleadings, ECF No. 47.[4]

After considering the pleadings, the Government's Motion for Judgment on the Pleadings, Safehouse's Response, ECF No. 48, and the Government's Reply, ECF No. 115, I have concluded that 21 U.S.C. § 856(a) 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. Accordingly, I need not consider whether application of the statute to Safehouse's proposed conduct violates the Commerce Clause. As to the Religious Freedom Restoration Act, Safehouse's claim that the Government's effort to enforce 21 U.S.C. § 856(a) violates the Religious Freedom Restoration Act is now moot, as Safehouse sought only prospective injunctive relief. The Government's Motion will be denied as to its claim for declaratory judgment, as well as Safehouse's counterclaim for declaratory judgment.

[4] At the outset of the case, the Government represented that the issue was purely one of law that could be decided on a Motion for Judgment on the Pleadings. Safehouse objected and requested a full trial. I adopted the Government's view but sought more detail as to the protocol under which Safehouse was to operate. Therefore, I requested an evidentiary hearing on a limited number of issues, with the goal of having the parties amend the pleadings to frame the issues. Safehouse provided a summary of proposed testimony that broadly addressed issues of public policy and public health. I declined to allow it such leeway, and attempted to provide the parties with clear guidance as to the narrow scope of the proposed hearing. The hearing was held on August 19, 2019. Safehouse presented substantial evidence that went well beyond the scope of my guidelines. The Government raised no objection, however, and it became clear during cross-examination that the Government also sought to use the hearing to address a number of public policy and public health issues.

After considering the record, I held a telephone conference on August 23, 2019, and advised both parties that neither had abided by my ground rules for the hearing. I then sought to secure agreement as to nine discrete factual items to be incorporated into the record by agreement. The parties were able to reach agreement on eight of the nine points but had a vigorous dispute as to the ninth. I then ruled that I would consider nothing beyond the pleadings. Ironically, during oral argument, the Government repeatedly invoked portions of the testimony from Mr. Benitez in an attempt to support is arguments. Significantly, however, the Government has not withdrawn its Motion for Judgment on the Pleadings or altered its original position that no further record is necessary. I have therefore proceeded to address the pending Motion for Judgment on the Pleadings without reference to the testimony presented at the evidentiary hearing, as originally requested by the Government.

III. The Controlling Procedural Standard

A Rule 12(c) motion for judgment on the pleadings "is analyzed under the same standards that apply to a Rule 12(b)(6) motion." *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 134 (3d Cir. 2010). This well-established standard requires that I view the pleadings in the light most favorable to the non-moving party. *Leamer v. Fauver*, 288 F.3d 532, 535 (3d Cir. 2002). "A Rule 12(c) motion should not be granted unless the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law." *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 271 (3d Cir. 2014) (internal quotations and citations omitted). I may consider all pleadings in ruling on a motion for judgment on the pleadings. *Id.* (citing to Rule 12(c)).

IV. The Statutory Question

For purposes of this motion, the facts outlined above are undisputed, and the sole question is one of law.

a. The Absence of a Controlling Standard of Statutory Construction

District courts must faithfully apply the law Congress enacts. Binding precedent usually dictates or substantially influences the way in which district courts apply the law. But the Third Circuit has not yet considered the proper construction of 21 U.S.C. § 856(a), and although other courts of appeals have addressed that subsection, no court has yet considered its application to medically supervised consumption sites.[5]

When a district judge must address a novel question of statutory construction, part of the challenge is that "[s]tatutory interpretation does not have a defined set of predictable rules. The

[5] The Third Circuit has considered the meaning of the word "maintained" under U.S.S.G. § 2D1.1(b)(12) and looked to other circuit courts' interpretations of the word "maintained" in § 856. *United States v. Carter*, 834 F.3d 259, 262-63 (3d Cir. 2016).

doctrines of the field are not treated as law. They do not have a theorized jurisprudence that legitimates their source, or even indicates what it might be." Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 Notre Dame L. Rev. 2053, 2054 (2017). There are instead competing models and schools of thought, and a judge's choice of methodology carries a risk of dictating the outcome of a case. For that reason, I first address the various methods available, both because I believe transparency is important, and because I am convinced that judges must be conscious of the inherent limitations in all the various methods employed.

The Third Circuit has noted that a court's "goal when interpreting a statute is to effectuate Congress's intent." *S.H. ex rel. Durrell v. Lower Merion School Dist.*, 729 F.3d 248, 257 (3d Cir. 2013) (quoting *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012)). Stated differently, "[w]hen a court interprets a statute, the court articulates the meaning of the words of the legislative branch." Robert A. Katzmann, *Judging Statutes* 8 (2014). In this endeavor, the Third Circuit has, as recently as this past August, again emphasized that "words matter" and that interpreters must begin the process of statutory construction by looking to the text. *Pellegrino v. Transp. Sec. Admin.*, 937 F.3d 164, 2019 WL 4125221, at *12 (3d Cir. Aug. 30 2019) (en banc) (Ambro, J.) (majority opinion); *id.* (Krause, J., dissenting). Accordingly, where the meaning of a provision is clear, a court need not look beyond the statutory language.

To determine whether language is unambiguous, the Third Circuit has instructed that one should "read the statute in its ordinary and natural sense." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010) (quoting *In re Harvard Indus., Inc.*, 568 F.3d 444, 451 (3d Cir. 2009)). "A provision is ambiguous only where the disputed language is 'reasonably susceptible of different interpretations.'" *Id.* (quoting *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)).

In application, however, reliance on the plain meaning of the text is hardly as simple as its proponents contend, as evidenced by cases where both the majority and dissent claim that the language of a statute is clear and unambiguous while reaching opposite results. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ*, 550 U.S. 81 (2007). I find substantial merit to the observation that "[p]lain meaning is a conclusion, not a method." Victoria Nourse, *Misreading Law, Misreading Democracy* 5, 66, 68-69 (Harvard Univ. Press 2016) (hereinafter Nourse, *Misreading Law*).

Where plain meaning proves elusive or "a statute is unclear on its face," the Court of Appeals has recently reaffirmed that "good arguments exist that materials making known Congress's purpose 'should be respected, lest the integrity of legislation be undermined.'" *Pellegrino*, 2019 WL 4125221 at *11 (quoting Robert A. Katzmann, *Judging Statutes* 4 (2014)). In fact, respecting Congress's purpose is necessary to preserve both the legislative and judicial roles, and legislative materials often provide helpful insight into what Congress meant to accomplish with a given statute. Among the criticisms leveled at courts' use of legislative materials is that they are cited selectively and cited indiscriminately without recognition that different sources are entitled to different weight.[6] Judges must therefore consider legislative materials with an accurate understanding of Congress's rules and procedures. Katzman, *supra* at 49; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 802-05 (1983) (hereinafter Posner, *Statutory Interpretation*).

[6] Indeed, the Government at oral argument voiced the oft-repeated criticism that using legislative history is like looking over the heads of guests at a cocktail party and choosing one's friends. *See* Tr. at 12; *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993). In reality, the same potential problem also pervades the realm of judicial canons of statutory construction, as judges choose which canons to employ, Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909 (2016), and the realm of textual analysis, as judges select the specific words on which to focus, Victoria Nourse, *Picking and Choosing the Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 60 Fla. L. Rev. 1409 (2017). Whatever tools judges employ, it must be with an awareness of their limitations.

Recently, Georgetown Law Professor Victoria Nourse[7] articulated five guiding principles to facilitate a disciplined, objective use of legislative history—which she prefers to call "legislative evidence"—in statutory interpretation. Nourse, *Misreading Law*, *supra* at 68-69; *see also* Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70 (2012). First, she observes that "Statutes Are Elections." By that she means that the legislature makes choices, and one side prevails. Accordingly, statements of a law's opponents should never be cited for the authoritative meaning of the law, much in the way that a dissenting opinion would not be cited as authority without explanation. Nourse, *Misreading Law*, *supra* at 68. Nourse's second principle emphasizes the sequential nature of how laws develop. Just as subsequent appellate decisions trump trial court decisions, later text or legislative evidence can trump earlier legislative evidence. *Id.* at 69. One should therefore read legislative history in reverse, beginning with the last point in the decision-making process related to the text at issue. *Id.* at 79-80. The third principle recognizes that Congress's own rules can provide meaningful interpretive guidance when used as legislative canons. *Id.* at 85-88. Nourse's fourth principle rejects the view that any particular "type" of legislative history will always be the most reliable. Any type of legislative history may mislead the interpreter absent an understanding of the realities of legislative conflict, sequence, and congressional rules. *Id.* at 88-90. Finally, the fifth principle recognizes that Congress operates with different institutional expectations and incentives than the courts, which may cause courts to misunderstand the

[7] I am indebted to Judge Michael Boudin, of the First Circuit, for first acquainting me with Professor Nourse's work. I note as well that he has cited her scholarship in his own opinions. *See, e.g.*, *United States v. Acosta-Joaquin*, 894 F.3d 60, 63 (1st Cir. 2018) (citing Victoria Nourse, *Misreading Law, Misreading Democracy* (Harvard Univ. Press 2016)).

significance of certain congressional language. *Id.* at 91-94. To the extent that I consider legislative context, it is with these principles in mind.

Necessarily, statutory construction also requires consideration of the "canons" of construction given new life by the late Justice Scalia, and now widely used. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012). Indeed, a critical case relied upon by the Government based its holding on the application of a canon. *See United States v. Chen*, 913 F.2d 183 (5th Cir. 1991). But like legislative evidence, judicial canons need to be employed with an awareness of their limitations. *See, e.g.*, Katzmann, *supra* at 51-53; Posner, *Statutory Interpretation*, *supra* at 805-17. Two criticisms in particular resonate with me. First, many canons are premised on unrealistic assumptions about how Congress creates law. Katzmann, *supra* at 52-53; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Posner, *Statutory Interpretation*, *supra* at 806. Second, the manipulability of canons carries the potential for judges to rewrite statutes based on personal preferences under the guise of adherence to objective rules. Nourse, *Misreading Law*, *supra* at 105-06; Posner, *Statutory Interpretation*, *supra* at 816 ("Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained."). Canons' prevalence in the case law requires their consideration, but with the same caution that accompanies use of the legislative record.

The challenge of statutory construction is such that fidelity to method must often yield to the need to answer a specific, complex question. For example, textualists are fond of praising Justice Frankfurter's admonition to "(1) Read the statute; (2) read the statute; (3) read the statute!" Judge Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in*

Benchmarks, 196, 202 (1967). But Justice Frankfurter more broadly recognized that "there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947), *in Judges on Judging: Views from the Bench* 221, 229 (David M. O'Brien ed., 1997). In practice, therefore, most judges do not subscribe to purely one method. Katzman, *supra* at 55; Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 13 Harv. L. Rev. 1298, 1313-14 (2018); *see also* Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. Legis. 1 (2003). Instead, they draw upon multiple tools with the goal being to interpret the statute in question "in a way that is faithful to its meaning." Katzmann, *supra* at 29. Although both parties to this case claim the statute is clear, to resolve the question here requires the use of multiple tools as well.

I employ these tools of statutory construction to illuminate the statute's ordinary meaning. I take a statute's "ordinary meaning" to refer to the meaning consistent with the undisputed, prototypical examples of circumstances in which the statute applies—those to which legislators and members of the public would have expected the statute to apply at the time of enactment. *See* Lawrence Solan, *The New Textualists' New Text*, 38 Loy. L.A. L. Rev. 2027, 2040-42, 2044 (2005). Expressing a preference for a statute's ordinary meaning is not to say that the statute *only* applies to those examples. But just as courts should not interpret the law in a way that excludes the ordinary examples to which it undisputedly applies, courts should hesitate to extend a statute far beyond its ordinary meaning.

Such principles reflect appropriate respect for the role of Congress. Justice Gorsuch, writing for a majority of the Court, observed that it is fundamental that "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Absent binding precedent or some compelling rationale, courts should hesitate to expand the reach of a statute—particularly a criminal statute—far beyond the ordinary meaning conceived of at the time of enactment.

b. Interpretation of 21 U.S.C. § 856(a)

The sole question in this case is one of statutory construction. Specifically, the Court is tasked with construing 21 U.S.C. § 856(a), the most relevant portion of which makes it unlawful for any person to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance." § 856(a)(2). I must then determine whether Safehouse's planned activity, specifically the operation of the consumption room, falls within the scope of the statute's criminal prohibition.[8]

Section 856(a) was enacted in 1986 as part of the Anti-Drug Abuse Act and subsequently amended in 2003 as part of the PROTECT Act. The full text reads:

> Except as authorized by this subchapter, it shall be unlawful to--
>
> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;

[8] Neither party disputes that the other aspects of Safehouse's operation—providing sterile consumption equipment, naloxone, respiratory support, medical care, and addiction treatment referrals—do not violate the CSA. *See* Pl.'s Reply at 10. In fact, the Government conceded at oral argument that even mobile vans parked near public places to provide the same services offered inside Safehouse would not violate the statute. Tr. at 38.

> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

Some aspects of the statute's application to these facts are clear. Safehouse will manage or control a place and make that place available to participants. Safehouse participants undisputedly will use drugs on Safehouse's property. The remaining question is whether Safehouse will knowingly and intentionally make its property available "for the ***purpose*** of unlawfully . . . using drugs" within the meaning of the statute. In the parties' view, this is a simple question. I disagree.

The impetus for § 856(a) initially was a concern about crack houses, and a similar concern about drug-fueled raves motivated the 2003 amendment. The question is how far beyond those undisputedly covered activities the statute reaches. While I agree that, taking each of the statute's words literally, it might be possible to read § 856(a) to apply to Safehouse, I am not convinced that a plain or ordinary reading of the statute allows that application.

The Government argues that (a)(2) prohibits Safehouse's medically supervised consumption rooms because the purpose requirement there applies to the third party using the property, not the actor charged with violating the statute. That is, in the Government's view, only the third party must act "for the purpose of unlawfully . . . using drugs." The Government further contends that, even if the relevant purpose under the statute is that of Safehouse, Safehouse is necessarily acting for the purpose of unlawful drug use. Safehouse disagrees, arguing that the relevant purpose is the purpose for which the property itself is used and contending that its site is not "for the purpose of unlawfully . . . using drugs." Safehouse also

asserts that § 856(a) does not prohibit safe consumption rooms because the CSA authorizes their operation and because the statute does not define "unlawfully . . . using."

I reject Safehouse's latter two arguments for reasons explained more fully below. With respect to the purpose requirement, I conclude that the relevant purpose is that of the *actor*, not the third party or the property. However, "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance" remains ambiguous, susceptible to multiple interpretations. Consistent with the common understanding of purpose to refer to one's end or goal, along with the statutory scheme and legislative context, I interpret that provision to require that the actor have a significant, but not sole, purpose to facilitate drug activity. Because Safehouse does not plan to make its facility available "for the purpose of" facilitating unlawful drug use, I ultimately conclude that § 856(a) does not criminalize Safehouse's proposed conduct.

i. Authorization

Safehouse contends that its proposed conduct is "authorized by" the Controlled Substances Act (CSA) and therefore falls within the "[e]xcept as authorized by this subchapter" exemption of § 856(a). According to Safehouse, this follows not from any express authorization, but from the fact that medically supervised consumption sites constitute a legitimate medical practice "which the CSA does not regulate and Section 856 does not prohibit." Defs.' Resp. to Pl.'s Mot. J. on the Pleadings at 28, ECF No. 48 (hereinafter Safehouse Response). As a logical matter, Safehouse advances an argument that is both simplistic and circular: because the proposed conduct is not prohibited or regulated by the CSA, it is therefore necessarily authorized by the statute and excluded from the reach of § 856 of the CSA. I reject the premise that Congress's failure to prohibit activity constitutes an affirmative authorization. Rather, I am confident that the statute neither expressly prohibits nor authorizes the sites for the same reason —the legislature simply never contemplated them when enacting the law. Granted, if

§ 856 does not prohibit Safehouse's medically supervised consumption sites—a matter explored further below—additional express authorization would of course be unnecessary. That may make the sites "authorized" in the colloquial sense that they are not illegal, but it does not render them "authorized by this subchapter" within the meaning of the statute.

Safehouse relies heavily on *Gonzales v. Oregon*, 546 U.S. 243 (2006), in support of its contention that the Controlled Substances Act allows for safe consumption sites. *See* Safehouse Response at 30; Transcript of Oral Argument, ECF No. 131, at 49-50. Specifically, Safehouse contends that its medically supervised consumption rooms are authorized because the Attorney General lacks the power to "promulgate rules 'based on his view of legitimate medical practice'" and the CSA does not regulate the legitimate practice of medicine. Safehouse Response at 30 (quoting *Gonzales*, 546 U.S. at 260, 270). *Gonzales* involved a federal challenge to an Oregon statute, passed through a voter ballot initiative, allowing physicians to assist with suicide. 546 U.S. at 250. The statute in question established a detailed protocol for physicians to follow under the supervision of the Oregon Department of Human Services. Or. Rev. Stat. § 127.800 *et seq.* (2003). The Attorney General of the United States later published an "Interpretative Rule" that physician-assisted suicide was not a legitimate medical purpose, with the result that prescribing, dispensing, or administering drugs to facilitate it could be deemed a violation of federal law and lead to the suspension or revocation of a physician's registration under the CSA. 546 U.S. at 254.

Although the Supreme Court ruled against the Government, *Gonzales* does not control on the facts of the current case for several reasons. As a preliminary matter, the proposed activities of Safehouse here are not analogous to the detailed state-regulated scheme at issue in *Gonzales*. Safe injection sites are recognized as a legitimate harm reduction strategy among some public

health experts and recognized medical authorities such as the American Medical Association, *see* Defs.' Answer at 31, but as Safehouse concedes, no state medical board has issued standards governing their operation. Tr. at 52. It is clear that the Supreme Court in *Gonzales* was also concerned with issues of federalism, which are not present in a case where the conduct in question is not formally endorsed by any state or local governmental entity.[9] *See* 546 U.S. at 270.

Furthermore, an important concern of the Court in *Gonzales* was the Attorney General exceeding the bounds of his authority by interpreting a specific regulation governing the issuance of prescriptions by physicians. 546 U.S. at 266 (interpreting 21 C.F.R. § 1306.04). Similar concerns do not exist here where the Government seeks no more than direct enforcement of the statute.

Finally, as to Safehouse's argument that because "Congress does not regulate the legitimate practice of medicine" under *Gonzales*, the CSA does not prohibit safe consumption sites, Tr. at 49, I again find the facts of this case distinguishable. Although medication-assisted treatment, which requires the involvement of a physician, is part of the Safehouse protocol, medical practitioners are not directing that participants make use of safe consumption rooms as part of any formal course of treatment. Even if they were, *Gonzales* cannot be read so broadly as to exempt all legitimate medical practices from all provisions of the CSA. *Gonzales* may shed some light on the proper interpretation of the statute—a matter I address further below—but it does not by itself prohibit a criminal prosecution simply because the conduct in question is related to medical practice.[10]

[9] I do not recognize the support of individual public officials as the formal support of a governmental entity.

[10] Safehouse also cites several cases for the proposition that, to convict a practitioner, the Government must prove the practitioner acted outside the course of professional practice and without a legitimate medical purpose. But the

ii. Meaning of "unlawfully . . . using"

Safehouse also suggests that, because the statute does not offer a technical definition of "unlawfully . . . using," the meaning of that phrase is indecipherable, and § 856 cannot apply where the drug activity in question is consumption or use. With this argument, Safehouse advocates a problematic isolationist approach to statutory interpretation that can lead courts to conclusions far from the legislature's meaning. I decline to isolate "using" and read that term out of the text when the statutory and legislative context easily clarify the meaning of "unlawfully . . . using." Although the CSA does not criminalize "use" alone, the statute criminalizes possession, which, as the Government points out, is a necessary predicate to use.[11] By definition, a person cannot lawfully use or consume[12] a substance that the person cannot even lawfully possess. In the context of the statute, a reader can fairly understand "unlawfully . . . using" to refer to use of a substance the person cannot lawfully possess. This view is consistent with the legislative evidence, which refers to "using illegal drugs." *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 108-66, 108th Cong., 1st Sess. 49, at 68 (2003) (hereinafter Joint Explanatory Statement).[13] In a case where the illegality of the

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cases cited exclusively concern distribution under 21 U.S.C. § 841(a) and its implementing regulation concerning prescriptions, 21 C.F.R. § 1306.04. These cases might be relevant if the Government were accusing Safehouse of distributing medication, but they offer no insight into the question about § 856(a)(2)'s applicability to the facts at hand.

[11] The hypothetical used by Safehouse to advance its position at oral argument—one who unlawfully consumes a prescription they initially lawfully possessed for another, Tr. at 55, simply has no relevance to the issues here.

[12] Neither party seems to dispute that the term "using" unambiguously refers to consumption in this context.

[13] The joint explanatory statement to a conference report offers explanations of how conferees resolved disputes between the House and Senate versions of a bill or why any new language was added to the final bill text, which is embodied in the conference report. *See* Nourse, *Misreading Law*, *supra* at 80; Christopher M. Davis, *Conference Reports and Joint Explanatory Statements*, Congressional Research Service (2015). The statements are therefore helpful and proximate evidence of the meaning of text, particularly text added or modified in conference committees.

controlled substances involved is undisputed, the use of the term "unlawfully using" is not ambiguous. The question remains whether Safehouse plans to knowingly and intentionally make a place available for the purpose of unlawfully using drugs.

iii. To whose purpose (a)(2) refers

With respect to the purpose requirement, the first dispute concerns *whose* purpose is at issue. The text of (a)(2) requires that the actor charged with violating the statute "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." 21 U.S.C. § 856(a)(2). The Government contends that the actor in (a)(2) simply needs to have knowingly made a place available to *others who have the purpose* of engaging in drug activity. Pl. & Third-Party Defs.' Mot. for J. on the Pleadings at 9. Safehouse argues that the relevant purpose is that of the place itself. I reject both constructions and conclude that the statute requires that the *actor* have acted for the proscribed purpose.

A natural reading of the text indicates that, for a person to knowingly and intentionally make a place available for use for the purpose of unlawful drug activity, *that person*—the actor—must make the place available with the proscribed purpose. Section 856(a)(2) applies only when a person knowingly and intentionally makes a place available for use or rents the place "for the purpose of" unlawful drug activity, not when he knowingly makes it available for use or rents it to others who have the purpose of engaging in drug activity. In the most natural reading of the sentence, the "for the purpose of" clause refers to the mental state of the actor.

The context of the whole statute supports this reading. Sections 856(a)(1) and (a)(2) both contain the requirement that one engage in the prohibited conduct "for the purpose of" drug activity. No party—and no court, for that matter—disputes that the actor in (a)(1) must act "for the purpose of" drug activity. The same requirement exists in (a)(2) structured in precisely the

same way. Both provisions have the same subject, identified in § 856(b) as "any person." Both further identify a knowledge requirement—"knowingly" or "knowingly and intentionally"—followed by a set of verbs and a direct object—"place"—and conclude with the "for the purpose of" clause. In both provisions, the purpose requirement applies to the person who acts knowingly—an elaboration of the requisite mental state. The text suggests no reason to read the requirement differently in (a)(2) than in (a)(1).[14]

The substantive difference between the two provisions, as the Government agrees, Tr. at 9, and as many courts have recognized, is that (a)(1) targets actors who themselves use or maintain the place in question to engage in drug activity, whereas (a)(2) encompasses actors who manage or control a space and then make the place available *to others* who engage in drug activity. The legislative context confirms as much. Joint Explanatory Statement at 68 (explaining that the 2003 amendment to § 856 aimed to make "clear that anyone who knowingly and intentionally uses their property, or allows another person to use their property, for the purpose of distributing or manufacturing or using illegal drugs will be held accountable"). But that distinction does not mean that in (a)(2) the actor need not have the proscribed purpose. One can still make a place available to others for the purpose of those people manufacturing, distributing, or using illicit substances there.[15] Reading § 856(a) naturally, the purpose

[14] The Government at oral argument made much of the fact that (a)(2) begins with "manage and control" as opposed to "knowingly open" in (a)(1) and that "knowingly and intentionally" appears later in (a)(2). Tr. at 24-27. But the introductory clause in (a)(2) simply adds that one must first "manage and control" the place *and then* "knowingly and intentionally" make it available for use for the purpose of drug activity. Although "knowingly and intentionally" appears later in (a)(2), it precedes several verbs and the "for the purpose of" clause, just as in (a)(1). Moreover, the verbs in (a)(1) and (a)(2) share the same subject—"any person," as indicated in § 856(b). At no point has the Government presented a compelling textual reason why the structure of (a)(2) dictates that the purpose requirement must refer to the purpose of the third party.

[15] At oral argument, the Government referred to this reading of the statute as "nonsensical and self-defeating" because it would allow "a stone-cold crack dealer" to claim a benign purpose of making money to support his family. Tr. at 19. That argument erroneously merges two distinct issues. *Whose* purpose is at issue is a distinct question from whether the proscribed purpose must be the sole purpose. I address the latter question below and conclude that the proscribed purpose may be one of multiple purposes for which the actor makes the space available.

requirement applies to the actor in both (a)(1) and (a)(2) on its face, and absent evidence that it should apply differently in each, I decline to assign (a)(2) a lower mental state than its text requires.

Legislative evidence confirms that the purpose requirement applies to the actor in both provisions. When Congress most recently considered § 856, in 2003, it amended the statute, including (a)(2).[16] The amendment to § 856, originally introduced as the Illicit Drug Anti-Proliferation Act, was added to the PROTECT Act in the Conference Committee, an Act aimed at preventing child abuse and facilitating prosecution of crimes against children. Then-Senator Joseph Biden sponsored the Illicit Drug Anti-Proliferation Act and was a conferee at the Conference Committee on the PROTECT Act.[17] His remarks during the subsequent debate on the Conference Report offer strong evidence that § 856's meaning requires the actor or defendant to act with the purpose of drug use. The remarks were made just prior to Congress's collective decision to agree to the Conference Report, which represented the final decision about the text at issue. Because these comments were made by a sponsor of the original bill containing the amendment, who was also a conferee to the Conference Committee, they carry weight as

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Because one of the primary purposes of the "stone-cold crack dealer" is undoubtedly facilitating drug use, his purpose of facilitating drug activity would assure he did not "get off scot free," as the Government laments. *See id.* at 19, 20. Moreover, the Government's hypothetical profoundly underestimates the capacity of federal judges to avoid being duped by criminal defendants engaging in wordplay.

[16] Although the "for the purpose of" language was also in the original version of § 856, the legislative evidence from 2003 carries no less weight simply because the language was not entirely new in 2003. Congress revisited the language in question in 2003 and decided to enact the modified provision with the "for the purpose of" language. The context surrounding that decision constitutes evidence of the most recent legislative decision about the relevant text and can therefore shed light on its meaning. *See* Nourse, *Misreading Law*, at 69, 80.

[17] In the Senate, a conferee is also called a "manager" and is appointed to serve on a conference committee, typically from the committee or committees that reported the legislation. Conferees "are expected to try and uphold the Senate's position on measures when they negotiate with conferees from the other body" about the text of a bill. *Conferees*, United States Senate Glossary, *available at* https://www.senate.gov/reference/glossary_term/conferees.htm (last visited Oct. 1, 2019).

evidence of the text's meaning. *See* Nourse, *Misreading Law*, *supra* at 69. Biden stated explicitly that the actor must make the place available for the purpose of drug activity: "My bill would help in the prosecution of rogue promoters who **not only know** that there is drug use at their event but also **hold the event for the purpose of illegal drug use** or distribution. That is quite a high bar." 149 Cong. Rec. 9384 (emphasis added). He further commented that "[t]he bill is aimed at the defendant's predatory behavior," which points to the requirement of purposeful action on the part of the person accused of violating the statute. 149 Cong. Rec. 9383. Coupled with the text of the statute, the legislative context makes clear that, to be liable under (a)(2), an actor must make the place in question available for the specific purpose of drug activity.

A deeper textual analysis, tested by application of judicial canons, leads to the same conclusion. On the face of (a)(2), "for the purpose of" modifies the preceding verbs (rent, lease, profit from, make available for use), the subject of which is the actor accused of violating the statute.[18] The "grammar canon" therefore supports the view that the purpose applies to the actor, rather than an unspecified third party. *See* Scalia & Garner, *supra* at 140. The "presumption of consistent usage" likewise encourages this view. That canon holds that, if a phrase has a clear meaning in one portion of a statute, but the meaning is less clear in a related section, courts should presume that the phrase carries the same meaning in both. *Id.* at 170; *see Si Min Cen v. Attorney General*, 825 F.3d 177, 193 (3d Cir. 2016). Though canons must be applied with caution, the presumption of consistent usage carries inherent logical force where, as here, the two provisions in question are part of the same subsection, were enacted together, and use the phrase

[18] Safehouse asks the Court to read "for the purpose of" to modify the place itself rather than any person's action with respect to the place. As a technical matter, I read "for the purpose of" to modify the verbs, rather than the direct object. One *acts* for a purpose; a place does not carry an inherent purpose separate from a person's intentions for its use. Because any "purpose" of a place is simply the purpose a person or group has given it, there is little meaningful difference between referring to the purpose of a place and the purpose of the actor controlling it.

in the same way. In that regard, the presumption of consistent usage canon is one that directs the court to focus on how *Congress* used terms within the structure of a statute, reducing the risk of judges importing a meaning of their own. "For the purpose of" in (a)(1) clearly and undisputedly refers to the purpose of the actor accused of violating the provision. Although the implication in (a)(2) that third parties will use the place in question may make the purpose clause there less clear to some readers than in (a)(1), courts should presume—absent context indicating otherwise[19]—that the clause carries the same meaning. That is, courts should presume that (a)(2) requires that the *actor* act "for the purpose of" drug activity.

The inclusion of "and intentionally" in (a)(2) further emphasizes that the actor allowing others to use the property must do so "for the purpose of" drug activity. Unlike (a)(1), which requires only that the defendant act "knowingly," (a)(2) requires that the defendant have "knowingly *and intentionally*" made the place available for the proscribed purpose—expressly requiring not only knowledge of the drug-related circumstances but the intention that the proscribed purpose occur. The Government concedes that the combination of "knowingly" and "for the purpose of" in (a)(1) unambiguously requires that the actor "open" or "maintain" the

[19] The close reader may notice that the terms "rent" and "lease" also appear in both provisions, but context clarifies that these terms carry different meanings in (a)(1) and (a)(2). In (a)(2), the indication that the actor must "manage or control" the property as an owner or lessee *and then* rent, lease, or make it available, clarifies that "rent" and "lease" in that provision refer to renting and leasing a space to others. In (a)(1), the same words refer to renting and leasing a space for one's own use. The legislative context reinforces this interpretation. When Congress added these terms to the statute in 2003, it did not change the primary distinction between (a)(1) and (a)(2)—that the former applies to use of one's own property and the latter to making a property one controls available to others. *See* Joint Explanatory Statement at 68; 149 Cong. Rec. 1849 (Statement of Senator Grassley at introduction of the Illicit Drug Anti-Proliferation Act that the bill was "an important step, but a careful one"). Construing "rent" and "lease" to mean the same thing in both would run counter to the meaning the legislature gave the two sections. Proponents of the "Latin canons" will also note that the *noscitur a sociis* canon, which holds that interpreters should give related meanings to words in a list, requires this interpretation. *See* Scalia & Garner, *supra* at 195. In (a)(1), "rent" and "lease" take on meanings related to "open," "use," and "maintain," and in (a)(2), their meaning must relate to "profit from" and "make available for use," both of which imply a third party using the property. Nothing in the text counters the presumption that "for the purpose of" has consistent meaning in both provisions. In fact, both the statutory and legislative context confirm that "for the purpose of" applies to the actor in both.

place in question "for the purpose of" drug activity. The addition of "intentionally" to that combination cannot possibly signal a change in the purpose requirement from (a)(1)—particularly not a change that would *lower* the requisite mental state for an (a)(2) violation. Congress's addition of the term "intentionally" resolves any doubt over whether the actor must act with the proscribed purpose of fostering drug activity under (a)(2).[20]

The Government would have me read a combination of "knowingly," "intentionally," and "for the purpose of" to require mere knowledge of an unidentified third party's purpose. Its requested interpretation would require judicial editing of the statutory text, ignore a critical term, read (a)(1) and (a)(2) inconsistently, and lower the requisite mental state of (a)(2) in a manner that directly contradicts the legislative context surrounding the provision. I am compelled to reject the Government's view of whose purpose (a)(2) concerns and accept the interpretation that, as in (a)(1), the purpose requirement applies to the actor charged with violating the statute.

The Government correctly points out that more than one circuit court has adopted the interpretation the Government advocates. But these circuit courts do not include the Third Circuit, and upon closer review, all of those decisions rest upon *United States v. Chen*, 913 F.2d 183 (5th Cir. 1991), adopting its conclusion without critical analysis. This is not said as a criticism of those other circuits; the cases before them did not require rigorous analysis of *Chen*. This case does, and though it may seem presumptuous for a lone district judge to look behind so many circuit decisions, the unique facts of this case require me to do so, and judges must not shirk from their responsibility to follow where reason and logic take them.

[20] Depending on the context, "intentionally" can mean either "purposely"—having the conscious object to cause a specific result, or "knowingly"—being practically certain that one's conduct will cause a result. *See* 3d Cir. Model Crim. Jury Instructions § 5.03 cmt. (2018). In this context, it would be redundant to treat "knowingly" and "intentionally" as synonymous when they appear together in (a)(2).

In *Chen*, the Fifth Circuit analyzed the 1986 version of 21 U.S.C. § 856(a) to determine whether the trial court had erred in giving a deliberate ignorance instruction as to the knowledge requirement in both (a)(1) and (a)(2). The *Chen* court concluded that "for the purpose of" in (a)(1) referred to the purpose of the actor charged with violating the statute, making the deliberate ignorance instruction inappropriate, but that in (a)(2) the actor need not have the purpose that drug activity take place. In reaching this conclusion, the Court spent little time analyzing the text of (a)(2). Rather, most of its analysis focused on (a)(1), specifically concluding that, in combination with "knowingly," "for the purpose of" unambiguously applies to the actor who opens or maintains the place in question—a proposition with which I agree.[21] I accept the *Chen* court's conclusion that the actor in (a)(1) must act for the purpose of drug activity. But I see no reason why the court's reasoning should not extend to (a)(2).

Rather than analyze (a)(2) as it did (a)(1), however, the *Chen* court stated in an almost offhand way that reading (a)(1) differently would make it superfluous in relation to (a)(2). This conclusion was, according to the Court, simply "[b]ased on [its] reading" of (a)(2)—a reading that involved little to no analysis of the text. *Chen*, 913 F.2d at 190. Under the Fifth Circuit's reading, "§ 856(a)(2) is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use . . . for the purpose of unlawfully' engaging in such activity." *Id.* at 190. Without elaboration, the court then concluded that in (a)(2), "the person who manages or controls the building and then rents to

[21] In that regard, the Government's assertion that the *Chen* court found (a)(2) unambiguous is inaccurate. Notably, the court only remarked that the statute was unambiguous in its discussion of (a)(1). *Chen*, 913 F.2d at 190.

others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose)."

Five concerns lead me to decline to follow *Chen*. First, I cannot read (a)(1) and (a)(2) as redundant. Second, the *Chen* court's interpretation of (a)(2) is inconsistent with its analysis of (a)(1). Third, the court unnecessarily applied the rule against surplusage to address a redundancy that in my view does not exist, and then violated it by failing to give meaning to the term "intentionally." Fourth, the court selectively applied statutory canons, invoking the rule against surplusage but violating the presumption of consistent usage by giving "purpose" one meaning in (a)(1) but a different meaning in (a)(2). Fifth, legislative evidence directly refutes the Fifth Circuit's construction of the statute.

First, the baseline premise of *Chen*, that (a)(1) and (a)(2) overlap, is not one I can accept. Read naturally, (a)(1) addresses circumstances where the actor uses their property for their own unlawful drug activity, whereas (a)(2) addresses circumstances where the actor makes the property available to others for the purpose of those individuals engaging in unlawful drug activity. As I have described above, a violation of (a)(1) requires that "any person" "knowingly open, lease, rent, use, or maintain any place . . . for the purpose of" drug activity. §§ 856(a)(1), (b).[22] Section (a)(2) then makes it unlawful for "any person" to "manage or control any place," in one of a variety of capacities, "and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of" unlawful drug activity. §§ 856(a)(2), (b). I find it clear from the face of subsection (a) that (a)(1) and (a)(2) are different: (a)(1) refers to one's use of their property for their own drug activity, and (a)(2) refers to one

[22] Section 856(b) delineates the criminal penalties for "[a]ny person who violates subsection (a)." "Any person" therefore can be fairly understood as the subject associated with the verbs in subsection (a).

making property available for the purpose of others engaging in drug activity. I do not see the redundancy that concerned the *Chen* court.

Second, as to the inconsistency between the court's interpretation of (a)(2) and its analysis of (a)(1), the court offered no textual reason why the terms "for the purpose of" should apply to a different person in (a)(2) than (a)(1). In its analysis of (a)(1), the court emphasized that the combination of "knowingly" and "for the purpose of" clearly signified that the relevant purpose was that of the actor—the person controlling the property. To hold otherwise would "twist the clear and plain language of the statute." *Id.* at 190. In support of that conclusion, the court noted that, in sixteen other federal statutes combining the terms "knowingly" and "for the purpose of," the purpose clearly referred to that of the actor. *Id.* at 190 n.9. The problem with this analysis is that the *same* combination of "knowingly" and "for the purpose of" appears in (a)(2), *reinforced* by the addition of the term "intentionally." Yet the court offered no explanation why its reasoning as to whose purpose matters in (a)(1) should not apply equally if not with greater force in (a)(2).[23]

Third, the court unnecessarily altered the meaning of the statute. As discussed above, the court did not need to change the purpose requirement to retain the key distinction that (a)(2) involves *others* engaging in drug activity. It reached that result applying a statutory canon, the rule that "a statute should be construed so that each of its provisions is given its full effect," *id.* at 190 (citation omitted), also known as the rule against surplusage. Ironically, that same cannon

[23] One portion of the court's opinion even seemed to contradict this conclusion. The court initially noted that "[t]he government agrees both that the offense requires two mental elements—knowledge and purpose—and that the jury had to find that Chen maintained (§ 856(a)(1)) or operated (§ 856(a)(2)) the motel with the *specific purpose* of unlawfully using, storing, or distributing a controlled substance, and not merely that she 'operated a motel where drug activity was rampant.'" *Chen*, 913 F.2d at 188. Although the *Chen* court seemed to accept the Government's concession that *the actor* must have the specific purpose of drug activity under both paragraphs, the court then inexplicably interpreted the purpose requirement as pertaining to a third party.

requires that *every* word in a statute be given meaning when possible. *See Bastardo-Vale v. Attorney General*, 934 F.3d 255, 261-62 (3d Cir. 2019) (en banc) (Schwartz, J.) (majority opinion); *id.* at 271-72 (McKee, J., dissenting); Scalia & Garner, *supra* at 174-79. Yet the *Chen* court read "intentionally" out of the statute.[24] Earlier in its opinion, the *Chen* court noted that "intention" is a synonym for purpose, *id.* at 189, and quoted the trial court jury instruction stating that "[a]n act is done 'willfully' or 'intentionally' if done voluntarily and purposely with the intent to do something the law forbids." *Id.* at 187.[25] Yet the court failed to examine the implication of the inclusion of "intentionally" in (a)(2) before concluding that (a)(2) requires a person to act with a significantly lower mental state than (a)(1).

The *Chen* court's use of the rule against surplusage brings me to my fourth point about the selective application of the canons of construction and underscores one of the risks of their use.[26] The rule against surplusage generally presumes that Congress is not redundant. But it applies in different ways. When a court deems two provisions of a statute redundant, it is *the court* who then proceeds to supply meaning by means of inference. Necessarily, there is a risk that the meaning supplied by the court is different from that of Congress. In contrast, when a court invokes the rule for the purpose of giving meaning to every word of a statutory provision,

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[24] The Government concedes the responsibility of a judge to give meaning to every word in a statute, Tr. at 28, but its briefing, like the *Chen* court, simply ignores the term "intentionally," and it offered no insight at argument as to how this term should be construed.

[25] Confusingly, the trial court's "knowingly" instruction also said that "[a]n act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." *Chen*, 913 F.2d at 187. This is consistent with the Fifth Circuit's current model instruction for "knowingly." *See* 5th Cir. Model Crim. Jury Instructions § 1.37 (2015). But, in context, the suggestion that "intentionally" is akin to "voluntarily" conflicts with the court's immediately preceding suggestion that "intentionally" is a synonym for "willfully," which requires one act with a specific purpose. *Chen*, 913 F.2d at 187.

[26] As indicated above, Judges and academics alike have offered various criticisms of the canons. Katzmann, *supra* at 52-53; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Nourse, *Misreading Law*, *supra* at 105-06; Posner, *Statutory Interpretation*, *supra* at 806.

the focus is on the actual term employed by Congress, reducing the risk of legislating from the bench. In failing to assign any meaning to the term "intentionally," but deeming (a)(1) and (a)(2) redundant save for the court's inferred meaning, *Chen* applied the rule against surplusage selectively.

Moreover, when statutory canons are applied, what is the standard for choosing *which* to apply? *See* Richard A. Posner, *The Federal Courts: Crisis and Reform* 277 (1985) ("[T]here is no canon for ranking or choosing between canons; the code lacks a key.") Along with the rule against surplusage, a separate canon is the presumption of consistent usage, which provides that "[a] word or phrase is presumed to bear the same meaning throughout a text." Scalia & Garner, *supra* at 170. Absent some reason, and I can identify none, the phrase "for the purpose of" should be interpreted consistently, particularly when it appears in contiguous paragraphs of the statute. The same sixteen federal criminal statutes supporting the Fifth Circuit's construction of (a)(1) would apply equally to (a)(2). Yet the *Chen* court neglected this canon in favor of a selective application of the rule against surplusage, claiming redundancy on the one hand, while simply ignoring the term "intentionally."[27]

Finally, as reviewed above, legislative evidence directly contradicts the *Chen* court's interpretation. The court gave life to the precise interpretation that the sponsor of the 2003 amendment expressly rejected. Then-Senator Biden rejected the concern that the law might allow prosecution of businesses that knew individuals would come onto their property and use drugs. He specifically stated that the provision would allow for prosecution of those who "**not**

[27] This graphically illustrates Professor Llewellyn's classic critique of statutory canons, the observation that for almost every canon, there is a counter-canon. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Constructed*, 3 Vanderbilt L. Rev. 395, 400 (1949-1950); *see also* Anita S. Krishnakumar, *Dueling Canons*, 65 Duke L.J. 909 (2016).

only know that there is drug use at their event but also **hold the event for the purpose of illegal drug use** or distribution. That is quite a high bar." 149 Cong. Rec. at 1847, 9384. Biden further remarked that "[t]he bill provides federal prosecutors the tools needed to combat the manufacture, distribution or use of any controlled substance at any venue **whose purpose is to engage in illegal narcotics activity**." 149 Cong. Rec. at 9383 (Apr. 10, 2003). These statements make clear that the event-holder or the venue—in practice the venue operator—must have the proscribed purpose.

Biden's remarks were directed at criticisms that the mental state required to support conviction was too low and would allow prosecution of legitimate businesses for knowingly allowing others to use drugs on their property without some greater involvement in the unlawful conduct. *Id.* Earlier in the debate, Senator Leahy, who ultimately voted for the Act, had voiced concerns about the Government using the existing crack house statute, or any expanded version, to pursue legitimate business owners. 132 Cong. Rec. 9378 (addressing reports of the Government using the statute to prosecute business owners who take precautions against drug use rather than "solely against property owners who have been directly involved in committing drug offenses" and contending that business owners' worries "about being held personally accountable for the illegal acts of others" warranted a fuller hearing).[28] Senator Leahy's

[28] Senator Leahy noted that these concerns were raised in a prior House Judiciary Hearing. The previous Congress's House Judiciary Committee hearing on the RAVE Act—the prior version of the Illicit Drug Anti-Proliferation Act—is not properly considered as legislative evidence of the meaning of the statute. However, Senator Leahy's citation to the hearing gives it some relevance. At that hearing, a witness raised concerns about what he considered "a frightening interpretation of the law" expressed in *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991), a case that relied on *Chen* to conclude that "the person who manages and controls the building and then rents it to another need not have the express purpose in doing so that drug-related activity is engaged in by others." *Reducing Americans' Vulnerability to Ecstasy Act of 2002: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 56 (2002) (statement of Graham Boyd, Director, Drug Policy Litigation Project, American Civil Liberties Union); *see also id.* at 58 (statement of Boyd noting the Fifth Circuit's interpretation in *Chen*). This appeared to surprise and confuse some members of Congress. *See id.* at 56-58. Even the representative from the DEA at the hearing said he was unfamiliar with the *Tamez* case but "would be flabbergasted if that was the majority opinion." *Id.* He proceeded to indicate that the "knowingly" requirement sufficiently protects an innocent owner because it requires one act "purposely and deliberately." *Id.* at 60. During

comments draw attention to a risk that law enforcement could improperly apply the statute to actors without a purpose of unlawful drug activity. Senator Biden's subsequent comments then confirm that the statute means to subject to punishment only those who act for the purpose of drug activity, and Senator Leahy supported the conference report that included the amendment. This exchange reinforces the view that only actors who make their space available for the purpose of drug activity were meant to face criminal liability for the activity of others on their property.[29]

Of course, the *Chen* court—and most of the cases following *Chen* for that matter—did not have the benefit of this 2003 legislative evidence, nor did it look to the 1986 legislative record. That is no reason, however, for this Court to ignore a clear explanation of the meaning of the most recent congressional decision as to the text.[30] The legislative evidence demonstrates

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comments on the PROTECT Act, Senator Leahy shared the alarm expressed at the House Judiciary Committee hearing in the previous Congress about a *Tamez*-like interpretation allowing the government to criminally prosecute property owners and managers for drug use that occurred on their property even if they did not act for the purpose of permitting drug use.

[29] Notably, the only statement arguing that § 856 requires an affirmative effort by business owners to prevent drug use—and implying that they need not act "for the purpose of" unlawful activity to be liable—came from an opponent, Representative Kilpatrick, who voted against the bill, in a statement inserted into the record after debate. 132 Cong. Rec. 9093. To take as authoritative the meaning attributed to a provision after debate by an opponent who voted against the bill would give legal effect to the minority view that lost the debate. Nourse, *Misreading Law*, *supra* at 74; *see also* Parliamentarian of the House Thomas J. Wickham, Jr., *House Practice*, U.S. House of Representatives, 383-84 (2017) (providing that extraneous materials, including extensions of remarks, submitted on the day of a bill's consideration or later are inserted into the congressional record *after* the general debate on the bill and identified by a distinct typeface), *available at* http://clerk.house.gov/legislative/legprocess.aspx.

[30] As noted above, Congress revisited the statutory text in 2003 and decided to enact the modified provision, with the original "for the purpose of" language included. The context surrounding that decision constitutes evidence of the most recent legislative decision about the relevant text and sheds light on its meaning. *See* Nourse, *Misreading Law*, *supra* at 69, 80. To the extent one might argue that Congress incorporated *Chen* and related decisions in 2003, the legislative record reveals no evidence that *Chen*'s interpretation of (a)(2) was debated or considered by the 108th Congress prior to the enactment of the PROTECT Act. It is true that courts often employ the so-called prior-construction canon. That canon presumes that Congress, if it adopts language used in an earlier version of the act, must also be considered to have adopted "judicial interpretations [that] have settled the meaning of an existing statutory provision." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also Berardelli v. Allied Servs. Inst. Of Rehab. Med.*, 900 F.3d 104, 117 (3d Cir. 2018). Judicial interpretations are "settled" only if a word or phrase has been authoritatively interpreted by the jurisdiction's highest court or has been given a uniform interpretation by the lower courts. *See id.* Neither has occurred here. At the time of the 2003 amendment, the Supreme Court had not interpreted the meaning of (a)(2)'s "purpose" clause. Nor had the courts of appeals produced anything close to a

that *Chen* misinterpreted whether the actor in (a)(2) must act for the purpose of drug activity. For this and the four other reasons described above, I decline to follow *Chen*'s interpretation.

The other Circuits that have endorsed *Chen*'s interpretation have largely done so without question, simply citing the rule against surplusage and choosing not to engage in independent analysis of the statute. The first case to address § 856(a)(2) after *Chen* was *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991). Although faced with an argument from the appellant "that the statute require[d] that he *intend* to use the building for a prohibited purpose under section 856(a)(2)," the *Tamez* court never addressed the implication of the word "intentionally" in the statute. *Id.* at 774. The court rejected the appellant's argument as to § 856(a)(2) exclusively "on the logic of *Chen*," finding that, because (a)(1) "applies to purposeful activity," it follows that "if illegal purpose is . . . a requirement of 856(a)(2), the section would overlap entirely with 856(a)(1)." *Id.* at 774. The Court did not explain why this was so but simply concluded that "§ 856(a)(2) requires only that proscribed activity was present, that [the actor] knew of the activity and allowed that activity to continue." *Id.* at 774. Inexplicably, the Ninth Circuit noted that § 856(a)(1), which does *not* include the word "intentionally," "requires purpose or intention" to engage in drug activity, *id.*, without paying heed to the addition of intentionally in (a)(2).

Since *Tamez*, several other circuit courts have reached the same conclusion on the authority of *Chen*, but the facts of the cases before them did not require that they engage in any independent interpretation of the text. *See United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) (accepting *Chen*'s conclusion without question or elaboration); *United States v. Wilson*, 503 F.3d 195, 196-97 (2d Cir. 2007) (relying on *Chen* and *Tamez* to reach the same conclusion

"uniform body of . . . judicial precedent." *See Bragdon*, 524 U.S. at 645. To be sure, *Chen* (in the Fifth Circuit) and *Tamez* (in the Ninth Circuit) were on the books, but no other court of appeals had sought to interpret (a)(2), and as discussed below, *Tamez* relied exclusively "on the logic of *Chen*." 941 F.2d at 744.

without elaboration, despite appellant's argument that § 856(a)(2) required that "she herself intended that the premises would be used for the unlawful purpose"); *United States v. Tebeau*, 713 F.3d 955, 959-61 (8th Cir. 2013) (relying on the aforementioned cases to reach the same conclusion without question or elaboration[31]); *see also United States v. Ramsey*, 406 F.3d 426, 429 (7th Cir. 2005) (relying on *Chen*, *Tamez*, and *Banks* to conclude that deliberate ignorance satisfies the knowledge requirement and approving of removal of the word "intentionally" from jury instructions on § 856(a)(2) because the "'intentionally' element can be satisfied by the government proving . . . the defendant intentionally permitted another person to use the property at issue and that the other person used it for an illicit purpose about which the defendant knew").[32] Given the importance of close analysis of the statute on the facts of this case, I cannot simply rely upon other circuits' uncritical embrace of *Chen* when the cases before them did not require critical reflection on its analysis.

The Government has cited only one Third Circuit case, a non-precedential decision that, ironically, does not support its position. In *United States v. Coles*, 558 F. App'x 173, 181 (3d Cir. 2014), a panel of the Court considered an appeal where a defendant convicted under § 856(a)(2) argued the Government had failed to establish his knowledge of drug activity at an apartment he rented but allowed his cousin to live in. The Court reviewed the record, including evidence that the defendant had coached his cousin to cook crack, and concluded that "the jury was entitled to infer [the defendant] intended that the property be used for manufacturing and

[31] The Eighth Circuit also cited their own model jury instructions on § 856(a)(2), but those instructions simply relied on the authority of *Chen* and *Banks*. *Tebeau*, 713 F.3d at 961.

[32] The Government further cites *United States v. Bilis*, 170 F.3d 88, 92 (1st Cir. 1999), as a case that supports its interpretation of "for the purpose of." But the First Circuit in that case did not address the "for the purpose of" clause, nor did it discuss the implication of "intentionally." It simply evaluated whether a willful blindness instruction was appropriate based only on a test recognized in the First Circuit.

storing controlled substances." *Id.* In short, this panel of the Third Circuit appears to have read the purpose requirement of (a)(2) as I do, referring to the purpose of the actor in control of the property. The Government is certainly correct that this case is not binding, and that non-precedential decisions of our Circuit are not meant to involve the same depth of analysis as precedential decisions. But in a case where ordinary meaning is the question, I give at least some weight to the fact that no ambiguity arose in the minds of these jurists applying the statute to a trial record.[33]

Absent any instruction from the Third Circuit to follow *Chen* and its progeny, I cannot do so in good conscience, given my own analysis of § 856(a). For the foregoing reasons, I conclude that the actor charged with violating § 856(a)(2)—in this case Safehouse—must have acted "for the purpose of unlawfully . . . using a controlled substance." I turn next to the meaning of that phrase.

iv. Meaning of "for the purpose of unlawfully . . . using a controlled substance"

Having determined *who* must act "for the purpose of" unlawful drug activity under (a)(2)—that the actor who manages or controls the place must make it available "for the purpose of unlawfully . . . using a controlled substance"—does not end the inquiry. There remains a question of what it means to make a space available "for the purpose of unlawfully . . . using a controlled substance"—and whether Safehouse is acting for that purpose.[34] I begin with the

[33] I have reviewed the briefs from *Coles* and take note that neither side advanced arguments rooted in the text of the statute.

[34] Setting aside the dispute resolved in the preceding section about whether the actor must have the purpose in question, the parties seem to accept that the conduct (a)(2) addresses involves making a space available to *others* who use, manufacture, distribute, or store drugs. In contrast, cases brought under § 856(a)(1), at least in this circuit, typically center on drug activity in which the defendant is directly involved. *See, e.g.*, *United States v. Sawyers*, 2019 WL 3816940, at *1 (M.D. Pa. Aug. 14, 2019) (defendant charged under § 856(a)(1) stemming from his "selling drugs from [his residence]"); *United States v. Fuhai Li*, 2019 WL 1126093, at *1 (M.D. Pa. Mar. 12, 2019) (defendant "charged [with] violations of 21 U.S.C. § 856(a)(1)" for "maintaining locations . . . for the purpose of

observation that, by its very nature, the phrase "for the purpose of" can be assigned many different meanings and can operate on multiple levels.

In the Government's view, Safehouse plans to make safe consumption rooms available for the purpose § 856(a)(2) proscribes. It argues in part that even an ultimately lawful purpose does not suffice to avoid liability if unlawful drug use is required to accomplish that purpose. In that regard, the Government cites a number of cases that can accurately be described as civil disobedience cases. Common among those cases is a defendant deliberately violating a law to achieve some higher moral purpose. *See, e.g.*, *United States v. Romano*, 849 F.2d 812, 816 n.7 (3d Cir. 1988) (defendant broke into naval air station and damaged government property but argued that his conduct was justified because it would save lives). I do not find these cases instructive. Unlike the civil disobedience cases the Government cites, Safehouse does not concede that it is violating § 856(a) or any other law.[35] Safehouse has not argued that its ultimate purpose justifies an intermediate purpose of unlawful drug use. Rather, Safehouse argues that it will not unlawfully make a place available "for the purpose of . . . using a controlled substance" as that clause is properly understood under § 856(a)(2).

To determine whether Safehouse is acting with the proscribed purpose, I must examine the scope of the purpose requirement—what it means to act "for the purpose of unlawfully . . . using a controlled substance." Faced with these differing interpretations, I again begin with the text, and where the text remains unclear, I turn to a variety of contextual sources for guidance as

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unlawfully distributing controlled substances"); *United States v. Rice*, 2017 WL 6349372, at *1 (W.D. Pa. Dec. 13, 2017) (defendant charged under § 856(a)(1) stemming from discovery of "grow operation" at defendant's residence and commercial building used by defendant).

[35] Technically, certain defendants in *Romano* asserted they lacked the requisite mens rea or that their actions were "necessary" and, in those ways, did not concede illegality. But there was no dispute whether the defendants broke into the military installation and damaged government property.

to the meaning of "for the purpose of unlawfully . . . using a controlled substance." I note that even in the course of determining whether the text is clear on its face, the Third Circuit has relied on an array of extra-textual sources. *See, e.g.*, *Pellegrino*, 2019 WL 4125221, at *5-6, *11 (citation omitted) (considering dictionaries, the broader statutory and regulatory scheme, and Fourth Amendment case law to determine the meaning of "execute searches" before concluding that the statutory text was clear). Where the evidence points toward multiple interpretations, an interpretation consistent with the law's original, ordinary meaning is the most responsible course to take in an effort to avoid unwarranted judicial expansion of the statute.

The text itself does not specify the scope of § 856(a)(2)'s purpose requirement, let alone address the legal status of public health projects that would make property available for drug use to facilitate the administration of treatment. Safehouse knows and intends that some drug use will occur on its property, but it does not necessarily follow that the organization will knowingly and intentionally make the place available *for the purpose of* unlawful drug activity. That is so because, as noted above, the purpose requirement in (a)(2) is susceptible of multiple meanings. The condition that one act "for the purpose of" unlawful drug activity could refer to any purpose (however insignificant), to one's sole purpose, or to one's ultimate purpose.

Although I am certain the parties would each claim "plain meaning" on the face of the text, both their interpretations implicitly add some meaning to the language of the statute. The Government argues that "for the purpose of unlawfully . . . using" drugs plainly includes *any* intended allowance of drug use on one's property, even as part of an effort to administer medical treatment. Safehouse, on the other hand, argues that "for the purpose of unlawfully . . . using" drugs plainly does not extend to a purpose that would allow drug use on-site only to provide life-saving treatment to drug users. Safehouse reads the statute to require a *primary* purpose to

encourage drug use, not just any purpose that involves allowing drug use and certainly not a purpose aimed at stopping drug use.

To determine the scope of the purpose requirement, I must initially examine whether the proscribed purpose must be the primary or principal purpose of the actor, as Safehouse contends, or whether it may be one of multiple purposes, as the Government argues. I next address whether any purpose involving the allowance of drug use satisfies the purpose requirement or whether the purpose requirement must be applied in a more discerning way.

I turn first to whether the proscribed purpose must be the primary purpose of the actor or whether it may be one of many purposes. To answer that question, I consider the dictionary definition of "purpose." Both the Supreme Court and the Court of Appeals cite to dictionaries as a tool of statutory construction, observing that "[o]rdinarily, a word's usage accords with its dictionary definition." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015); *Pellegrino*, 2019 WL 4125221, at *3. Dictionary definitions offer substantial support to Safehouse's view, as neither party seems to dispute that, as a definitional matter, "purpose" refers to one's objective, goal, or end. Safehouse Response at 21; Tr. at 31; *see Purpose*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("[S]omething set up as an object or end to be attained."); *Purpose*, Black's Law Dictionary (7th ed. 1999) ("An objective, goal, or end."); *Purpose*, Oxford English Dictionary (1986) ("That which one sets before oneself as a thing to be done or attained; the object which one has in view.").[36] Based on this definition, Safehouse insists that the only relevant purpose under § 856(a) is the *primary* or principal purpose, because the term "purpose"

[36] The definitions in earlier editions of the same authorities are essentially the same. *Purpose*, Webster's Deluxe Unabridged Dictionary (2d ed. 1983) ("[T]hat which a person sets before himself as an object to be reached or accomplished; aim; intention; design."); *Purpose*, Black's Law Dictionary (5th ed. 1979) ("That which one sets before him to accomplish; an end, intention, or aim, object, plan, project.").

would ordinarily refer to one's ultimate objective. If one literally reads the dictionary definitions into the statute—"for the [objective, goal, end] of unlawfully using a controlled substance"—Safehouse's interpretation would appear to be correct, for the dictionary definitions do in fact consider purpose as referring to one's ultimate end, goal, or objective, rather than an intermediate step. Those who find dictionaries sufficient to determine the ordinary meaning of statutory language might stop here.[37] But it remains conceivable that an intermediate purpose could be relevant under the statute or that one could act with more than one ultimate purpose. I therefore decline to adopt Safehouse's position merely on the authority of Webster or Black.

Looking beyond the dictionary definitions of "purpose," I agree with the Government that requiring a *sole* purpose of unlawful drug use would render § 856(a)(2) inapplicable to the undisputed examples of behavior it targets. If the drug-related purpose for which the place was made available had to be the sole purpose of the actor, the statute would fail to reach rave promoters who encourage dancing *and* drugs and crack house operators who live in the house *and* use it as a crack house. Neither party disputes that the statute targets those individuals. The conclusion that the proscribed purpose in § 856(a)(2) need not be the actor's sole purpose thus reflects the "prototypical" meaning of the statute. *See* Solan, *supra* at 2040-42, 2044. Multiple

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[37] In modern practice appellate courts have made extensive use of dictionaries, making it necessary for district courts to employ the same tool. This was not always the case. Learned Hand famously noted:

> It is not enough for a judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled [the statute's] plain purpose.

Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, in The Spirit of Liberty 103, 106 (Irving Dilliard ed., 1952); *see McBoyle v. United States*, 283 U.S. 25 (1931) (Holmes, J.). As modern scholars increasingly conduct empirical research into how Congress actually operates, there is also reason to question whether the drafters of legislation rely on dictionaries to the same degree as the courts. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 938-939 (2013) (noting that more than fifty percent of legislative staffers either rarely or never consult dictionaries when drafting, and awareness of judicial citation to dictionaries has not changed staff practice.)

courts have reached this conclusion when interpreting § 856(a)(1). *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995); *United States v. Church*, 970 F.2d 401, 406 (7th Cir. 1992). It follows logically that the proscribed purpose in (a)(2) may also be one of multiple purposes for which the property is made available. That is not to say, however, that any drug-related purpose would satisfy the statute's purpose requirement. In fact, the Government agreed at oral argument that an incidental purpose would be insufficient. Tr. at 34-35.

I conclude that the proscribed purpose must be a "significant" purpose or "one of the primary" purposes. *See United States v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) (finding that the purpose must be "at least one of the primary or principal uses to which the house is put").[38] This view is consistent with the proposition which multiple courts of appeals have endorsed that the "'casual' drug user does not run afoul of § 856 because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose." *United States v. Russell*, 595 F.3d 633, 642-43 (6th Cir. 2010) (citation omitted); *see also United States v. Johnson*, 737 F.3d 444, 449 (6th Cir. 2013); *United States v. Shetler*, 665 F.3d 1150, 1161 (9th Cir. 2011); *Verners*, 53 F.3d at 296; *United States v. Robinson*, 997 F.2d 884, 896 (D.C. Cir. 1993). Although the user maintains and uses the residence and has, at the time of the use, the purpose of unlawfully using drugs—all within the strict language of § 856(a)(1)—courts have found no violation of § 856(a)(1). As a matter of logic, then, it would seem that one who makes a place available to another for a purpose other than drug use does not necessarily violate § 856(a)(2) even if they know some consumption of

[38] By finding that the drug-related purpose must be *one of the* significant or primary purposes, I do not endorse Safehouse's view that the proscribed purpose must be the *singular* primary or principal purpose. This is a subtle, but important distinction.

drugs therein occurs in addition to that other lawful purpose. Although such a limitation has not been expressly articulated in cases considering (a)(2), it is implicit in the analysis of those circuit courts and is reflected in practice by the fact that cases brought under (a)(2) typically have not involved individuals who allowed casual drug use in their homes.[39] I therefore accept that there is a limitation on the scope of the purpose requirement in that the proscribed purpose must bear a significant relationship to the conduct that Congress sought to prohibit.

The statutory context supports the view that the purpose must be a significant, not incidental, purpose. Looking to the whole statute, a requirement that the purpose be significant enables the statutory scheme to make sense. The severity of the sentence permitted by § 856(a)(2)—up to 20 years in prison—strongly favors such a conclusion. Those who knowingly and intentionally allow use secondary to another lawful purpose would be subject to a far harsher penalty than opioid users whose possession is undisputedly criminal but who would be subject to at most three years if prosecuted for possession under 21 U.S.C. § 844. Such disparity would be inconsistent with the overall statutory scheme, particularly where courts agree that a user in his own home could not be punished under § 856(a)(1). *See Russell*, 595 F.3d at 642-43. I also find this interpretation consistent with the legislative background's focus on *predatory* actors rather than casual users or friends of users. *See* 149 Cong. Rec. 9383 (2003). The drug-related purpose in § 856(a)(2) must therefore be a significant purpose, even if not the sole purpose, of the actor.

There is the additional question of whether a purpose of unlawful drug use includes any purpose that involves allowing drug use or only purposes to encourage, promote, or facilitate

[39] Indeed, Safehouse represented at oral argument that, since the statute's inception, the Government has not brought a single § 856(a) case predicated solely on use. Transcript at 58. This is consistent with the Court's own research.

drug use. Safehouse assumes the latter view, while the Government's briefing embraces the former. But the Government conceded an important limitation on the scope of the purpose requirement when, at oral argument, it recognized that not every allowance of drug use on one's property would constitute a purpose of unlawful drug use within the meaning of the statute.

The Government was presented with a hypothetical of parents whose adult child is using drugs, leading the parents to have them move back home. Tr. at 35. The parents then instruct the child to inject drugs there, in the parents' presence, to allow for resuscitation. *Id.* The United States Attorney responded that (a)(2) would not apply, because it was not the parents' "purpose for their son, their adult son or adult daughter to be in the home [] to use drugs." *Id*. As an initial matter, it should be noted that the Government's response to the hypothetical was inconsistent with its embrace of *Chen*, because it invoked the purpose of the parents as the owners of the property. I do not raise this as a judicial admission, but only to point out that the Government's instinctive response to a specific factual scenario underscores that (a)(2) is most naturally and logically read as I have analyzed it above, and as a panel of the Third Circuit did in *Coles*. It also illustrates how reading (a)(2) as *Chen* did would lead to an absurd result.

The Government's answer is further instructive because it admits there are limitations on the scope of (a)(2) that turn on the actor's purpose vis-à-vis the user. Specifically, the Government replied that, where the actor does not want the drug use to occur or has the goal of "trying to stop that person from using drugs," the statute does not prohibit their actions. *Id.* at 35. In fairness to the Government, it should be noted that the Court's hypothetical also included a statement by the parents that they would prefer the child not use drugs, a fact the Government emphasized because the Safehouse protocol does not reflect that participants will be actively

discouraged from use before entering the consumption room.[40] But that fact's relevance pertains to the statute's specific application to Safehouse, a matter I take up below. I raise the Government's response to the hypothetical at this juncture as I consider the *scope* of the statute's purpose requirement. Its response supports a conclusion that a purpose involving some known and intended drug use may nonetheless fall outside the reach of the statute, at least where the actor aims to stop drug use. In short, both parties agree that there is some limit to the scope of the purpose requirement; I now look to the usual tools of statutory interpretation to define that limit.

Returning to dictionaries, the definition of "purpose" as an objective, goal, end, aim, or intention indicates that a purpose is something one seeks to advance, "something set up as an object or end to be attained." *Purpose*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); *see also Purpose*, Black's Law Dictionary (7th ed. 1999) (similar); *Purpose*, Oxford English Dictionary (1986) (similar). An action taken "for the purpose of" unlawful drug use would therefore refer to a purpose of facilitating drug use, not an effort to reduce drug use. Again, those who deem dictionary definitions sufficient to determine a statute's ordinary meaning might stop here, but in my view an analysis that ends here would be superficial. I will therefore consider 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, and test it through the prism of § 856(a)(2)'s statutory and legislative context.

[40] In the final analysis, the specific details of Safehouse's model only go so far in answering the statutory question. Whether to approach opioid users confrontationally or empathetically is a therapeutic decision. If the delivery of a lecture on the hazards of opioid abuse would render Safehouse's facility legal, I am confident that Safehouse would even allow the Government to supply its content.

The context of the larger statutory scheme, something the Supreme Court deemed relevant in *Gonzalez v. Oregon*, provides support for both parties' interpretations, albeit to different degrees. On the one hand, as Safehouse points out, the statutory scheme largely permits medical practice and treatment efforts. No provision in the CSA contains a broad exemption from its prohibitions for all legitimate medical practices, nor did *Gonzales* create any such exemption. But the Supreme Court emphasized that the CSA generally does not regulate medical practice. 546 U.S. at 270. With respect to medical harm reduction efforts in particular, federal law expressly permits a number of tactics that aim to reduce harm and increase access to treatment for drug abuse. *See* Appropriations Act of 2016 § 520, 129 Stat. 2652 (permitting federal funding to be used for syringe exchange programs that address risk of HIV or hepatitis outbreaks); Comprehensive Addiction and Recovery Act of 2016 § 911(e)(1), 130 Stat. 759 (requiring that the Secretary of Veterans Affairs "maximize the availability of opioid receptor antagonists, including naloxone, to veterans"); Support for Patients and Communities Act § 3201, 130 Stat. 3894 (allowing for greater flexibility with respect to medication-assisted treatment for opioid use disorders).[41]

On the other hand, the Government emphasizes that § 812 of the CSA expresses a congressional judgment that Schedule I drugs have "no currently accepted medical use in treatment in the United States" and that "[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b). Similarly, Schedule II reflects a congressional judgment that covered drugs, including fentanyl, cannot be used safely without a prescription. 21 U.S.C. § 812(b). The Government goes on to cite *United States v. Oakland*

[41] Although one might then question why Congress has not specifically authorized safe injection sites, congressional failure to act is generally not considered a reliable tool for statutory construction. *See In re Visteon Corp.*, 612 F.3d 210, 230 (3d Cir. 2010).

Cannabis Buyers' Coop., which held that medical necessity could not be a defense to the CSA prohibition on distribution of marijuana because Congress had made a judgment that marijuana has no medical use. 532 U.S. 483, 490-91 (2001). But unlike the defendant in *Oakland Cannabis Buyers' Cooperative*, Safehouse does not propose to provide or administer any prohibited substance. In that case, there was no dispute about whether the defendants had directly violated the CSA by engaging in distribution. *Id.* at 487. The Court refused to recognize a medical necessity defense because it would require a rejection of Congress's judgment that marijuana has no therapeutic purpose. *Id.* at 491-95. I do not understand Safehouse in any respect to contradict Congress's conclusion that, even under medical supervision, heroin use remains unsafe. Rather, I understand Safehouse to assert that, when drug users engage in the undisputedly unsafe behavior of consuming Schedules I and II drugs, providing a space to facilitate immediate medical intervention, although insufficient to make that behavior safe, does not violate § 856(a) of the CSA. At best, § 812 offers limited support for the Government's position, and can hardly be read to criminalize harm reduction strategies like the one proposed by Safehouse.

A review of the legislative evidence confirms that the reach of § 856(a)(2) is limited to purposes to facilitate drug use, which would in turn exclude a purpose to curb or combat drug use that may involve some allowance of use. I begin with the last decision-making point related to the text in question: the 2003 agreement to the Conference Report including the amendment to the crack house statute.[42] The 2003 amendment, originally called the Illicit Drug Anti-

[42] A conference committee report contains the final proposed text of a bill, which emerges from the conference committee, where members of both houses have resolved differences between versions of the bill passed by the House and the Senate. Davis, *supra* at 1. Each chamber then votes on whether to agree to the conference report. Christopher M. Davis, *The Legislative Process on the House Floor: An Introduction*, Congressional Research Service 9 (2019). The decision to agree to the conference report is therefore the final legislative act with respect to

Proliferation Act and incorporated into the PROTECT Act, aimed to expand the crack house statute to address events, such as raves, at which promotors encourage use of "club drugs" and other controlled substances by children and teens. *See* 149 Cong. Rec. 9383. In determining the scope of the amendment, is important to recognize the significance of the amendment being inserted in conference. Under both Senate and House Rules, any addition to a bill in conference must be germane to the subject of the legislation, in this case the protection of children. *See* Senate Rule XXVIII; House Rule XXII.[43] It is for that reason that the joint explanation to the Conference Report emphasized the amendment's goal of protecting children. Joint Explanatory Statement at 68. Prior to the vote on the Conference Report, then-Senator Biden, sponsor of the original bill, expressly noted that "[t]he bill is aimed at the defendant's **predatory behavior**, regardless of the type of drug or the particular place in which it is being used or distributed." 149 Cong. Rec. 9383 (2003) (emphasis added). This evidence makes clear that, when Congress decided to amend the statute, it expanded the meaning of the law to include a larger category of "predatory behavior" that involved increasing access to illicit drugs at a variety of events, particularly those attracting young people. It broadened the meaning of the statute from targeting crack houses to targeting events, like raves, that encourage drug use and prey on potential drug users.

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the text, and the debate prior to the vote on whether to agree offers proximate evidence of the legislature's decision. *See* Nourse, *Misreading Law*, *supra* at 80.

[43] Both Houses' rules require that any changes made in conference be germane to the matters committed to conference. *Id.* It bears mention that the addition of an entirely new provision in conference pushes the limits of the matters properly before the conferees under the rules of both Houses. Senate Rule XXVIII, ¶ 3; House Rule XXII, cl. 9. Nonetheless the § 856 amendment was included in the Protect Act without objection. *See* Senate Rule XXVIII, ¶ 3 (providing members with recourse to raise a point of order in objection to non-germane additions); House Rule XXII, cl. 10 (same). Both Houses then agreed to the conference report, and the legislative evidence pertaining to debate on that decision is therefore relevant.

Although the Government is correct that Congress expanded the statute, that expansion was minimal. The change to the statute clarified that single events as well as ongoing operations were included, that the place involved need not be a building or enclosure, and that renters and lessees could also be liable.[44] *See* Conference Report to S. 151 at 43; 149 Cong. Rec. 9383 (statement of then-Senator Biden). At the introduction of the Illicit Drug Anti-Proliferation Act, co-sponsor Senator Grassley commented on the limited nature of the change. 149 Cong. Rec. 1849. He described the amendment as an effort to "update our laws so they can be used effectively against drug dealers who are pushing drugs on our kids." 149 Cong. Rec. 1848. His comments specifically focused on raves and other temporary events. One statement, which referred to "illegal drug use in any location," could lend support to the Government's position, but the remainder of his remarks do not support such a broad interpretation. Senator Grassley referred to "cover activity" created to hide drug transactions and emphasized that the amendment was not designed to hamper "legitimate" activities. *Id.* He noted that § 856 would be a means for law enforcement to target events at which dealers "push their product," and addressed the party drug Ecstasy at length. *Id.* at 1848-49. He specifically referred to drug reduction efforts as an example of conduct that would be inconsistent with criminal intent. *Id.* at 1849. He closed his remarks by characterizing the amendment as a "careful step," with a recognition that drug abuse must be addressed "not only through law enforcement but education and treatment as well." *Id.* at 1849. Similarly, although the legislative evidence includes a description of the statute applying to "any type of event for the purpose of drug use or distribution," 149 Cong.

[44] The Government also references the change in title to "maintaining drug-involved premises." I do not reject looking to titles for guidance, but in this instance the wording is not particularly enlightening. The statute cannot possibly apply to *all* "drug-involved premises," just as under the previous title it could not have applied *only* to "manufacturing operations."

Rec. 9384 (statement of then-Senator Biden), nothing in the legislative record reveals an expansion of the statute's meaning beyond events and operations to facilitate drug use, and certainly not an expansion to reach activities designed to stop drug use.[45]

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[45] The Government cites a statement from Senator Biden in which he said, "section 856 has always punished those who knowingly and intentionally provide a venue for others to engage in illicit drug activity." 149 Cong. Rec. 20539. Safehouse cites to another portion of the same statement in support of its position. The statement in question was made in July 2003, several months *after* the April passage of the PROTECT Act.

Courts generally reject such "post hoc" statements as unreliable tools for construing a statute. *See, e.g.*, *Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 132 (1974); *Pa. Med. Soc. v. Snider*, 29 F.3d 886, 898 (3d Cir. 1994). In part this is because they were not part of the consideration or debate in which the legislature engaged prior to voting to enact the law in question. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483, 568 (2013); Nourse, *Misreading Law*, *supra* at 155 (arguing that to the extent "group process determines the legitimacy of legislative evidence . . . evidence incapable of influencing the group, should be rejected"). Statutory interpreters largely agree that "post-enactment history" is therefore minimally helpful in determining the meaning of legislative decisions. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 2035 (2011) (suggesting that a rule considering post-enactment evidence authoritative would be unconstitutional); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vanderbilt L. Rev. 1457, 1522-23 (2000) (describing general agreement that post-enactment legislative history deserves less weight); *see also* § 48:20. Post-enactment history, 2A Sutherland Statutory Construction § 48:20 (7th ed.). In part, this is a recognition that legislators are also politicians, whose statements after a bill becomes law may serve other purposes.

But to the extent that the Government focuses on this specific comment, it must be reviewed in the context of Biden's immediately preceding remarks clarifying that his amendment to § 856 in the PROTECT Act did not greatly expand that statute. He sought to emphasize the point that the crack house statute has always been used, not only against traditional crack houses, but also against "seemingly 'legitimate businesses' used as a front for drug activity," such as motels, car dealerships, and bars. 149 Cong. Rec. 20539. Later in his remarks he referred to the same venues as "non-traditional crack house[s]." *Id.* What Safehouse proposes, whether within the scope of the statute or not, is certainly different from a "non-traditional crack house."

The remainder of these post-hoc remarks would lend no support to the Government. First, Senator Biden clarified the limited effect of the bill's changes to the statute, contradicting the Government's assertions that the amendment significantly broadened § 856. *Id.* Next, Biden repeatedly emphasized that the amended statute only targets those who intentionally hold or promote events for the purpose of unlawful drug activity. *Id.* Third, during a lengthy discussion of the "'knowledge' and 'intent'" requirement and the "requirement that the defendant make their property available 'for the purpose' of illicit drug activity," Biden made no distinction between how the purpose requirement should be understood in (a)(1) and (a)(2), undercutting the Government's argument for a lower mental state requirement in (a)(2). *Id.* at 20539. In a discussion clearly considering (a)(2), given references to the "knowingly and intentionally" requirement and the language about making a property available, Biden cited the *Chen* court's discussion of (a)(1)'s purpose requirement, evidently assuming it applied to (a)(2) as well. *Id.* Specifically, he noted that a purpose is "that which one sets before him to accomplish; an end, intention, or aim, object, plan, project" and that "it is strictly incumbent on the government to prove beyond a reasonable doubt that a defendant knowingly maintained a place for the specific purpose of distributing or using a controlled substance." *Id.* (quoting *Chen*, 913 F.2d at 189). In discussing knowledge and intent, he clarified that actual knowledge is required and referred to the portion of *Chen* in which the court quoted the trial court's instructions, including the instruction that an act is done "'intentionally' if done voluntarily and purposely with the intent to do something the law forbids." *Id.* (quoting *Chen*, 913 F.2d at 187). These statements indicate that Biden understood the purpose requirement to refer to the actor's purpose and to set a high bar for the Government to clear. Fourth, in a point that Safehouse emphasizes as part of its analysis, Biden explicitly endorsed the view that the purpose must be the

The 1986 legislative record related to the provision reveals that the original meaning of the statute, prior to any expansion in 2003, contemplated only purposes to facilitate drug use. The 1986 act focused specifically on crack houses. For instance, the section-by-section description read: "Outlaws operation of houses or buildings, so-called 'crack houses,' where 'crack' cocaine and other drugs are manufactured and used." 132 Cong. Rec. 26474. The original meaning of places made available "for the purpose of unlawfully . . . using a controlled substance" referred to spaces designed to facilitate drug use.

The legislative focus on making places available for such illicit purposes does not limit the provision's applicability to only crack houses and raves, but it does caution against extending the statute too far beyond similar circumstances. 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 among the actions of these individuals is the goal of enabling drug use and supporting the market for unlawful drugs. To read § 856(a)(2) to apply to medical purposes and efforts to combat drug abuse would take the statute well beyond what it aimed to criminalize. As employed by Congress, the words "for the purpose of unlawfully . . . using a controlled substance" in § 856(a) are properly understood as referring to significant purposes to facilitate, rather than reduce, unlawful drug use.

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primary purpose of the place in question, *id.* at 20538, 20539, quoting a DEA memo that likewise stated that the activity on the property must be "primarily for the purpose of drug use." *Id.* at 20538. Finally, the remarks expressed that the bill's only goal was to "deter illicit drug use and protect kids" and made repeated references to crack houses, "non-traditional crack houses," raves, and other events that perpetuate illicit drug activity. *Id.* at 20538-39.

Thus, even if properly considered, nothing about this post-hoc statement suggests contemplation of efforts to facilitate medical care and access to drug treatment.

V. Application of (a)(2) to Safehouse

I cannot conclude that Safehouse has, as a significant purpose, the objective of facilitating drug use. 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 a purpose to facilitate drug use.

The Government contended at oral argument that Safehouse's purpose cannot be to stop or reduce drug use. Tr. at 32-34. But its own Complaint belies that argument. It acknowledges that Safehouse will offer all its participants treatment referrals and on-site initiation of medication-assisted treatment. Pl.'s Am. Compl. at 4. Treatment, along with a variety of other services, will be offered during at least three stages of Safehouse's protocol. Pl.'s Am. Compl. Ex. A at 4-5; *see also* The Safehouse Model, https://www.safehousephilly.org/about/the-safehouse-model (last visited Oct. 1, 2019). One offer of services will be made before any participant enters the consumption room. *Id.* Any participant who then chooses to use the medically supervised consumption room will, in the subsequent medically supervised observation room, meet with peer specialists, recovery specialists, social workers, and case managers who will specifically encourage treatment. *Id.* The Court is hardly being "anti-factual," as the Government accuses, Tr. at 34, when it construes the pleadings as describing a program that ultimately seeks to reduce unlawful drug use.

Within the consumption rooms themselves, Safehouse will engage in the legal acts of providing sterile injection equipment and administering emergency medical care. The Government has not contended that the provision of medical treatment facilitates or advances drug use. In fact, other federally supported initiatives recognize that such services prevent

fatalities from drug use. The use that will occur is subsidiary to the purpose of ensuring proximity to medical care while users are vulnerable to fatal overdose. The Government has conceded that similar harm reduction strategies would be lawful if executed through mobile vans or if Safehouse personnel monitored drug use in public places. The Government seeks to distinguish consumption rooms from the ways in which other entities currently engage in harm reduction (and ways that they could, such as through use of a mobile van) by observing that in those efforts no real property is used, and "what matters [is] the statutory language." Tr. at 39. This is myopic textualism that seeks to avoid the central issue. The statutory language that matters most is "purpose," and no credible argument can be made that a constructive lawful purpose is rendered predatory and unlawful simply because it moves indoors. Viewed objectively, what Safehouse proposes is far closer to the harm reduction strategies expressly endorsed by Congress than the dangerous conduct § 856(a) seeks to prohibit. Safehouse therefore is not making a place available "for the purpose of unlawfully . . . using a controlled substance" within the meaning of § 856(a)(2).

When pointedly asked—twice—whether Safehouse was promoting drug use, the Government could only respond obliquely. Tr. at 36-37. It replied that because Prevention Point, an existing program run by Safehouse's President and Treasurer, Jose Benitez, is already successfully moving some of its clients into treatment, in the absence of proof that Safehouse will accomplish more, the net effect of Safehouse will simply be more drug use. *Id.* at 37. Specifically, the Government replied that "the logical implication of setting up Safehouse is there's going to be more drug use. So yes, they are promoting drug use." *Id*. In a case that turns on "purpose," the nature of the Government's response is revealing. Rather than attribute any unlawful purpose to Safehouse, it pointed instead to what it presumes will be a deleterious

outcome.[46] And as observed at the beginning of this opinion, the wisdom or effectiveness of safe injection sites is not the issue before me. One might criticize the Safehouse model from the standpoint of therapeutic soundness or effectiveness, but again that is not the issue before me.

It would be an issue for Congress, but there can be no question that Safehouse's approach to harm reduction and increasing access to treatment was not within the contemplation of Congress when it enacted or amended this statute. The records of Congress are now searchable electronically, and a global search of the legislative record prior to the statute's amendment in 2003 reveals a single passing reference to a 1998 article in *Foreign Affairs* magazine discussing safe injection facilities as a potential harm reduction strategy. *See The Decriminalization of Illegal Drugs: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the H. Comm. on Gov't Reform*, 106th Cong. 8 (1999) (statement of Thomas A. Constantine, Former Administrator, Drug Enforcement Administration (citing Ethan A. Nadelmann, *Commonsense Drug Policy*, Foreign Affairs, Jan.–Feb. 1998)). Even then, the article cited by the witness discussed safe injection facilities as a "[h]arm reduction innovation . . . to stem the spread of HIV," not in relation to an opioid crisis. *Id.*

Aside from the legislative record, there is an additional governmental source to consult that sheds light on when safe injection sites became a subject of public debate. The National Center for Biotechnology Information, in collaboration with the United States National Library of Medicine and National Institutes of Health, maintains a searchable database of medical literature, PubMed, which includes articles that cut across multiple disciplines, including public

[46] For the sake of completeness, it must be mentioned that the Government's rebuttal was not as carefully nuanced. Referring to Safehouse's description of its program, counsel derided it as "Bizarro World," urged the Court to "be real," and seemingly rejected any therapeutic purpose, stating, "They're not inviting people onto their property just to get treatment or whatever other services they're offering. The whole purpose here is for people to use drugs." Tr. at 71-72. My inclination is to discount these remarks as a moment of overly zealous advocacy. But in any case, no plausible reading of the pleadings before me supports such a caricature of what Safehouse proposes.

health. The statute here was last amended in April 2003. If one conducts a search using the term "safe injection sites," multiple publications appear, none having to do with management of opioid addiction prior to 2003.[47] If one adds the limiting term "opioid," there are still no relevant results. A search for the related term "supervised injection" through the end of 2003 reveals only two relevant articles published within five months of the amendment, both in a Canadian specialty law review focusing on HIV and AIDS prevention efforts. Simply put, supervised injection sites as a harm reduction strategy for opioid abuse were not a subject of public discourse when the statute was last amended.

At argument, the Government was invited multiple times to point to any legislative evidence that supervised injection programs were specifically considered by Congress, but counsel skillfully avoided giving a direct answer to the question. Tr. at 7-12. The most the Government could offer as to a specific focus on safe injections sites was for the Court to go back in time to reconstruct what Congress *might* have thought had the subject actually been considered at the time. Tr. at 7. This method is mentioned in the scholarly literature and termed "imaginative reconstruction." Posner, *Statutory Interpretation*, *supra* at 817. Such an approach is inherently speculative and has not been endorsed by case law.[48] As Justice Gorsuch has noted, although new applications of statutes may arise, "every statute's meaning is fixed at the time of enactment." *Wisconsin Central, Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

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[47] Judges are rightly cautioned to limit internet research. I am not concerned with doing so here because the exercise is akin to judicial notice. The search conducted can be objectively replicated by anyone, with the results speaking for themselves. And the purpose is not to garner substantive input for the Court to consider without the perspective of the litigants, but simply to test what resources were publicly available at the time Congress was deliberating.

[48] To adopt the Government's suggestion would fly in the face of the admonition that courts should "not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 214 (1958); *accord Reno v. Koray*, 515 U.S. 50, 65 (1995) (Rehnquist, C.J.).

Accordingly, I confine myself to the documented evidence of what Congress did, in fact, mean to accomplish at the time of enactment.

The Government's refusal to concede that there was not specific consideration by Congress reveals its concern over a core weakness in its position. It urges me to hold that even though harm reduction efforts like safe consumption facilities were indisputably beyond the contemplation of Congress, I should apply the language of the statute in the broadest possible way, leaving it to Congress to clarify if it does *not* wish to criminalize safe consumption facilities. But the law does not default to criminalization, requiring Congress to clarify when it wishes not to incarcerate citizens. Rather, as Chief Justice John Marshall explained, "penal laws are to be construed strictly" because "the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Modern cases echo those same principles: "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

Congress here determined that making places available to facilitate drug use, supporting the drug market as crack houses and raves do, warranted moral condemnation and punishment. Congress has not had the opportunity to decide whether such moral condemnation and punishment should extend to consumption facilities that are components of medical efforts to facilitate drug treatment. By any objective measure, what Safehouse proposes is not some variation on a theme of drug trafficking or conduct that a reasonable person would instinctively identify as nefarious or destructive. Even if one believes it to be misguided, the nature and character of what it proposes is not prototypically criminal.

A consistent theme in the Government's case is what it describes as the "hubris" of Safehouse in seeking to open its safe injection site without first securing some form of official approval from federal authorities. There is, however, no mechanism under the CSA for seeking review from any governmental entity for the activity that Safehouse proposes, which the Government conceded at oral argument. Tr. at 43. Physicians and researchers can seek exemptions from the prohibition against administering Schedule I and Schedule II drugs. Safehouse does not seek to administer prohibited drugs but rather to ameliorate the harm from their unlawful use. In the Government's view, Safehouse literally needs an Act of Congress to proceed. But that begs the question. The question is whether current law criminalizes Safehouse's proposed conduct. As Justice Rutledge memorably phrased a core tenet of federal law, "[b]lurred signposts to criminality will not suffice to create it." *United States v. C.I.O.*, 355 U.S. 106, 143 (1968) (Rutledge, J., concurring).

Although irrelevant for the Court's purposes, the numerous policy arguments raised by the parties and amici indicate that there is a vibrant debate to be had about the possible advantages, risks, and costs of safe consumption sites.[49] A narrow interpretation of § 856(a)(2)

[49] The Court received thirteen amicus briefs from various individuals and groups from around the nation. Brief of and by Professors of Religious Liberty Law as Amici Curiae; Brief of Amici Curiae Harrowgate Civic Association, Bridesburg Civic Association, Juniata Park Civic Association, Kensington Independent Civic Association, Port Richmond on Patrol and Civic, South Port Richmond Civic Association, and Fraternal Order of Police, Lodge 5; Brief of Amici Curiae Philadelphia-Area Community Organizations; Brief of Current and Former Prosecutors, Law Enforcement Leaders, And Former Department of Justice Officials and Leaders as Amici Curiae; Amicus Curiae Brief of Homeless Service Providers; Amicus Curiae Brief of Friends and Family of Victims of Opioid Addiction in Support of Defendant's Safehouse and Jose Benitez; Proposed Brief of Amici Curiae Aids United, Association for Multidisciplinary Education and Research in Substance Use and Addiction, Association of Schools and Programs of Public Health, California Society of Addiction Medicine, Drug Policy Alliance, Harm Reduction Coalition, National Association of State and Territorial Aids Directors, The Foundation for Aids Research, Positive Women's Network, Treatment Action Group, Vital; Amici Curiae Brief of Religious Leaders in the Philadelphia Community and Beyond; Amici Curiae Brief of Constitutional Law Scholar and Commerce Clause Expert Professor Randy Barnett; Brief of Amici Curiae King County, WA; New York, NY; San Francisco; Seattle, WA; Pittsburgh, PA; and Svante L. Myrick, Mayor of Ithaca, NY; Brief Amici Curiae of the American Civil Liberties Union and The American Civil Liberties Union of Pennsylvania; Brief of Amici Curiae Mayor Jim Kenney and Health Commissioner Dr. Thomas Farley.

appropriately defers to Congress to engage in this debate and determine whether and how it wants to criminalize the conduct of medical providers and recovery specialists who seek to manage safe consumption facilities. A narrow interpretation of § 856(a)'s purpose requirement and restrained application of that statute also protects the important separation of powers principles discussed above. Such principles are one of the foundations of the longstanding rule of lenity,[50] which Safehouse invokes here. I do not rely on the rule of lenity as the basis for this decision. Nonetheless, the separation of powers principles underlying the rule carry substantial weight in this case, where the Executive has invited the Judiciary to expand the reach of a criminal statute to include conduct that I am convinced was never contemplated by the Legislature.

VI. Application of (a)(1) to Safehouse

The Government has only brought this action under (a)(2), but in its Counterclaim Safehouse seeks a declaratory judgment as to § 856(a) as a whole. However, no motion for relief on that aspect of the Counterclaim is pending before me.

VII. Religious Freedom Restoration Act

Because I have determined that § 856(a)(2) does not apply to Safehouse's proposed conduct, I need not consider whether the Government's effort to enforce the statute violates Safehouse's rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. In connection with that claim, Safehouse sought: (1) a declaration that any prohibition or

[50] Another policy underlying the rule of lenity is that the law must provide fair notice of the punishment imposed "if a certain line is passed," and "[t]o make the warning fair, . . . the line should be clear." *Bass*, 404 U.S. at 348. This policy is somewhat less applicable here, where the Government seeks a declaratory judgment, which by definition will provide notice as to whether the law prohibits the conduct in question. It bears mention, however, that courts have applied the rule of lenity in declaratory judgment cases. *See, e.g.*, *Bingham, Ltd. v. United States*, 724 F.2d 921, 924-25 (11th Cir. 1984) (noting the rule of lenity applies "even though we construe the [statute] in a declaratory judgment action, a civil context").

penalization of Safehouse would violate RFRA and (2) an injunction permanently enjoining the Third-Party Defendants from enforcing or threatening to enforce 21 U.S.C. § 856 against Safehouse. Defs.' Answer at 43-44. Because I have concluded that § 856(a)(2) does not criminalize Safehouse's proposed actions, the RFRA claim is now moot.

VIII. Conclusion

Both sides skillfully argue that Congress's meaning in § 856 is consistent with their own, and further argue that to conclude otherwise would be a judicial usurpation of legislative power. Here, however, the Government asks the Court to apply statutory language to a set of facts beyond the comprehension of Congress when the bill was passed. I find the most conservative, circumspect approach to favor the original, ordinary meaning of the statute. On the record before me, having applied multiple tools of construction, I find that the purpose at issue under § 856 must be a significant purpose to facilitate drug use, and that allowance of some drug use as one component of an effort to combat drug use will not suffice to establish a violation of § 856(a)(2). The ultimate goal of Safehouse's proposed operation is to reduce drug use, not facilitate it, and accordingly, § 856(a) does not prohibit Safehouse's proposed conduct.

The Government's Motion will be denied as to its claim for declaratory judgment as well as Safehouse's counterclaim for declaratory judgment. I need not consider Safehouse's Religious Freedom Restoration Act claim, which is now moot.

/s/ Gerald Austin McHugh
United States District Judge

CERTIFICATE OF SERVICE

I certify that on this date this Joint Appendix was filed via the Court's Electronic Case Filing (ECF) system and served electronically on counsel for all parties.

/s/ Gregory B. David
GREGORY B. DAVID
Assistant United States Attorney

Dated: May 15, 2020

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
JOSE 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 FEBRUARY 25, 2020 ORDER GRANTING FINAL DECLARATORY JUDGMENT, IN CIVIL ACTION NO. 19–519, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (HON. GERALD A. McHUGH)

JOINT APPENDIX
VOLUME II OF III
Appx071–344

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JOINT APPENDIX

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APPEAL,STANDARD

United States District Court
Eastern District of Pennsylvania (Philadelphia)
CIVIL DOCKET FOR CASE #: 2:19–cv–00519–GAM

UNITED STATES OF AMERICA v. SAFEHOUSE et al
Assigned to: HONORABLE GERALD A. MCHUGH
Case in other court: USCA, 20–01422
Cause: 28:2201 Declaratory Judgement

Date Filed: 02/05/2019
Jury Demand: None
Nature of Suit: 890 Other Statutes: Other Statutory Actions
Jurisdiction: U.S. Government Plaintiff

Plaintiff

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ATTORNEY TO BE NOTICED

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SEATTLE, WA represented by **VIRGINIA A. GIBSON**
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MICAH SCHWARTZMAN represented by **KATHERINE FRANKE**
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ELIZABETH SEPPER represented by **KATHERINE FRANKE**
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MAYOR OF ITHACA, NY

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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represented by **JENNIFER E. MACNAUGHTON**
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DR THOMAS FARLEY
HEALTH COMMISSIONER

represented by **JENNIFER E. MACNAUGHTON**
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RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND

represented by **JONATHAN ISAAC ARONCHICK**
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ATTORNEY TO BE NOTICED

MIRA E. BAYLSON
(See above for address)
ATTORNEY TO BE NOTICED

Counter Claimant

SAFEHOUSE
A PENNSYLVANIA NONPROFIT

represented by **ADAM STEENE**
(See above for address)

CORPORATION

TERMINATED: 08/07/2019
LEAD ATTORNEY

THIRU VIGNARAJAH
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ADRIAN M. LOWE
(See above for address)
ATTORNEY TO BE NOTICED

JACOB M. EDEN
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ATTORNEY TO BE NOTICED

PETER GOLDBERGER
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ATTORNEY TO BE NOTICED

RONDA GOLDFEIN
(See above for address)
ATTORNEY TO BE NOTICED

YOLANDA FRENCH LOLLIS
(See above for address)
ATTORNEY TO BE NOTICED

ILANA H. EISENSTEIN
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

UNITED STATES OF AMERICA represented by **BRYAN C. HUGHES**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

GREGORY B. DAVID
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

WILLIAM M. MCSWAIN
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ERIC D. GILL
(See above for address)
ATTORNEY TO BE NOTICED

ERIN E. LINDGREN
(See above for address)
ATTORNEY TO BE NOTICED

ThirdParty Plaintiff

SAFEHOUSE
A PENNSYLVANIA NONPROFIT CORPORATION
represented by **ADAM STEENE**
(See above for address)
TERMINATED: 08/07/2019
LEAD ATTORNEY

THIRU VIGNARAJAH
(See above for address)
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ADRIAN M. LOWE
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ILANA H. EISENSTEIN
(See above for address)
ATTORNEY TO BE NOTICED

V.

ThirdParty Defendant

U.S. DEPARTMENT OF JUSTICE represented by **GREGORY B. DAVID**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ERIC D. GILL
(See above for address)
ATTORNEY TO BE NOTICED

ERIN E. LINDGREN
(See above for address)
ATTORNEY TO BE NOTICED

ThirdParty Defendant

WILLIAM P. BARR represented by **GREGORY B. DAVID**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ERIC D. GILL
(See above for address)
ATTORNEY TO BE NOTICED

ThirdParty Defendant

WILLIAM M. MCSWAIN represented by **GREGORY B. DAVID**
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ERIC D. GILL
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ERIN E. LINDGREN
(See above for address)
ATTORNEY TO BE NOTICED

ThirdParty Plaintiff

JOSE BENITEZ
AS PRESIDENT AND TREASURER OF SAFEHOUSE

represented by **ADRIAN M. LOWE**
(See above for address)
ATTORNEY TO BE NOTICED

BEN C. FABENS–LASSEN
(See above for address)
ATTORNEY TO BE NOTICED

COURTNEY G. SALESKI
(See above for address)
ATTORNEY TO BE NOTICED

ILANA H. EISENSTEIN
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MEGAN KREBS
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RONDA GOLDFEIN
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ATTORNEY TO BE NOTICED

YOLANDA FRENCH LOLLIS
(See above for address)
ATTORNEY TO BE NOTICED

ThirdParty Plaintiff

SAFEHOUSE
A PENNSYLVANIA NONPROFIT CORPORATION

represented by **ADAM STEENE**
(See above for address)
TERMINATED: 08/07/2019
LEAD ATTORNEY

THIRU VIGNARAJAH
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YOLANDA FRENCH LOLLIS
(See above for address)
ATTORNEY TO BE NOTICED

ILANA H. EISENSTEIN
(See above for address)
ATTORNEY TO BE NOTICED

V.

ThirdParty Defendant

U.S. DEPARTMENT OF JUSTICE represented by **GREGORY B. DAVID**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ERIC D. GILL
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ATTORNEY TO BE NOTICED

ThirdParty Defendant

WILLIAM P. BARR represented by **GREGORY B. DAVID**
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LEAD ATTORNEY
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ThirdParty Defendant

WILLIAM M. MCSWAIN represented by **GREGORY B. DAVID**
IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ERIC D. GILL
(See above for address)

ATTORNEY TO BE NOTICED

Counter Claimant

JOSE BENITEZ
AS PRESIDENT AND TREASURER OF SAFEHOUSE

represented by **ADRIAN M. LOWE**
(See above for address)
ATTORNEY TO BE NOTICED

BEN C. FABENS–LASSEN
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Counter Claimant

SAFEHOUSE
A PENNSYLVANIA NONPROFIT CORPORATION

represented by **ADAM STEENE**
(See above for address)
TERMINATED: 08/07/2019
LEAD ATTORNEY

THIRU VIGNARAJAH
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V.

Counter Defendant

UNITED STATES OF AMERICA represented by **BRYAN C. HUGHES**
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LEAD ATTORNEY
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GREGORY B. DAVID
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ERIC D. GILL
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ERIN E. LINDGREN
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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/05/2019	1	COMPLAINT against JEANETTE BOWLES, SAFEHOUSE, filed by UNITED STATES OF AMERICA. (Attachments: # 1 Civil Cover Sheet, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(jwl,) (Entered: 02/06/2019)
02/05/2019		Summons Issued as to JEANETTE BOWLES, SAFEHOUSE. Two Forwarded To: Counsel on 2/6/19 (jwl,) (Entered: 02/06/2019)
02/14/2019	2	WAIVER OF SERVICE Returned Executed by UNITED STATES OF AMERICA. All Defendants. (HUGHES, BRYAN) (Entered: 02/14/2019)
04/03/2019	3	ANSWER to 1 Complaint together with, Affirmative Defenses and Third–Party Complaint *against 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*, COUNTERCLAIM against

		UNITED STATES OF AMERICA by SAFEHOUSE. (Attachments: # 1 Certificate of Service)(EISENSTEIN, ILANA) (Entered: 04/03/2019)
04/03/2019		THIRD PARTY COMPLAINT against U.S. DEPARTMENT OF JUSTICE, WILLIAM P. BARR, WILLIAM M. MCSWAIN, filed by SAFEHOUSE. *FOR PDF SEE DOC.# 3 * (lisad,) (Entered: 04/04/2019)
04/04/2019	4	NOTICE of Appearance by BEN C. FABENS–LASSEN on behalf of SAFEHOUSE with Certificate of Service (Attachments: # 1 Certificate of Service)(FABENS–LASSEN, BEN) (Entered: 04/04/2019)
04/04/2019	5	NOTICE of Appearance by MEGAN LAGRECA on behalf of SAFEHOUSE with Certificate of Service (Attachments: # 1 Certificate of Service)(LAGRECA, MEGAN) (Entered: 04/04/2019)
04/04/2019	6	NOTICE of Appearance by COURTNEY G. SALESKI on behalf of SAFEHOUSE with Certificate of Service (Attachments: # 1 Certificate of Service)(SALESKI, COURTNEY) (Entered: 04/04/2019)
04/04/2019	7	APPLICATION for Admission Pro Hac Vice of Adam Steene by SAFEHOUSE. (Filing fee $ 40 receipt number 0313–13458926.). (FABENS–LASSEN, BEN) (Entered: 04/04/2019)
04/04/2019	8	APPLICATION for Admission Pro Hac Vice of Thiru Vignarajah by SAFEHOUSE. (Filing fee $ 40 receipt number 0313–13458980.). (FABENS–LASSEN, BEN) (Entered: 04/04/2019)
04/05/2019	9	NOTICE of Appearance by SETH KREIMER on behalf of SAFEHOUSE (Attachments: # 1 Certificate of Service)(KREIMER, SETH) (Entered: 04/05/2019)
04/05/2019	10	NOTICE of Appearance by ADRIAN M. LOWE on behalf of SAFEHOUSE (LOWE, ADRIAN) (Entered: 04/05/2019)
04/05/2019	11	NOTICE of Appearance by RONDA GOLDFEIN on behalf of SAFEHOUSE (GOLDFEIN, RONDA) (Entered: 04/05/2019)
04/05/2019	12	NOTICE of Appearance by YOLANDA FRENCH LOLLIS on behalf of SAFEHOUSE (LOLLIS, YOLANDA) (Entered: 04/05/2019)
04/05/2019	13	NOTICE of Appearance by JACOB M. EDEN on behalf of SAFEHOUSE (EDEN, JACOB) (Entered: 04/05/2019)
04/05/2019	14	NOTICE of Appearance by PETER GOLDBERGER on behalf of JEANETTE BOWLES, SAFEHOUSE (GOLDBERGER, PETER) (Entered: 04/05/2019)
04/05/2019	15	ORDER THAT ATTORNEY ADAM STEENE'S APPLICATION FOR PRO HAC VICE FOR SAFEHOUSE IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 4/5/2019. 4/5/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 04/05/2019)
04/05/2019	16	ORDER THAT ATTORNEY THIRU VIGNARAJAH'S APPLICATION FOR PRO HAC VICE FOR SAFEHOUSE IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 4/5/2019. 4/5/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 04/05/2019)
04/05/2019	17	NOTICE by SAFEHOUSE re 14 Notice of Appearance *(Corrected Notice of Appearance)* (GOLDBERGER, PETER) (Entered: 04/05/2019)
04/08/2019	18	NOTICE of Appearance by ERIN LINDGREN on behalf of UNITED STATES OF AMERICA with Certificate of Service(LINDGREN, ERIN) (Entered: 04/08/2019)
04/08/2019		5 Summons Issued as to WILLIAM P. BARR, WILLIAM M. MCSWAIN, U.S. DEPARTMENT OF JUSTICE, U.S. Attorney and U.S. Attorney General Forwarded To: 4 to 3RD PARTY PLAINTIFF COUNSEL 1 to US ATTORNEY on 4/8/2019. (sg,) (Entered: 04/08/2019)
04/09/2019	19	NOTICE of Appearance by JOHN T. CRUTCHLOW on behalf of UNITED STATES OF AMERICA with Certificate of Service(CRUTCHLOW, JOHN) (Entered: 04/09/2019)

04/11/2019	20	NOTICE of Appearance by ERIC D. GILL on behalf of WILLIAM P. BARR, WILLIAM M. MCSWAIN, U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA with Certificate of Service(GILL, ERIC) (Entered: 04/11/2019)
04/11/2019	21	ORDERED THAT A CONFERENCE TO DISCUSS ISSUES OF CASE MANAGEMENT IS SCHEDULED FOR WEDNESDAY, 4/17/2019 AT 2:00 PM. ETC.. SIGNED BY HONORABLE GERALD A. MCHUGH ON 4/11/2019. 4/12/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 04/12/2019)
04/11/2019	22	Acceptance of Service by U.S. Attorney Re: accepted summons and complaint on behalf of the United States Attorney (only). (sg,) (Entered: 04/12/2019)
04/12/2019	23	NOTICE of Appearance by MAURICE R. MITTS on behalf of JEANETTE BOWLES with Certificate of Service(MITTS, MAURICE) (Entered: 04/12/2019)
04/12/2019	24	NOTICE of Appearance by JENNIFER MARIE ADAMS on behalf of JEANETTE BOWLES with Certificate of Service(ADAMS, JENNIFER) (Entered: 04/12/2019)
04/16/2019	25	STIPULATION AND ORDER THAT THE TIME WITHIN WHICH DEFENDANT JEANETTE BOWLES MAY MOVE, ANSWER OR OTHERWISE RESPOND TO THE COMPLAINT IS HEREBY EXTENDED UP TO AND INCLUDING 4/30/2019. SIGNED BY HONORABLE GERALD A. MCHUGH ON 4/15/2019. 4/16/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 04/16/2019)
04/19/2019	26	Minute Entry for proceedings held before HONORABLE GERALD A. MCHUGH Scheduling Conference held on 04/17/2019. (nd,) (Entered: 04/19/2019)
04/26/2019	27	*Defendant Jeanette Bowles*' ANSWER to 1 Complaint together with no *attachments* by JEANETTE BOWLES.(MITTS, MAURICE) (Entered: 04/26/2019)
04/26/2019	28	Praecipe to Attach Exhibit A to Defendant Jeanette Bowles Answer and Affirmative Defenses to Plaintiffs Complaint by JEANETTE BOWLES. (MITTS, MAURICE) (Entered: 04/26/2019)
05/10/2019	29	BRIEF in Support of MOTION for Judgment on the Pleadings *Pursuant to Federal Rule of Civil Procedure 12(C)* filed by JEANETTE BOWLES. Certificate of Service.(MITTS, MAURICE) Modified on 5/13/2019 (lisad,). (Entered: 05/10/2019)
05/23/2019	30	STIPULATION of Dismissal *of Defendant Jeanette Bowles* by UNITED STATES OF AMERICA. (DAVID, GREGORY) (Entered: 05/23/2019)
05/24/2019	31	MOTION for Leave to File *Amended Complaint (Unopposed)* filed by UNITED STATES OF AMERICA.Certificate of Counsel, Certificate of Service. (Attachments: # 1 Exhibit 1 Amended Complaint, # 2 Exhibit Exhs. A – C to Amd Complaint)(DAVID, GREGORY) (Entered: 05/24/2019)
05/28/2019	32	ORDER THAT DEFENDANT JEANETTE BOWLESS MOTION FOR JUDGMENT ON THE PLEADINGS (ECF NO. 29) IS DENIED AS MOOT BECAUSE DEFENDANT JEANETTE BOWLES HAS BEEN DISMISSED FROM THE LAWSUIT. SIGNED BY HONORABLE GERALD A. MCHUGH ON 5/28/19. 5/29/19 ENTERED AND COPIES MAILED AND E–MAILED. (va,) (Entered: 05/29/2019)
05/28/2019	33	STIPULATED SCHEDULING ORDER THAT SHOULD THE COURT GRANT THE MOTION FOR LEAVE TO AMEND, DEFTS SAFEHOUSE & JOSE BENITEZ SHALL ANSWER PLFF UNITED STATES' AMENDED COMPLAINT BY 6/7/2019. THE UNITED STATES SHALL FILE ANY RULE 12 MOTION BY 6/11/2019. DEFT SAFEHOUSE & JOSE BENITEZ SHALL FILE ANY OPPOSITION THERETO BY 6/28/2019, ETC. SIGNED BY HONORABLE GERALD A. MCHUGH ON 5/28/19. 5/29/19 ENTERED AND COPIES MAILED AND E–MAILED.(kw,) (Entered: 05/29/2019)
05/28/2019	34	ORDER THAT PLFF'S UNOPPOSED MOTION FOR LEAVE TO AMEND ITS COMPLAINT (ECF NO. 31) IS GRANTED. THE CLERK OF COURT IS DIRECTED TO DOCKET THE AMENDED COMPLAINT ATTACHED TO PLFF'S MOTION (EFC NO. 31–1, 2) & AMEND THE CAPTION TO INCLUDE AS A DEFT JOSE BENITEZ, AS PRESIDENT AND TREASURER OF SAFEHOUSE. SIGNED BY HONORABLE GERALD A. MCHUGH ON 5/28/19. 5/29/19

		ENTERED AND COPIES MAILED AND E–MAILED.(kw,) (Entered: 05/29/2019)
05/28/2019	35	AMENDED COMPLAINT against SAFEHOUSE, JOSE BENITEZ, filed by PLFF UNITED STATES OF AMERICA. (Attachments: # 1 Exhibits A – C)(kw,) (Entered: 05/29/2019)
05/28/2019		(1) Summons on Amended Complaint Issued as to JOSE BENITEZ. Forwarded To: counsel on 5/29/19. (kw,) (Entered: 05/29/2019)
05/31/2019	36	NOTICE of Appearance by MEGAN KREBS on behalf of JOSE BENITEZ (Attachments: # 1 Certificate of Service)(KREBS, MEGAN) (Entered: 05/31/2019)
05/31/2019	37	NOTICE of Appearance by BEN C. FABENS–LASSEN on behalf of JOSE BENITEZ (Attachments: # 1 Certificate of Service)(FABENS–LASSEN, BEN) (Entered: 05/31/2019)
05/31/2019	38	NOTICE of Appearance by COURTNEY G. SALESKI on behalf of JOSE BENITEZ (Attachments: # 1 Certificate of Service)(SALESKI, COURTNEY) (Entered: 05/31/2019)
05/31/2019	39	NOTICE of Appearance by ILANA H. EISENSTEIN on behalf of JOSE BENITEZ (Attachments: # 1 Certificate of Service)(EISENSTEIN, ILANA) (Entered: 05/31/2019)
05/31/2019	40	ACCEPTANCE OF SERVICE as to 35 Amended Complaint Re: accepted summons and complaint for JOSE BENITEZ on 5/29/2019, answer due 6/19/2019. (Attachments: # 1 Certificate of Service)(EISENSTEIN, ILANA) (Entered: 05/31/2019)
05/31/2019	41	NOTICE of Appearance by RONDA GOLDFEIN on behalf of JOSE BENITEZ with Certificate of Service (Attachments: # 1 Certificate of Service)(GOLDFEIN, RONDA) (Entered: 05/31/2019)
05/31/2019	42	NOTICE of Appearance by YOLANDA FRENCH LOLLIS on behalf of JOSE BENITEZ with Certificate of Service (Attachments: # 1 Certificate of Service)(LOLLIS, YOLANDA) (Entered: 05/31/2019)
05/31/2019	43	NOTICE of Appearance by ADRIAN M. LOWE on behalf of JOSE BENITEZ with Certificate of Service (Attachments: # 1 Certificate of Service)(LOWE, ADRIAN) (Entered: 05/31/2019)
05/31/2019	44	NOTICE of Appearance by JACOB M. EDEN on behalf of JOSE BENITEZ with Certificate of Service (Attachments: # 1 Certificate of Service)(EDEN, JACOB) (Entered: 05/31/2019)
06/07/2019	45	ANSWER to 35 Amended Complaint *with Affirmative Defenses and*, THIRD PARTY COMPLAINT against U.S. DEPARTMENT OF JUSTICE, WILLIAM P. BARR, WILLIAM M. MCSWAIN, COUNTERCLAIM against UNITED STATES OF AMERICA by JOSE BENITEZ, SAFEHOUSE. (Attachments: # 1 Certificate of Service)(EISENSTEIN, ILANA) (Entered: 06/07/2019)
06/10/2019	46	ANSWER to 3 Answer to Complaint,, Counterclaim, *Third–Party Complaint* by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA.(DAVID, GREGORY) (Entered: 06/10/2019)
06/11/2019	47	MOTION for Judgment on the Pleadings filed by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA.Memorandum, Certificate of Service.(DAVID, GREGORY) (Entered: 06/11/2019)
06/28/2019	48	MEMORANDUM of Law in Opposition re 47 MOTION for Judgment on the Pleadings filed by JOSE BENITEZ, SAFEHOUSE. Certificate of Service. (Attachments: # 1 Text of Proposed Order)(EISENSTEIN, ILANA) Modified on 7/1/2019 (lisad,). (Entered: 06/28/2019)

07/09/2019	49	APPLICATION for Admission Pro Hac Vice of Katherine Franke by LAW PROFESSORS OF RELIGION. (Filing fee $ 40 receipt number 0313–13654340.). (CAMPOS, JOSE) (Entered: 07/09/2019)
07/09/2019	50	ORDER THAT THE APPLICATION FOR PRO HAC VICE OF ATTORNEY KATHERINE FRANKE FOR LAW PROFESSORS OF RELIGION IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/9/2019. 7/10/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/10/2019)
07/10/2019	51	MOTION to File Amicus Brief filed by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS.Certificate of Service. (Attachments: # 1 Exhibit A, # 2 Certificate of Service)(SEGAL, DANIEL) (Entered: 07/10/2019)
07/10/2019	52	MOTION for Pro Hac Vice *Lucy E. Pittman* filed by THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, DELAWARE, MICHIGAN, MINNESOTA, NEW MEXICO, OREGON AND VIRGINIA.Certificate of service.(STIEGLER, MATTHEW) FILING FEE PAID, RECEIPT NO. 200446. Modified on 7/17/2019 (sg,). (Entered: 07/10/2019)
07/10/2019	53	MOTION to File Amicus Brief *by Philadelphia–Area Community Organizations* filed by ACT UP PHILADELPHIA, ACTION WELLNESS, LGBT ELDER INITIATIVE, PENNSYLVANIA HARM REDUCTION COALITION, PHILADELPHIA FIGHT, PREVENTION POINT PHILADELPHIA, SERO PROJECT, SOL COLLECTIVE, WILLIAM WAY LGBT COMMUNITY CENTER.Certificate of Service. (Attachments: # 1 Certificate of Uncontested Status, # 2 Exhibit A, # 3 Certificate of Service)(NATALI, JESSICA) (Additional attachment(s) added with permission from Chambers on 7/10/2019: # 4 Proposed Order) (lisad,). Modified on 7/10/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	54	NOTICE of Appearance by BRIAN T. FEENEY on behalf of ACT UP PHILADELPHIA, ACTION WELLNESS, LGBT ELDER INITIATIVE, PENNSYLVANIA HARM REDUCTION COALITION, PHILADELPHIA FIGHT, PREVENTION POINT PHILADELPHIA, SERO PROJECT, SOL COLLECTIVE, WILLIAM WAY LGBT COMMUNITY CENTER with Certificate of Service (Attachments: # 1 Certificate of Service)(FEENEY, BRIAN) (Entered: 07/10/2019)
07/10/2019	55	NOTICE of Appearance by BRADLY A. NANKERVILLE on behalf of ACT UP PHILADELPHIA, ACTION WELLNESS, LGBT ELDER INITIATIVE, PENNSYLVANIA HARM REDUCTION COALITION, PHILADELPHIA FIGHT, PREVENTION POINT PHILADELPHIA, SERO PROJECT, SOL COLLECTIVE, WILLIAM WAY LGBT COMMUNITY CENTER with Certificate of Service (Attachments: # 1 Certificate of Service)(NANKERVILLE, BRADLY) (Entered: 07/10/2019)
07/10/2019	56	Consent MOTION to File Amicus Brief *in Support of Defendant/Counterclaim Plaintiff* filed by THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, DELAWARE, MICHIGAN, MINNESOTA, NEW MEXICO, OREGON AND VIRGINIA.Certificate of service. (Attachments: # 1 Brief)(STIEGLER, MATTHEW) (Entered: 07/10/2019)
07/10/2019	57	MOTION for Pro Hac Vice *of Jillian Schlotter* (Filing fee $ 40 receipt number 0313–13658856.) filed by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS.Certificate of Service.(HAMERMESH, MATTHEW) (Entered: 07/10/2019)
07/10/2019	58	NOTICE of Appearance by ELLEN C. BROTMAN on behalf of DRUG POLICY ALLIANCE with Certificate of Service(BROTMAN, ELLEN) Modified on 7/10/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	59	First MOTION for Pro Hac Vice *Entry of Appearance of Lindsay LaSalle, Esq.*, MOTION for Pro Hac Vice (Filing fee $ 40 receipt number 0313–13658921.) filed by AIDS UNITED, ASSOCIATION FOR MULTIDISCIPLINARY EDUCATION AND RESEARCH IN SUBSTANCE USE AND ADDICTION, ASSOCIATION OF SCHOOLS AND PROGRAMS OF PUBLIC HEALTH, CALIFORNIA SOCIETY OF

		ADDICTION MEDICINE, DRUG POLICY ALLIANCE, HARM REDUCTION COALITION, NATIONAL ASSOCIATION OF STATE AND TERRITORIAL AIDS DIRECTORS, THE FOUNDATION FOR AIDS RESEARCH, POSITIVE WOMEN'S NETWORK, TREATMENT ACTION GROUP, VITAL STRATEGIES. Certificate of Service.(BROTMAN, ELLEN) Modified on 7/10/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	60	NOTICE of Appearance by KEVIN W. RETHORE on behalf of ACT UP PHILADELPHIA, ACTION WELLNESS, LGBT ELDER INITIATIVE, PENNSYLVANIA HARM REDUCTION COALITION, PHILADELPHIA FIGHT, PREVENTION POINT PHILADELPHIA, SERO PROJECT, SOL COLLECTIVE, WILLIAM WAY LGBT COMMUNITY CENTER with Certificate of Service (Attachments: # 1 Certificate of Service Certificate of Service)(RETHORE, KEVIN) (Entered: 07/10/2019)
07/10/2019	61	MOTION to File Amicus Brief filed by HOMELESS ADVOCACY PROJECT, PATHWAYS TO HOUSING PA, CATHOLIC WORKER FREE CLINIC, BETHESDA PROJECT, ST. FRANCIS INN. Certificate of Service. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Text of Proposed Order)(LIPUMA, MICHAEL) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	62	MOTION for Pro Hac Vice *of Mark C. Fleming* (Filing fee $ 40 receipt number 0313–13659244.) filed by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS.Certificate of Service.(HAMERMESH, MATTHEW) (Entered: 07/10/2019)
07/10/2019	63	MOTION for Pro Hac Vice *of Nicholas Roger Werle* (Filing fee $ 40 receipt number 0313–13659274.) filed by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS.Certificate of Service.(HAMERMESH, MATTHEW) (Entered: 07/10/2019)
07/10/2019	64	MOTION for Pro Hac Vice *of Tasha J. Bahal* (Filing fee $ 40 receipt number 0313–13659291.) filed by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS.Certificate of Service.(HAMERMESH, MATTHEW) (Entered: 07/10/2019)
07/10/2019	65	CERTIFICATE OF SERVICE by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS re 57 MOTION for Pro Hac Vice *of Jillian Schlotter* (Filing fee $ 40 receipt number 0313–13658856.) *Amended Certificate of Service* (HAMERMESH, MATTHEW) (Entered: 07/10/2019)
07/10/2019	66	ENTRY of Appearance filed by CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT.Certificate of Service.(RECKER, CATHERINE) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	67	ENTRY of Appearance filed by CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT.Certificate of Service.(CARVER, AMY) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	68	APPLICATION for Admission Pro Hac Vice of Nida Vidutis by CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT. (Filing fee $ 40 receipt number 0313–13659813.). (RECKER, CATHERINE) (Entered: 07/10/2019)
07/10/2019	69	APPLICATION for Admission Pro Hac Vice of Thomas V. Loran III by CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT. (Filing fee $ 40 receipt number 0313–13659903.). (RECKER, CATHERINE) (Entered: 07/10/2019)
07/10/2019	70	MOTION to File Amicus Brief filed by KATHERINE FRANKE, MICHA SCHWARTZMAN, ELIZABETH SEPPER, NELSON TEBBE. Certificate of Service, Brief.(FRANKE, KATHERINE) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)

07/10/2019	71	MOTION for Leave to File *Amicus Brief* filed by FRIENDS AND FAMILY OF VICTIMS OF OPIOID ADDICTION.Amicus Brief. (Attachments: # 1 Proposed Amicus Brief, # 2 Text of Proposed Order)(LEONARD, THOMAS) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	72	First MOTION to File Amicus Brief *on behalf of Drug Policy Alliance, AIDS United, Association for Multidisciplinary Education and Research in Substance Use and Addiction, Association of Schools and Programs of Public Health, California Society of Addiction Medicine, Drug Policy Alliance, The Foundation for AIDS Research, Harm Reduction Coalition, National Association of State and Territorial AIDS Directors,The Network for Public Health, Positive Womens Network, Treatment Action Group and Vital Strategies,,* filed by DRUG POLICY ALLIANCE.Amicus Brief, Certificate of Counsel, Certificate of Service. (Attachments: # 1 Brief, # 2 Text of Proposed Order)(BROTMAN, ELLEN) (Entered: 07/10/2019)
07/10/2019	73	NOTICE of Appearance by STEVEN B. FEIRSON on behalf of BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION (FEIRSON, STEVEN) (Entered: 07/10/2019)
07/10/2019	74	NOTICE of Appearance by MICHAEL H. MCGINLEY on behalf of BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION (MCGINLEY, MICHAEL) (Entered: 07/10/2019)
07/10/2019	75	NOTICE of Appearance by JUSTIN M. ROMEO on behalf of BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION (ROMEO, JUSTIN) (Entered: 07/10/2019)
07/10/2019	76	NOTICE of Appearance by JUDAH BELLIN on behalf of BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION (BELLIN, JUDAH) (Entered: 07/10/2019)
07/10/2019	77	MOTION to File Amicus Brief filed by RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND. (Attachments: # 1 PROPOSED AMICUS BRIEF ON BEHALF OF RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND)(BAYLSON, MIRA) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)
07/10/2019	78	MOTION to File Amicus Brief filed by BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION.. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order, # 3 Certificate of Service)(MCGINLEY, MICHAEL) (Entered: 07/10/2019)
07/10/2019	79	MOTION to File Amicus Brief filed by CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT.Certificate of Service. (Attachments: # 1 Exhibit Brief, # 2 Text of Proposed Order)(CARVER, AMY) (Entered: 07/10/2019)
07/10/2019	80	MOTION to File Amicus Brief filed by KING COUNTY, WA, NEW YORK, NY, PITTSBURGH, PA, SAN FRANCISCO, CA, SEATTLE, WA, SVANTE L. MYRICK. Certificate of Service. (Attachments: # 1 Exhibit Proposed Brief, # 2 Text of Proposed Order, # 3 Certificate of Service)(GIBSON, VIRGINIA) Modified on 7/11/2019 (lisad,). (Entered: 07/10/2019)

07/10/2019	81	Consent MOTION for Leave to Appear Amicus filed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF PA.brief. (Attachments: # 1 Text of Proposed Order, # 2 Brief)(ROPER, MARY) (Entered: 07/11/2019)
07/10/2019	82	ORDERED THAT THE APPLICATION OF JILLIAN SCHLOTTER, ESQUIRE, TO PRACTICE IN THIS COURT IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/10/2019.7/11/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/11/2019)
07/10/2019	83	ORDERED THAT THE APPLICATION OF LINDSAY LASALLE, ESQUIRE, TO PRACTICE IN THIS CASE PRO HAC VICE IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/10/2019.7/11/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/11/2019)
07/10/2019	84	ORDERED THAT THE APPLICATION OF LUCY E. PITTMAN, ESQUIRE, TO PRACTICE IN THIS CASE PRO HAC VICE IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/10/2019.7/11/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/11/2019)
07/10/2019	85	MOTION FOR LEAVE TO FILE BRIED AS AMICI CURIAE filed by PHILADELPHIA MAYOR JIM KENNEY, HEALTH COMMISSIONER DR. THOMAS FARLEY..(sg,) (Entered: 07/11/2019)
07/10/2019	86	NOTICE of Appearance by JENNIFER E. MACNAUGHTON on behalf of THOMAS FARLEY, JIM KENNEY (sg,) (Entered: 07/11/2019)
07/10/2019	87	MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, filed by RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND..(sg,) (Entered: 07/11/2019)
07/11/2019	88	ORDERED THAT LEAVE TO FILE AMICUS CURIAE BRIEFS IS GENERALLY GRANTED. THE CLERK IS INSTRUCTED TO ACCEPT THIS ORDER AS AUTHORITY TO DOCKET AMICUS BRIEFS AS THEY ARE RECEIVED WITHOUT ANY FURTHER ORDER FROM THE COURT. THIS PROCEDURAL ORDER IS WITHOUT PREJUDICE TO THE RIGHT OF EITHER PARTY TO MOVE LATER TO STRIKE ANY AMICUS BRIEF AS INAPPROPRIATE FOR CONSIDERATION BY THE COURT. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/11/2019.7/11/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 07/11/2019)
07/11/2019	89	BRIEF OF AMICI CURIAE, by CURRENT AND FORMER PROSECUTORS, LAW ENFORCEMENT LEADERS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS AND LEADERS. (sg,) (Entered: 07/11/2019)
07/11/2019	90	BRIEF OF AMICI CURIAE, by ACT UP PHILADELPHIA, ACTION WELLNESS, LGBT ELDER INITIATIVE, PENNSYLVANIA HARM REDUCTION COALITION, PHILADELPHIA FIGHT, PREVENTION POINT PHILADELPHIA, SERO PROJECT, SOL COLLECTIVE, WILLIAM WAY LGBT COMMUNITY CENTER. (sg,) (Entered: 07/11/2019)
07/11/2019	91	BRIEF OF AMICI CURIAE, by THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, DELAWARE, MICHIGAN, MINNESOTA, NEW MEXICO, OREGON AND VIRGINIA. (sg,) (Entered: 07/11/2019)
07/11/2019	92	BRIEF OF AMICI CURIAE, by BETHESDA PROJECT, CATHOLIC WORKER FREE CLINIC, HOMELESS ADVOCACY PROJECT, PATHWAYS TO HOUSING PA, ST. FRANCIS INN. (sg,) (Entered: 07/11/2019)
07/11/2019	93	BRIEF OF AMICI CURIAE, by KATHERINE FRANKE, MICAH SCHWARTZMAN, ELIZABETH SEPPER, NELSON TEBBE. (sg,) (Entered: 07/11/2019)
07/11/2019	94	BRIEF OF AMICI CURIAE by FRIENDS AND FAMILY OF VICTIMS OF OPIOID ADDICTION. (sg,) (Entered: 07/11/2019)

07/11/2019	95	BRIEF OF AMICI CURIAE, by AIDS UNITED, ASSOCIATION FOR MULTIDISCIPLINARY EDUCATION AND RESEARCH IN SUBSTANCE USE AND ADDICTION, ASSOCIATION OF SCHOOLS AND PROGRAMS OF PUBLIC HEALTH, CALIFORNIA SOCIETY OF ADDICTION MEDICINE, DRUG POLICY ALLIANCE, HARM REDUCTION COALITION, NATIONAL ASSOCIATION OF STATE AND TERRITORIAL AIDS DIRECTORS, THE FOUNDATION FOR AIDS RESEARCH, POSITIVE WOMEN'S NETWORK, TREATMENT ACTION GROUP, VITAL. (sg,) Modified on 7/12/2019 (lisad,). (Entered: 07/11/2019)
07/11/2019	96	BRIEF OF AMICI CURIAE, by RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND. (sg,) (Entered: 07/11/2019)
07/11/2019	97	BRIEF OF AMICI CURIAE, by BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION. (sg,) (Main Document 97 replaced on 7/12/2019) (lisad,). (Entered: 07/11/2019)
07/11/2019	98	BRIEF OF AMICI CURIAE, by CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT. (sg,) (Entered: 07/11/2019)
07/11/2019	99	BRIEF OF AMICI CURIAE, by KING COUNTY, WA, SVANTE L. MYRICK, NEW YORK, NY, PITTSBURGH, PA, SAN FRANCISCO, CA, SEATTLE, WA. (sg,) (Entered: 07/11/2019)
07/11/2019	100	BRIEF OF AMICI CURIAE, by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF PA. (sg,) (Entered: 07/11/2019)
07/11/2019	101	BRIEF OF AMICI CURIAE, by THOMAS FARLEY, JIM KENNEY. (sg,) (Entered: 07/11/2019)
07/11/2019	102	NOTICE of Appearance by JONATHAN ISAAC ARONCHICK on behalf of RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND (sg,) (Entered: 07/11/2019)
07/11/2019	103	APPLICATION FOR ADMISSION PRO HAC VICE OF ANDREW R. SCHLOSSBERG, filed by RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND. CERTIFICATE OF SERVICE, PROPOSED ORDER. FILING FEE PAID, RECEIPT No.: 200277.(sg,) (Entered: 07/11/2019)
07/11/2019	104	APPLICATION FOR ADMISSION PRO HAC VICE OF DEVIN S. SIKES, filed by RELIGIOUS LEADERS IN THE PHILADELPHIA COMMUNITY AND BEYOND. CERTIFICATE OF SERVICE, PROPOSED ORDER. FILING FEE PAID, RECEIPT No.: 200277.(sg,) (Entered: 07/11/2019)
07/11/2019	105	ORDER THAT ATTORNEY THOMAS V. LORAN, III'S APPLICATION FOR PRO HAC VICE FOR CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/10/2019. 7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)
07/11/2019	106	ORDER THAT ATTORNEY NIDA VIDUTIS'S APPLICATION FOR ADMISSION PRO HAC VICE FOR CONSTITUTIONAL LAW SCHOLAR AND COMMERCE CLAUSE EXPERT PROFESSOR RANDY BARNETT IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/11/2019. 7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)
07/11/2019	107	ORDERED THAT THE APPLICATION FOR PRO HAC VICE OF NICHOLAS ROGER WERLE IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/11/2019.7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)

07/11/2019	108	ORDERED THAT THE APPLICATION FOR PRO HAC VICE OF TASHA J. BAHAL IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/11/2019.7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)
07/11/2019	109	ORDERED THAT THE APPLICATION FOR PRO HAC VICE OF MARK C. FLEMING IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/11/2019.7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)
07/12/2019	110	ORDERED THAT AN EVIDENTIARY HEARING WILL BE HELD ON MONDAY, 8/19/2019 TO CONCLUDE NO LATER THAN TUESDAY, 8/20/2019. THE SCOPE OF THIS HEARING SHALL BE LIMITED TO THE ISSUE OF HOW DEFENDANT PROPOSED TO OPERATE THE SITE THAT IS THE SUBJECT OF THIS LITIGATION. THE HEARING WILL COMMENCE EACH DAY AT 9:30 AM IN COURTROOM 9–B. AT THE REQUEST OF THE UNITED STATES, A CONFERENCE CALL TO FURTHER DISCUSS THE SCOPE AND PURPOSE OF THE HEARING IS SCHEDULED FOR MONDAY, 7/15/2019 AT 4:00 PM. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/12/2019. 7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 07/12/2019)
07/12/2019	111	ORDERED THAT THE APPLICATION FOR PRO HAC VICE OF ANDREW R. SCHLOSSBERG IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/12/2019.7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)
07/12/2019	112	ORDERED THAT THE APPLICATION FOR PRO HAC VICE OF DEVIN S. SIKES IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/12/2019.7/12/2019 ENTERED AND COPIES MAILED AND E–MAILED. ECF APP MAILED.(sg,) (Entered: 07/12/2019)
07/16/2019	113	Minute Entry for proceedings held before HONORABLE GERALD A. MCHUGH Telephone Conference held on 7/15/2019 (sg,) (Entered: 07/17/2019)
07/16/2019	114	ORDER THAT ORAL ARGUMENT IS SCHEDULED FOR THURSDAY 9/5/2019 01:00 PM BEFORE HONORABLE GERALD A. MCHUGH AS OUTLINED HEREIN. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/16/2019. 7/17/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 07/17/2019)
07/22/2019	115	RESPONSE in Support re 47 MOTION for Judgment on the Pleadings filed by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA. (Attachments: # 1 Certificate of Service)(DAVID, GREGORY) (Entered: 07/22/2019)
07/26/2019	116	MOTION to Withdraw by JUDAH BELLIN filed by BRIDESBURG CIVIC ASSOCIATION, FRATERNAL ORDER OF POLICE, LODGE 5, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH PORT RICHMOND CIVIC ASSOCIATION. Certificate of Service. (BELLIN, JUDAH) Modified on 7/29/2019 (lisad,). (Entered: 07/26/2019)
07/30/2019	117	ORDERED THAT JUDAH BELLIN, ESQUIRE'S MOTION TO WITHDRAW (DOC. [116}) ON BEHALF OF AMICI PARTIES IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 7/30/2019.7/31/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 07/31/2019)
08/05/2019	118	Minute Entry for proceedings held before HONORABLE GERALD A. MCHUGH Telephone Conference held on 8/5/2019. Court Reporter: ESR. (sg,) Modified on 8/6/2019 (lisad,). (Entered: 08/06/2019)
08/06/2019	119	MOTION to Withdraw as Attorney *Adam I. Steene, Esquire* filed by JOSE BENITEZ, SAFEHOUSE.Certificate of Counsel and Certificate of Service.(FABENS–LASSEN, BEN) (Entered: 08/06/2019)

08/07/2019	120	ORDERED THAT ADAM I STEENE, ESQUIRE'S MOTION FOR WITHDRAWAL OF APPEARANCE (DOC. 119) IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 8/7/2019.8/8/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 08/08/2019)
08/20/2019	121	Minute Entry for proceedings held before HONORABLE GERALD A. MCHUGH in Courtroom 9–B. Evidentiary Hearing held on 8/19/19. Court Reporter: ESR. (lisad,) Modified on 8/26/2019 (admin1,). (Entered: 08/20/2019)
08/23/2019	122	NOTICE of Appearance by RACHEL A.H. HORTON on behalf of JOSE BENITEZ, SAFEHOUSE (HORTON, RACHEL) Modified on 8/26/2019 (admin1,). (Entered: 08/23/2019)
08/26/2019	123	Audio File 08/19/2019 9:34 AM, regarding Evidentiary Hearing part 1 held on 08/19/2019, before HONORABLE GERALD A. MCHUGH (emo,) Modified on 8/26/2019 (admin1,). (Entered: 08/26/2019)
08/26/2019	124	Audio File 8/19/2019 11:29 AM, regarding Evidentiary Hearing Part 2 held on 8/19/2019, before HONORABLE GERALD A. MCHUGH (emo,) Modified on 8/26/2019 (admin1,). (Entered: 08/26/2019)
08/26/2019	125	Audio File 8/19/2019 2:09 PM, regarding Evidentiary Hearing Part 3 held on 8/19/2019, before HONORABLE GERALD A. MCHUGH (emo,) Modified on 8/26/2019 (admin1,). (Entered: 08/26/2019)
08/26/2019	126	Audio File 8/19/2019 4:00 PM, regarding Evidentiary Hearing Part 4 held on 8/19/2019, before HONORABLE GERALD A. MCHUGH (emo,) Modified on 8/26/2019 (admin1,). (Entered: 08/26/2019)
08/27/2019	127	TRANSCRIPT of EVIDENTIARY HEARING held on 8/19/2019, before Judge GERALD A. MCHUGH. Court Reporter/Transcriber ASC SERVICES, LLC. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 9/17/2019. Redacted Transcript Deadline set for 9/27/2019. Release of Transcript Restriction set for 11/25/2019. (sg,) (Entered: 08/28/2019)
08/27/2019	128	Notice of Filing of Official Transcript with Certificate of Service re 127 Transcript – PDF, 8/28/2019 Entered and Copies Emailed and Mailed. (sg,) (Entered: 08/28/2019)
09/05/2019	129	Audio File 09/05/2019 1:08 PM, regarding ORAL ARGUMENT held on 09/05/2019, before HONORABLE GERALD A. MCHUGH (emo,) (Entered: 09/05/2019)
09/06/2019	130	Minute Entry for proceedings held before HONORABLE GERALD A. MCHUGHin Courtroom 9B ORAL ARGUMENT held on 9/5/2019. Court Reporter: ESR. (sg,) (Entered: 09/06/2019)
09/12/2019	131	TRANSCRIPT of ORAL ARGUMENT held on 9/5/2019, before Judge GERALD A. MCHUGH. Court Reporter/Transcriber ASC SERVICES, LLC. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 10/3/2019. Redacted Transcript Deadline set for 10/15/2019. Release of Transcript Restriction set for 12/11/2019. (sg,) (Entered: 09/13/2019)
09/12/2019	132	Notice of Filing of Official Transcript with Certificate of Service re 131 Transcript – PDF, 9/13/2019 Entered and Copies Mailed and Emailed. (sg,) (Entered: 09/13/2019)
10/02/2019	133	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE GERALD A. MCHUGH ON 10/02/2019. 10/02/2019 ENTERED AND COPIES E–MAILED.(nd,) (Entered: 10/02/2019)
10/02/2019	134	ORDER THAT UPON CONSIDERATION OF THE GOVERNMENT'S MOTION FOR JUDGMENT ON THE PLEADINGS (ECF NO. 47) IT IS ORDERED THAT THE MOTION IS DENIED.. SIGNED BY HONORABLE GERALD A. MCHUGH ON 10/02/2019. 10/02/2019 ENTERED AND COPIES MAILED AND E–MAILED.(nd,) (Entered: 10/02/2019)

10/21/2019	135	ORDER THAT A TELEPHONE CONFERENCE SET FOR 10/25/2019 10:00 AM BEFORE HONORABLE GERALD A. MCHUGH. SIGNED BY HONORABLE GERALD A. MCHUGH ON 10/21/2019. 10/22/2019 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 10/22/2019)
10/24/2019	136	Minute Entry for proceedings held before HONORABLE GERALD A. MCHUGH Telephone Conference held on 10/25/2019 (sg,) (Entered: 10/25/2019)
01/06/2020	137	MOTION for Declaratory Judgment filed by JOSE BENITEZ, SAFEHOUSE.Memorandum. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order)(EISENSTEIN, ILANA) (Entered: 01/06/2020)
01/06/2020	138	STIPULATED SCHEDULING ORDER, DISPOSITIVE MOTIONS DUE BY 1/6/2020. ETC.. SIGNED BY HONORABLE GERALD A. MCHUGH ON 1/3/2020. 1/7/2020 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 01/07/2020)
01/17/2020	139	MOTION for Summary Judgment, OPPOSITION to Motion for Declaratory Judgment filed by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA.Memorandum and Certificate of Service. (Attachments: # 1 Exhibit Exhibit A)(DAVID, GREGORY) Modified on 1/21/2020 (lisad,). (Entered: 01/17/2020)
01/31/2020	140	MEMORANDUM of Law in Opposition re 139 MOTION for Summary Judgment filed by JOSE BENITEZ, SAFEHOUSE. (EISENSTEIN, ILANA) Modified on 2/3/2020 (lisad,). (Entered: 01/31/2020)
02/25/2020	141	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE GERALD A. MCHUGH ON 2/25/2020. 2/25/2020 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 02/25/2020)
02/25/2020	142	ORDERED THAT DEFENDANTS' MOTION FOR FINAL DECLARATORY JUDGMENT (DOC. 137) IS GRANTED AND THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT (DOC. 139) IS DENIED AS FOLLOWS: DEFENDANTS' MOTION FOR DECLARATORY JUDGMENT IS GRANTED. 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 E.D.P.A. WILLIAM M. MCSWAIN ON ALL OF PLAINTIFF'S CLAIMS AND ON COUNT I OF SAFEHOUSE'S COUNTERCLAIM. COUNT II OF DEFENDANTS' COUNTERCLAIM IS DISMISSED WITHOUT PREJUDICE AS MOOT. IT IS DECLARED THAT THE ESTABLISHMENT AND OPERATION OF DEFENDANTS' OVERDOSE PREVENTION SERVICES MODEL, INCLUDING SUPERVISED CONSUMPTION IN ACCORDANCE WITH THE PARTIES' STIPULATED FACTS DOES NOT VIOLATE 21 U.S.C. 856(a). SIGNED BY HONORABLE GERALD A. MCHUGH ON 2/25/2020. 2/25/2020 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 02/25/2020)
02/26/2020	143	NOTICE OF APPEAL as to 141 Memorandum and/or Opinion, 142 Order (Memorandum and/or Opinion),,, by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA. No filing fee required. Copies to Judge, Clerk USCA, Appeals Clerk. Certificate of Service. (DAVID, GREGORY) Modified on 2/27/2020 (lisad,). (Entered: 02/26/2020)
02/27/2020	144	NOTICE of Docketing Record on Appeal from USCA re 143 Notice of Appeal,, filed by WILLIAM P. BARR, UNITED STATES OF AMERICA, WILLIAM M. MCSWAIN, U.S. DEPARTMENT OF JUSTICE. USCA Case Number 20–1422 (dmc,) (Entered: 02/27/2020)

02/27/2020	145	MOTION to Stay re 141 Memorandum and/or Opinion, 142 Order (Memorandum and/or Opinion),,, filed by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA.Memorandum, Certificate of Service.(DAVID, GREGORY) (Entered: 02/27/2020)
02/28/2020	146	MOTION to File Amicus Brief filed by BRIDESBURG CIVIC ASSOCIATION, EAST PASSYUNK AVENUE BUSINESS IMPROVEMENT DISTRICT, FRATERNAL ORDER OF POLICE, LODGE 5, FRIENDS OF MARCONI PARK, GIRARD ESTATE AREA RESIDENTS, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, LOWER MOYAMENSING CIVIC ASSOCIATION, PACKER PARK CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH BROAD STREET NEIGHBORHOOD ASSOCIATION, SOUTH PHILADELPHIA BUSINESS ASSOCIATION, SOUTH PHILADELPHIA COMMUNITIES CIVIC ASSOCIATION (SPCCA), SOUTH PORT RICHMOND CIVIC ASSOCIATION.Brief. (Attachments: # 1 Exhibit A – Proposed Amici Curiae Brief Supporting USAs Motion for Stay, # 2 Exhibit B – Prior Amici Curiae Brief Supporting USAs Motion for Jmt on the Pleadings, # 3 Certificate of Service)(MCGINLEY, MICHAEL) (Entered: 02/28/2020)
03/02/2020	147	ORDERED THAT THE MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE UNITED STATES' EMERGENCY MOTION FOR STAY PENDING APPEAL (DOC. 146) IS GRANTED. THE CLERK OF COURT SHALL FILE THE BRIEF ATTACHED TO THE MOTION AS EXHIBIT A. SIGNED BY HONORABLE GERALD A. MCHUGH ON 3/2/2020.3/2/2020 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 03/02/2020)
03/02/2020	148	BRIEF OF 14 CIVIC ASSOCIATIONS AND THE FRATERNAL ORDER OF POLICE LODGE 5, AS AMICI CURIAE IN SUPPORT OF THE UNITED STATES' EMERGENCY MOTION FOR A STAY PENDING APPEAL, filed by BRIDESBURG CIVIC ASSOCIATION, EAST PASSYUNK AVENUE BUSINESS IMPROVEMENT DISTRICT, FRATERNAL ORDER OF POLICE, LODGE 5, FRIENDS OF MARCONI PARK, GIRARD ESTATE AREA RESIDENTS, HARROWGATE CIVIC ASSOCIATION, JUNIATA PARK CIVIC ASSOCIATION, KENSINGTON INDEPENDENT CIVIC ASSOCIATION, LOWER MOYAMENSING CIVIC ASSOCIATION, PACKER PARK CIVIC ASSOCIATION, PORT RICHMOND ON PATROL AND CIVIC, SOUTH BROAD STREET NEIGHBORHOOD ASSOCIATION, SOUTH PHILADELPHIA BUSINESS ASSOCIATION, SOUTH PHILADELPHIA COMMUNITIES CIVIC ASSOCIATION (SPCCA), SOUTH PORT RICHMOND CIVIC ASSOCIATION. (sg,) (Entered: 03/02/2020)
03/10/2020	149	MEMORANDUM of Law in Opposition re 145 MOTION to Stay re 141 Memorandum and/or Opinion, 142 Order (Memorandum and/or Opinion),,, filed by JOSE BENITEZ, SAFEHOUSE. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Text of Proposed Order)(EISENSTEIN, ILANA) Modified on 3/11/2020 (lisad,). (Entered: 03/10/2020)
03/10/2020	150	MOTION for Leave to File *Amicus Curiae Brief* filed by FRIENDS AND FAMILY OF VICTIMS OF OPIOID ADDICTION.Motion for Leave to File Amicus Curiae Brief. (Attachments: # 1 Ex. A – Proposed Amicus Brief)(KALDIS, HARYLE) (Entered: 03/10/2020)
03/11/2020	151	MOTION to File Amicus Brief filed by THOMAS FARLEY, JIM KENNEY.. (Attachments: # 1 Brief of Amici Mayor Kenney and Commissioner Farley)(MACNAUGHTON, JENNIFER) (Entered: 03/11/2020)
03/11/2020	152	ORDER THAT THE MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF OF THE FRIENDS AND FAMILY OF VICTIMS OF OPIOID ADDICTION IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 3/11/2020.3/12/2020 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 03/12/2020)

03/12/2020	153	*Amicus Curiae Brief in Support of Safehouse's Opposition to Government's Motion for Stay* re 145 MOTION to Stay re 141 Memorandum and/or Opinion, 142 Order (Memorandum and/or Opinion),,, filed by FRIENDS AND FAMILY OF VICTIMS OF OPIOID ADDICTION. (KALDIS, HARYLE) Modified on 3/13/2020 (lisad,). (Entered: 03/12/2020)
03/12/2020	154	ORDER THAT PHILADELPHIA MAY JIM KENNEY AND HEALTH COMMISSIONER DR THOMAS FARLEY'S MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE(DOC. 151) IS GRANTED. SIGNED BY HONORABLE GERALD A. MCHUGH ON 3/12/2020.3/13/2020 ENTERED AND COPIES MAILED AND E–MAILED.(sg,) (Entered: 03/13/2020)
03/27/2020	155	REPLY in Support re 145 MOTION to Stay re 141 Memorandum and/or Opinion, 142 Order (Memorandum and/or Opinion),,, filed by WILLIAM P. BARR(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL), WILLIAM M. MCSWAIN(IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY FOR THE EASTERN DISTRICT OF PENNYLVANIA (COLLECTIVELY, THE "DOJ")), U.S. DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA. (LINDGREN, ERIN) Modified on 3/30/2020 (lisad,). (Entered: 03/27/2020)

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
v.	:	Civil Action No. _____
	:	
SAFEHOUSE, a Pennsylvania nonprofit corporation;	:	
	:	
JEANETTE BOWLES, as Executive Director of Safehouse;	:	
	:	
Defendants.	:	

COMPLAINT FOR DECLARATORY JUDGMENT

While our country is in the midst of an opioid epidemic, this is not the first time we have faced a drug crisis. From crack cocaine, to methamphetamine, to heroin and fentanyl, our country has faced the challenge and tragedy of drug addiction for many years. Congress and the President have sought to address the challenges of drug addiction, abuse, and diversion with the Controlled Substances Act ("CSA"), enacted in 1970.

The CSA established a comprehensive and carefully balanced regulatory scheme that has been updated and revised over time, but remains in full force and effect. Among other things, the CSA created a tiered structure of controlled substances based on their risk of abuse and medical purpose; controlled the flow of these substances from their manufacture through the distribution chain; established important record-keeping requirements; determined which substances were illegal without an administrative application and waiver; and established a comprehensive scheme for the treatment of those afflicted with substance use disorder through narcotic treatment programs.

The legislation's calculated scheme includes the prohibition of certain conduct involving controlled substances. Most relevant to the suit at hand, the CSA provides that it is wholly unlawful to manage or control any place, regardless of compensation, for the purpose of unlawfully using a controlled substance. Defendant Safehouse seeks to disregard the law and override Congress' carefully balanced regulatory scheme by establishing, managing, and controlling sites in Philadelphia that will allow individuals to engage in the illicit use of controlled substances, namely, heroin and fentanyl.

For purposes of this action, it does not matter that Safehouse claims good intentions in fighting the opioid epidemic. What matters is that Congress has already determined that Safehouse's conduct is prohibited by federal law, without any relevant exception. To prevent Safehouse from violating federal law, the United States asks the Court to declare illegal the Defendants' proposed establishment and operation of a place for the unlawful use of controlled substances.

Plaintiff, the United States of America, by and through its attorneys, alleges as follows:

1. This is a civil action seeking declaratory judgment under the Declaratory Judgment Act, as amended, 28 U.S.C. § 2201, and under the Controlled Substances Act, as amended, 21 U.S.C. §§ 801 *et seq*., and its implementing regulations, 21 C.F.R. §§ 1301 *et seq*.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 21 U.S.C. §§ 856(e), 843(f), and 28 U.S.C. §§ 1331, 1345.

3. Venue is proper in the Eastern District of Pennsylvania pursuant to 21 U.S.C. § 843(f)(2) and 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff is the United States of America.

5. Defendant Safehouse is a privately held Pennsylvania nonprofit corporation located at 1211 Chestnut Street, Suite 600, in Philadelphia, Pennsylvania. Safehouse was formed in or around August of 2018.

6. Safehouse seeks to establish and operate one or more sites in Philadelphia where, among other things, intravenous drug users will be permitted to use illegal controlled substances (primarily, heroin and fentanyl) in "consumption rooms" under medical supervision (hereinafter, "Consumption Room(s)").

7. Defendant Jeanette Bowles is the Executive Director of Safehouse.

FACTUAL ALLEGATIONS

8. Existing nonprofit community organizations, such as Prevention Point Philadelphia, provide a wide range of medical and non-medical services intended to reduce the harms of the opioid crisis in Philadelphia. These services include, but are not limited to, access to addiction treatment, wound care, clean needle exchange, social services, testing, free distribution of the opioid overdose reversal medication Naloxone (Narcan), and training on how to administer Naloxone.

9. Safehouse states on its website that its mission is "sav[ing] lives by providing a range of overdose prevention services" in Philadelphia, including "[m]edically supervised safe consumption and post-consumption observation." (*See* Safehouse FAQ, attached hereto as Exhibit A).

10. Safehouse further states on its website that, upon arrival at "Safehouse facilities," drug users – called "participants" – who seek supervised consumption will be directed to a

Consumption Room where they will be provided with syringes and related paraphernalia by Safehouse staff, who will observe them while they prepare and inject illegal narcotics within the Safehouse Consumption Room. (*Id*.).

11. "[P]articipants" will then be sent to an "observation room," where they will be "offered on-site initiation of Medication Assisted Treatment (MAT), wound care, and referrals to primary care, social services, and housing opportunities." (*Id*.). Safehouse states that it will "provide overdose reversal and other emergency care" and "advise on sterile injection technique," but its staff will not "administer any narcotic or opioid," nor will they make any such drug available "other than those that are FDA-approved for the treatment of opioid addiction[.]" (*Id*.).

12. Heroin and fentanyl are controlled substances. 21 U.S.C. § 812; 21 C.F.R. §§ 1308.11, 1308.12. Heroin is a Schedule I substance, and fentanyl is a Schedule II substance. 21 U.S.C. § 812(c) ("Schedule I" at (b)(10); "Schedule II" at (b)(6)).

13. Knowing or intentional possession of Schedule I or II substances such as heroin or fentanyl, without satisfying certain exceptions that do not apply to Safehouse participants, violates federal law. 21 U.S.C. § 844(a).

14. The Controlled Substances Act, 21 U.S.C. §§ 801-971, provides, in pertinent part, that:

> it shall be unlawful to . . . manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

21 U.S.C. § 856(a), (a)(2).

15. Section 856(a)(2) applies to any person who "manage[s] or control[s] any place" that they "knowingly and intentionally . . . make available for use, with or without compensation . . . for the purpose of unlawfully . . . using a controlled substance." Defendants' operation of Consumption Rooms would do exactly that.

16. Therefore, Defendants will violate section 856(a)(2) of Title 21 if they open a Consumption Room.

17. Defendants have publically stated their position that the operation of such a Consumption Room would not violate federal law and that they intend to open one or more Consumption Rooms notwithstanding section 856 of Title 21 of the United States Code. (*See* Exhibit A).

18. By a letter to Safehouse's President and Vice President dated November 9, 2018, the United States Attorney for the Eastern District of Pennsylvania, William M. McSwain, advised Safehouse that its planned operation of one or more Consumption Rooms would clearly violate federal law. (*See* Nov. 9, 2018, letter, attached hereto as Exhibit B). The government requested assurance that Safehouse would comply with federal law, and advised that the government would pursue appropriate legal remedies should Safehouse fail to ensure its compliance. *Id.*

19. By letter dated November 26, 2018, Safehouse's President and Vice President advised the government that Safehouse would not comply, asserting, "[w]e respectfully disagree with the conclusion that Safehouse's proposed consumption room would violate federal law." (*See* Nov. 26, 2018, letter, attached hereto as Exhibit C, at 1).

20. On or about December 24, 2018, Safehouse announced that it had retained DLA Piper to represent it in potential litigation against the United States regarding Safehouse's legality.

21. In or around January 2019, Safehouse hired Defendant Jeanette Bowles as its Executive Director.

22. Upon information and belief, Defendants will imminently open one or more Consumption Rooms in Philadelphia. Defendants' initial plan was to be operational by January 2019, although they may have recently pushed back the opening to March 2019.[1]

COUNT I

Violation of the Controlled Substances Act, 21 U.S.C. § 856(a)(2) – Declaratory Judgment

23. The United States repeats and re-alleges Paragraphs 1 through 22 as if fully set forth herein.

24. Pursuant to 21 U.S.C. § 856(a) and (a)(2), "it shall be unlawful to . . . manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance."

25. Defendants intend to manage and control one or more Consumption Rooms in Philadelphia and they will knowingly and intentionally provide a place for drug users to use controlled substances unlawfully, such as heroin and fentanyl.

26. Accordingly, Defendants imminently will violate 21 U.S.C. § 856(a)(2).

[1] Colleen Slevin, *Denver is latest city pushing for 1st US drug injection site* (Nov. 28, 2018), https://www.apnews.com/86a3aca99f72489082fcfa7ff0ab3a83 ("A private nonprofit is raising money for a supervised injection site in Philadelphia but has pushed back its potential opening date from January to mid-March, the group Safehouse said.").

27. Pursuant to 21 U.S.C. § 856(e), "[a]ny person who violates subsection (a) of this section shall be subject to declaratory and injunctive remedies as set forth in section 843(f) of this title."

28. Section 843(f), provides, in turn, that "the Attorney General is authorized to commence a civil action for appropriate declaratory or injunctive relief relating to . . . [section] 856 of this title." 21 U.S.C. § 843(f)(1).

29. Under 28 U.S.C. § 2201(a), "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

30. Declaratory relief is especially appropriate where illegal conduct is imminent.

31. The United States is accordingly entitled to appropriate declaratory relief through this civil action pursuant to 21 U.S.C. § 843(f) and 28 U.S.C. § 2201, stating that Defendants' establishment and operation of any Consumption Rooms will violate section 856 of Title 21 of the United States Code.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that judgment be entered in its favor and against Defendants declaring that Defendants' establishment and operation of any Consumption Room, or similar sites made available for the unlawful use of controlled substances, will violate 21 U.S.C. § 856(a)(2).

Dated: February 5, 2019

Respectfully submitted,

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

UNITED STATES OF AMERICA, Plaintiff, v. SAFEHOUSE, a Pennsylvania nonprofit corporation; JEANETTE BOWLES, as Executive Director of Safehouse, Defendants.	Civil Action No.: 2:19-cv-00519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff,* v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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*.	

DEFENDANT SAFEHOUSE'S ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS TO PLAINTIFF'S COMPLAINT, AND THIRD-PARTY COMPLAINT

PRELIMINARY STATEMENT

"The opioid problem is perhaps the greatest public health crisis this city has faced in the last century."[1] Philadelphians and Americans are dying from opioid overdoses at unprecedented

[1] Tr. of Council of City of Phila., Comm. on Pub. Health & Human Servs., at 21:3-5 (Mar. 12, 2018) (Dr. Thomas Farley, Phila. Health Comm'r).

and alarming rates. In the last two years, more than 2,300 of our brothers, sisters, mothers, fathers, sons, daughters, and neighbors died of opioid overdoses in Philadelphia alone.[2] Philadelphia's overdose fatality rate is nearly four times its homicide rate.[3] The overdose crisis has intensified in the past several years due to the influx of fentanyl—a powerful and fast-acting opioid that was involved in 87% of the overdose deaths that occurred in Philadelphia in 2017.[4]

This is the stark reality: in an opioid overdose, a person loses consciousness, stops breathing, and then—absent intervention—will die. Fentanyl increases the risk of overdose, because it is 50-to-100 times more potent and faster-acting than heroin. A person overdosing on fentanyl can stop breathing in as little as 2-to-3 minutes. Opioid receptor antagonists (such as Naloxone) are a lifesaving treatment that will reverse the effects of an overdose—but only if timely medical assistance is available. Tragically, for thousands help arrived too late or not at all.

In Philadelphia, Safehouse intends to prevent as many of these deaths as possible through a medical and public health approach to overdose prevention. The Safehouse model will include medically supervised consumption and observation. Those who are at high risk of overdose death would stay within immediate reach of urgent, lifesaving medical care at the critical moment of consumption. Medical supervision at the time of consumption ensures that opioid receptor antagonists such as Naloxone, and other respiratory and supportive treatments like oxygen, will be immediately available in the event of an overdose. This intervention will not solve the opioid

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[2] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf; City of Phila., *Combating the Opioid Epidemic*, https://www.phila.gov/programs/combating-the-opioid-epidemic/reports-and-data/opioid-misuse-and-overdose-data/ (last visited Apr. 2, 2019); *see also* WHYY, *Fatal opioid overdoses expected to dip in Philly for first time in 5 years* (Dec. 24, 2018), https://whyy.org/articles/fatal-opioid-overdoses-expected-to-dip-in-philly-for-first-time-in-5-years/.

[3] City of Phila., Dep't of Pub. Health, *Philadelphia's Community Health Assessment: Health of the City 2018*, at 5, https://www.phila.gov/media/20181220135006/Health-of-the-City-2018.pdf (last visited Apr. 2, 2019).

[4] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf.

crisis, but it will provide a critical life raft. Safehouse's comprehensive model will also (i) encourage entry into drug treatment by engaging with participants when they are most receptive to counseling, (ii) reduce the transmission of communicable diseases such as HIV and Hepatitis C, (iii) treat and prevent life-threatening infections, (iv) provide primary medical care, and (v) offer a host of essential wraparound services. These measures are informed by medical science and public health data. And, consistent with their Judeo-Christian traditions, Safehouse's overdose prevention service is an exercise of the religious beliefs of its Board of Directors, who hold as core tenets preserving life, providing shelter to neighbors, and ministering to those most in need of physical and spiritual care.

The success of Safehouse's model has been confirmed by clinical and public health research that shows that medically supervised consumption sites save lives and prevent overdose deaths. Medically supervised consumption sites are not a new phenomenon; they have been in operation for more than 30 years. More than 120 sites operate openly worldwide, and *not a single fatal overdose* has been reported inside any similar facility. Extensive public health research of medically supervised consumption sites report a *decrease* in overdose deaths in their immediate vicinity, a *decrease* in the public use of drugs, a *decrease* in discarded drug paraphernalia waste, and a *decrease* in the transmission of infectious diseases. That research also shows that medically supervised consumption sites encourage long-term treatment for opioid addiction and do not contribute to increased crime.[5]

[5] *See* Beau Kilmer et al., Rand Corp., *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States* 31-38 (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2600/RR2693/RAND_RR2693.pdf ("The existing reviews of scientific evaluation of [supervised consumption sites] report positive findings across a broad range of outcomes."); Chloe Potier et al., *Supervised injection services: What has been demonstrated? A systematic literature review*, 145 Drug & Alcohol Dependence, Results (2014) (concluding, after review of seventy-five relevant articles, that supervised consumption sites "were efficacious in promoting safer injection conditions, enhancing access to primary health care, and reducing overdose frequency," that they are "associated with reduced levels of public drugs injections or dropped syringes," and that such sites "were not found to increase drug injecting, drug trafficking or crime in the surrounding environments").

Overdose prevention services, including medically supervised consumption, are nationally and internationally recognized as an appropriate medical and public health measure by the American Medical Association, the American Public Health Association, AIDS United, the European Monitoring Centre for Drugs and Drug Addiction, the Infectious Diseases Society of America, the HIV Medicine Association, the International Drug Policy Consortium, and innumerable public health experts, physicians, and addiction researchers. This measure has locally been endorsed and encouraged by Philadelphia's Mayor, Health Commissioner, Commissioner of the Department of Behavioral Health and Intellectual disAbility Services, and the District Attorney, who all see the critical need for this intervention.

Despite this evidence, the U.S. Department of Justice ("DOJ") has threatened to prosecute Safehouse and seeks a declaratory judgment that Safehouse's proposed overdose prevention services would violate 21 U.S.C. § 856. Providing lifesaving medical services to individuals who are suffering from substance use disorder does not and constitutionally cannot violate Section 856. The DOJ's interpretation of Section 856 ignores Safehouse's planned comprehensive medical model. It is contrary to (i) the statutory regime adopted by Congress in the Controlled Substances Act ("CSA"), Pub. L. No. 91-513, 84 Stat. 1242 (21 U.S.C. § 801 *et seq.*), the Consolidated Appropriations Act, 2016 ("Appropriations Act of 2016"), Pub. L. No. 114-113, § 520, 129 Stat. 2327, and the Comprehensive Addiction and Recovery Act of 2016 ("CARA"), Pub. L. No. 114-198, 130 Stat. 695; (ii) the text, structure, purpose, and history of Section 856; (iii) well-settled canons of construction; (iv) foundational principles of federalism and limited federal government authority underlying the U.S. Constitution; and (v) the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. § 2000bb *et seq.*). The DOJ now asks this Court to declare that the stark realities of the opioid crisis are irrelevant because "the law is

the law"—even though "the law" is not what DOJ claims it to be, and the DOJ has never enforced Section 856 in any analogous circumstance.

Section 856 does not address, much less prohibit, the legitimate, multifaceted, medical, and public health intervention that Safehouse intends to provide. Congress enacted Section 856 as an amendment to the CSA to target "crack houses" and "rave parties" where drug dealers established and maintained houses or temporary warehouses "for the purpose of" the manufacture, sale, and use of drugs in furtherance of their drug distribution and for-profit enterprises. Safehouse is nothing like a "crack house" or drug-fueled "rave." Nor is Safehouse established "for the purpose" of unlawful drug use. Rather, it is established for the exclusive purpose of providing urgent, lifesaving medical care to those at risk of drug overdose. The CSA does not regulate such a legitimate—indeed, critical—medical and public health intervention.

The DOJ claims that Safehouse's overdose prevention services violate federal law. It is wrong. To the contrary, Safehouse's comprehensive model is entirely consistent with the federal government's response to the opioid crisis. The services Safehouse will offer—clean injection equipment, Naloxone access, comprehensive medical services (primary care, wound care, HIV and Hepatitis C treatment), and immediate enrollment into drug treatment—are not only permitted by federal law, they are expressly endorsed by Congress and federal agencies. The U.S. Department of Health and Human Services ("HHS") and the Centers for Disease Control and Prevention ("CDC") expressly approve of comprehensive syringe exchange programs, which include the provision of clean needles, tourniquets, wipes, clean water for injections, and instruction on safer injection techniques. Recently, Congress clarified that federal law not only

permits syringe exchange programs, but now allows those programs to receive federal funding.[6] Congress and federal agencies likewise affirmatively have promoted the availability of Naloxone and other opioid receptor antagonists.[7]

Safehouse will bridge the short, but critical, gap—a matter of seconds to minutes—between the time a person receives a sterile syringe and other clean injection equipment and the need for immediate access to Naloxone and other medical treatment to reverse an overdose. The DOJ does not dispute that Safehouse may provide a person with syringes and consumption equipment and may have Naloxone at the ready. Yet, the DOJ suggests that Safehouse itself, as well as its leadership and personnel, would commit a 20-year felony unless it insists that a person leave the safety of its shelter—and potentially go to an alley, a public street or bathroom, or home alone—at the very moment when access to lifesaving medical supervision and care is most critical, that is, at the time of consumption. Contrary to the DOJ's Complaint, overdose prevention services, including Safehouse's proposed medically supervised consumption site in Philadelphia, will advance—not violate—federal law and policy.

The moral and religious imperative to save lives, medical ethics and practice, the public health data, and federal law all point to the same conclusion: Safehouse offers a lifesaving service that is not prohibited by Section 856. Federal criminal law does not require Safehouse to ignore this overdose crisis while people continue to die at a staggering rate. This Court should deny the DOJ's request for a declaration, and instead should hold that Section 856, under these circumstances, does not criminalize Safehouse's contemplated overdose prevention services.

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[6] CDC, *Program Guidance for Implementing Certain Components of Syringe Services Programs* (2016), https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-syringe-exchange-services.pdf.

[7] *See* CARA, § 107, 130 Stat. 703 (42 U.S.C. § 290dd-3).

Defendant Safehouse, by and through its counsel, answer the Complaint of Plaintiff United States of America ("Plaintiff") and aver as follows:

1. Safehouse admits that Plaintiff purports to seek a declaratory judgment under the Declaratory Judgment Act, as amended, 28 U.S.C. § 2201, and under the CSA, 21 U.S.C. § 843(f) (as made applicable by *id*. § 856(e)) and its implementing regulations, 21 C.F.R. § 1301 *et seq*., but denies that Plaintiff is entitled to such relief.

2. Admitted.

3. Admitted.

PARTIES

4. Admitted.

5. Admitted.

6. Denied as stated.

7. Denied.

FACTUAL ALLEGATIONS

8. Admitted. Despite the existence of such nonprofits providing services intended to reduce the harms of the opioid crisis, Philadelphians continue to die of overdoses at rates higher than nearly every other major city.[8]

[8] In 2016, Philadelphia had the second-highest rate of drug overdose deaths among counties with a population of more than one million residents. *See* Pew Tr., *Philadelphia's Drug Overdose Death Rate Among Highest in Nation* (Feb. 15, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/15/philadelphias-drug-overdose-death-rate-among-highest-in-nation.

In 2017, Philadelphia had the highest overdose death rate (65/100,000 residents) of the counties in the top ten largest U.S. cities. Its overdose death rate was three times the rate of the second highest county (Cook County, 23/100,000 residents). *See* CDC, *CDC WONDER Online Database*: *About Underlying Cause of Death, 1999-2017*, https://wonder.cdc.gov/ucd-icd10.html (last visited Apr. 2, 2019).

9. Admitted in part and denied in part. Safehouse's mission, as stated on its website, "is to save lives by providing a range of overdose prevention services."[9] Also as stated, "[t]he leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in [them] from [their] religious schooling, [their] devout families and [their] practices of worship. At the core of [their] faith is the principle that preservation of human life overrides any other considerations."[10] Safehouse will save lives by providing a range of overdose prevention services, including medically supervised consumption and observation. Exhibit A to the Complaint is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit A is therefore denied.

10. Denied as stated. Upon arrival at Safehouse, all participants must register and provide demographic information. A physical and behavioral health assessment will be conducted and a range of overdose prevention services offered. "[P]articipants will be directed to the medically supervised observation room," where they will be "offered on-site initiation of Medication Assisted Treatment (MAT), wound care, and referrals to primary care, social services, and housing opportunities."[11] Or participants may seek supervised consumption, in which case they "will be directed to the medically supervised consumption room and provided sterile consumption equipment and fentanyl test strips.[12] Participants will safely dispose of used

[9] Safehouse, *Frequently Asked Questions*, https://www.safehousephilly.org/about/faqs (last visited Apr. 2, 2019).

[10] *Id.*

[11] *Id.*

[12] The provision of sterile consumption equipment will reduce of the risk of transmission of infectious diseases. Fentanyl test strips are used to detect the presence of fentanyl prior to consumption. By alerting the participant to the presence of fentanyl and the increased risk of overdose, Safehouse would be practicing a harm reduction strategy that encourages a dosage adjustment to a safer level.

consumption equipment before leaving the supervised consumption area.[13] Under no circumstance will Safehouse make available any illicit narcotic or opioid. From the consumption area, participants will be directed to the medically supervised observation room and again offered opportunities for drug treatment, medical care, and social services .[14] Exhibit A is a printout of the Safehouse website as of February 2019. Exhibit A to the Complaint is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit A is therefore denied.

11. Admitted in part and denied in part. Paragraph 11 selectively quotes from the Safehouse website as of February 2019, as reflected in Exhibit A. Exhibit A to the Complaint is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit A is therefore denied.

12. Denied. The averments contained in Paragraph 12 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

13. Denied. The averments contained in Paragraph 13 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

14. Denied. The averments contained in Paragraph 14 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

15. Denied. The averments contained in Paragraph 15 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied. Safehouse's provision of overdose prevention services would not violate Section 856(a)(2).

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[13] The safe disposal of consumption equipment will reduce the risk of transmission of intravenous diseases, and will further the goals of city-sponsored programs like the Philadelphia Resilience Project, which aim to alleviate the public littering of consumption equipment that is prevalent in areas of Philadelphia with high drug use. *See* City of Phila., *Philadelphia Resilience Project*, https://www.phila.gov/programs/philadelphia-resilience-project/.

[14] *Id.* (footnotes added).

16. Denied. The averments contained in Paragraph 16 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied. Safehouse's overdose prevention services would not fall within the scope of Section 856(a)(2).

17. Admitted in part and denied in part. Safehouse has publicly stated that its planned operations would not violate federal law. The remainder of Paragraph 17 is denied.

18. Admitted in part and denied in part. It is admitted that Safehouse received a letter from U.S. Attorney for the Eastern District of Pennsylvania, William M. McSwain, dated November 9, 2018. Exhibit B to the Complaint is a copy of that letter, which is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit B is therefore denied.

19. Admitted in part and denied in part. It is admitted that Safehouse sent a letter to U.S. Attorney for the Eastern District of Pennsylvania, William M. McSwain, dated November 26, 2018, explaining (among other things) that a proper and constitutional application of Section 856 does not prohibit Safehouse's overdose prevention services model that would combat the opioid crisis and prevent fatal overdoses. Exhibit C to the Complaint is a copy of that letter, which is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit C is therefore denied.

20. Admitted.

21. Admitted as stated.

22. Denied.

COUNT I

Violations of the Controlled Substances Act, 21 U.S.C. § 856(a)(2) – Declaratory Judgment

23. Safehouse incorporates by reference its responses to paragraphs 1 through 22 of Plaintiff's Complaint as if set forth fully herein.

24. Denied. The averments contained in Paragraph 24 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

25. Denied. The averments contained in Paragraph 25 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

26. Denied. The averments contained in Paragraph 26 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

27. Denied. The averments contained in Paragraph 27 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

28. Denied. The averments contained in Paragraph 28 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

29. Denied. The averments contained in Paragraph 29 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

30. Denied. The averments contained in Paragraph 30 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

31. Denied. The averments contained in Paragraph 31 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and is therefore denied.

PRAYER FOR RELIEF

Safehouse denies that Plaintiff is entitled to any relief in connection with the allegations set forth in its Complaint, including, but not limited to, the allegations set forth in Plaintiff's Prayer for Relief.

AFFIRMATIVE DEFENSES

As affirmative defenses to Plaintiff's Complaint, Safehouse asserts as follows without assuming the burden of proof or persuasion on matters for which it has no such burden. In doing

so, Safehouse specifically reserves the right to restate, re-evaluate, or recall any defenses and to assert additional defenses:

1. The cited provision of the CSA, 21 U.S.C. § 856(a)(2), does not apply to Safehouse's proposed conduct.

2. Safehouse's proposed conduct is justified by medical necessity to avoid imminent serious bodily injury and death.

3. The application of Section 856 to Safehouse is barred by RFRA, 42 U.S.C. § 2000bb *et seq.*

4. As applied to Safehouse, Section 856(a)(2) is unconstitutional under the Commerce Clause.

SAFEHOUSE'S COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

Pursuant to Federal Rule of Civil Procedure 13, Counterclaim Plaintiff Safehouse asserts the following counterclaims against Counterclaim Defendant United States of America, and claims against Third-Party Defendants U.S. Department of Justice; William P. Barr, in his official capacity as U.S. Attorney General; and William M. McSwain, in his official capacity as U.S. Attorney for the Eastern District of Pennsylvania (collectively, "the DOJ"), and, by and through its counsel, alleges as follows:

INTRODUCTION

1. In this action, Safehouse seeks to have this Court declare 21 U.S.C. § 856 inapplicable to the establishment and carrying out of its overdose prevention services model, which includes medically supervised consumption and observation.

2. Safehouse further seeks a declaration by the Court that any prohibition on its operation of a medically supervised consumption room as part of its overdose prevention services model would violate the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb *et seq.*, by

substantially burdening the exercise of its religious beliefs that call its Board Members and Directors to provide lifesaving medical treatment to a vulnerable population. The federal government lacks any compelling interest in preventing Safehouse's proposed operation; nor would enforcement of Section 856 against Safehouse be the least restrictive means of advancing any such interest.

JURISDICTION AND VENUE

3. This action arises under 21 U.S.C. § 801 *et seq.* and 42 U.S.C. § 2000bb *et seq.* This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346. Safehouse seeks remedies under 28 U.S.C. §§ 2201 and 2202.

4. Venue lies in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(b), as the relevant events took place in this District.

DECLARATORY JUDGMENT

5. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of Safehouse to warrant relief under 28 U.S.C. § 2201.

6. The harm to Safehouse as a direct result of the actions and threatened actions of the DOJ is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment.

7. The DOJ and its officials have asserted that Safehouse's overdose prevention services model, which includes medically supervised consumption and observation, would violate federal criminal law. The DOJ has threatened to commence criminal and civil enforcement proceedings at any time to prevent Safehouse from opening and becoming operational, and brought the instant action resulting in this counterclaim.

8. Safehouse, as well as its leaders and personnel, are thus threatened with federal civil and criminal enforcement unless Safehouse refrains from engaging in entirely lawful conduct in pursuit of its lifesaving mission.

9. Under these circumstances, judicial intervention is warranted to resolve a genuine case or controversy within the meaning of Article III of the U.S. Constitution regarding the proper interpretation and application of Section 856.

10. A declaration that Safehouse would not violate Section 856 once it becomes operational would definitively resolve that controversy for the parties.

THE PARTIES

11. Counterclaim Plaintiff Safehouse is a nonprofit corporation operating under the laws of the Commonwealth of Pennsylvania with a registered address at 1211 Chestnut Street, Suite 600, Philadelphia, Pennsylvania 19107.

12. Counterclaim Defendant is the United States of America.

13. Third-Party Defendant is the U.S. Department of Justice.

14. Third-Party Defendant William P. Barr is sued in his official capacity as U.S. Attorney General.

15. Third-Party Defendant William M. McSwain is sued in his official capacity as the United States Attorney for the Eastern District of Pennsylvania.

I. FACTUAL ALLEGATIONS

16. Safehouse hereby incorporates and re-alleges the Preliminary Statement and each of the factual allegations in its Answer to Plaintiff's Complaint. It further avers as follows:

The Opioid Epidemic in the City of Philadelphia

17. The City of Philadelphia is in the midst of an unprecedented public health emergency due to the opioid epidemic and the opioid overdose crisis.

18. In the last two years, more than 2,300 individuals died as a result of an opioid overdose in Philadelphia.[15] On average, Philadelphia is losing three of its citizens each day to opioid overdoses.

19. On October 3, 2018, the Mayor of Philadelphia issued an Opioid Emergency Response Executive Order declaring that "Kensington and its surrounding neighborhoods are in the midst of a disaster" due to the opioid crisis, and empowering city agencies and officials to lead efforts to reduce opioid deaths and transmission of disease and to increase entry into drug treatment.[16]

20. Since 2011, most opioid-related deaths in Philadelphia have been caused by heroin.[17] In the last several years, Philadelphia has experienced a dramatic increase in the number of deaths related to fentanyl.[18]

21. Fentanyl is a synthetic opioid that is now found in many of the opioids sold on the street in Philadelphia. Fentanyl is often sold to drug users who mistakenly believe that they are purchasing less lethal drugs.

22. Fentanyl is 50-to-100 times more potent than heroin, and its effects are felt within the human body much faster. In the event of an overdose, a person may stop breathing within ***2-***

[15] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf; City of Phila., *Combating the Opioid Epidemic*, https://www.phila.gov/programs/combating-the-opioid-epidemic/reports-and-data/opioid-misuse-and-overdose-data/ (last visited Apr. 2, 2019); *see also* WHYY, *Fatal opioid overdoses expected to dip in Philly for first time in 5 years* (Dec. 24, 2018), https://whyy.org/articles/fatal-opioid-overdoses-expected-to-dip-in-philly-for-first-time-in-5-years/.

[16] City of Phila., Office of the Mayor, *Executive Order No. 3-18 – Opioid Emergency Response Executive Order* (Oct. 3, 2018), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/eo99318.pdf.

[17] *See id*.

[18] *See id*.

to-3 minutes after the consumption of fentanyl. Absent intervention, serious injury or death can occur as quickly as ***3-to-5 minutes*** from the time of consumption.

23. Every second counts in reversing an opioid overdose. When immediately available, the administration of Naloxone and similar opioid receptor antagonists provides lifesaving treatment. These interventions ***will resuscitate and keep a person alive with medical certainty***.

24. The time-sensitive nature of overdose prevention services is complicated by the fact that Philadelphia's Emergency Medical Services ("EMS") is inundated with calls to respond to overdoses, response times are variable, and for 46 percent of calls in 2017, more than 9 minutes elapsed before EMS arrived at the scene.[19]

25. In 2017, Philadelphia's EMS personnel administered Naloxone to more than 5,400 overdose victims.[20] This number has continued to increase in 2018.

26. Emergency rooms, moreover, frequently are not equipped to provide the wraparound services needed to overcome opioid addiction.[21]

27. As part of this growing crisis, the Mayor of Philadelphia created the Task Force to Combat the Opioid Epidemic in Philadelphia (the "Task Force"). The final report issued by the

[19] Adam Thiel, Fire Comm'r, *Philadelphia Fire Department Fiscal Year 2018 Budget Testimony*, at 6, http://phlcouncil.com/wp-content/uploads/2017/04/FY18-Fire-Budget-Testimony-final-version-4.12.17.pdf (last visited Apr. 2, 2019).

[20] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf; City of Phila., *Combating the Opioid Epidemic*, https://www.phila.gov/programs/combating-the-opioid-epidemic/reports-and-data/opioid-misuse-and-overdose-data/ (last visited Apr. 2, 2019)

[21] Hoag Levins, *Optimizing Heroin Users' Treatable Moments in the ER* (June 2017), https://ldi.upenn.edu/news/optimizing-heroin-users-treatable-moments-er (last visited Apr. 2, 2019).

Task Force recommended the implementation of overdose prevention services and expansion of treatment access and capacity.[22]

28. Safehouse would fulfill Philadelphia's dire need for overdose prevention services.

Formation of Safehouse

29. Safehouse, a privately funded nonprofit corporation, was established in 2018 with the mission to save lives by providing a range of overdose prevention services. Its proposed model is part of a broader harm reduction strategy to mitigate the catastrophic losses resulting from the opioid epidemic and overdose crisis in Philadelphia.

30. "Substance use disorder" or "Opioid use disorder" are defined by the CDC to be a medical condition diagnosed "based on specific criteria such as unsuccessful efforts to cut down or control use, or use resulting in social problems and a failure to fulfill obligations at work, school, or home, among other criteria."[23] The Office of the U.S. Surgeon General has reported that more than eleven million Americans use illicit drugs or misuse prescription drugs, but that only one out of four of those people seek specialized treatment for opioid use disorder.[24] In 2016, the Mayor's Task Force reported that more than 14,000 Medicaid recipients in Philadelphia sought treatment for opioid use disorder—a small fraction of those actually suffering from that condition—and estimated that more than 70,000 Philadelphians are active heroin users.[25]

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[22] *See* City of Phila., *The Mayor's Task Force To Combat The Opioid Epidemic in Philadelphia: Final Report and Recommendations* (May 19, 2017), https://dbhids.org/wp-content/uploads/2017/04/OTF_Report.pdf ("*Task Force Report*").

[23] CDC, *Commonly Used Terms: Opioid Overdose*, https://www.cdc.gov/drugoverdose/opioids/terms.html (last visited Apr. 3, 2019).

[24] HHS, *Facing Addiction in America: The Surgeon General's Spotlight on Opioids* 6 (Sept. 19, 2018), https://addiction.surgeongeneral.gov/sites/default/filesfiles/Spotlight-on-Opioids_09192018.pdf.

[25] *Task Force Report* 7-8.

31. "Harm reduction" is an umbrella term for interventions that aim to reduce problematic or otherwise harmful effects of certain behaviors. In the context of substance and opioid use disorders, such interventions are necessary to reduce harm for individuals "who, for whatever reason, may not be ready, willing, or able to pursue full abstinence as a goal." Harm reduction strategies are an essential aspect of public health initiatives. Harm reduction can include reducing the frequency of substance use, preventing diseases caused by substance use (such as HIV and Hepatitis C), providing syringe exchange, and offering medication-assisted treatments, overdose prevention, and wound care. Harm reduction strategies are necessary in light of the psychology of addiction and substance use disorder, and seek to help individuals engage in treatments to reduce, manage, and stop their substance use when appropriate.[26]

32. Safehouse will combat the opioid crisis through the use of a comprehensive harm reduction strategy.

33. Safehouse's overdose prevention services include the assessment of an individual's physical and behavioral health status, provision of sterile consumption equipment, provision of drug testing (*i.e.*, fentanyl test strips), medically supervised consumption and observation, overdose reversal, wound care and other primary care services, on-site education and counseling, on-site MAT and recovery counseling, distribution of Naloxone, and access to wraparound services such as housing, public benefits, and legal services.

34. Safehouse's overdose prevention services model provides those at highest risk of an opioid overdose with immediate access to medical care, including overdose reversal agents. Under this model, Safehouse can offer assurance, to a medical certainty, that people within its care will not die of a drug overdose.

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[26] *See* Diane E. Logan & G. Alan Marlatt, *Harm Reduction Therapy: A Practice-Friendly Review of Research,* 66 J. Clinical Psychol. 201 (2010).

35. Safehouse will not provide any illicit drugs for consumption, nor will it tolerate any sale of illicit drugs or drug sharing at its facility.

36. Safehouse's comprehensive services will encourage entry into drug treatment, reduce the burden on emergency services and first responders, prevent the transmission of infectious diseases, and create a safer community by reducing public consumption of illicit drugs and discarded needles and other consumption equipment.

37. Safehouse will save lives by preventing and averting overdose deaths. It will also save lives by preventing death and serious health complications caused by infections and disease transmitted by intravenous drug use.

38. Studies estimate that an overdose prevention site like Safehouse could reduce overdose deaths annually by 30% in the site's immediate vicinity.[27]

Threat of Prosecution

39. On November 9, 2018, the U.S. Attorney for the Eastern District of Pennsylvania, William M. McSwain, sent a letter to Safehouse declaring the DOJ's intent to pursue "appropriate legal remedies" for a purported "violation of the CSA." A true and correct copy of the November 9, 2018 letter is attached as Exhibit B to the Complaint.

40. Similarly, in a widely published op-ed, U.S. Deputy Attorney General Rod Rosenstein argued that safe injection facilities violate federal law and could result in "up to 20 years in prison."[28]

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[27] Sharon Larson et al., *Supervised Consumption Facilities – Review of the Evidence* 20 (2017), https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf ("*Supervised Consumption Facilities*").

[28] *See* Rod J. Rosenstein, *Fight Drug Abuse, Don't Subsidize It,* N.Y. Times (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html.

41. On February 5, 2019, the DOJ filed a complaint for a declaratory judgment that Safehouse's medically supervised consumption room would violate 21 U.S.C. § 856(a)(2).

42. Violation of 21 U.S.C. § 856(a)(1) or (a)(2) carries with it severe criminal and civil penalties, including fines of up to $2,000,000 and imprisonment for up to twenty years. *See* 21 U.S.C. § 856(b) and (d).

II. SAFEHOUSE'S OVERDOSE PREVENTION SERVICES ARE ENTIRELY CONSISTENT WITH FEDERAL LAW AND POLICY

43. Efforts to expand drug treatment have been at the heart of the CSA, 21 U.S.C. § 801 *et seq*. since its passage in 1970. In the bill enacting the CSA, Congress identified "increased efforts in drug abuse prevention and rehabilitation of users" as one of three important objectives of the CSA. *See* H.R. Rep. No. 91-1444, *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4567; *see also* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

44. Under the CSA, health care practitioners licensed by the U.S. Drug Enforcement Administration ("DEA") may lawfully dispense or prescribe controlled substance "in the course of professional practice." 21 U.S.C. § 802(21); 21 C.F.R. § 1306.04. The CSA does not generally "regulate the practice of medicine," except "insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood." *Gonzales v. Oregon,* 546 U.S. 243, 270 (2006). Outside of those delineated spheres, the CSA does not limit the appropriate medical response to the risk of drug overdose.

45. Federal law permits, and indeed encourages, a facility like Safehouse to provide safe and clean equipment for intravenous drug users, notwithstanding 21 U.S.C. § 863, and to provide them with medical treatment, including immediate access to Naloxone and other opioid reversal agents.

46. Safehouse's overdose prevention services model allows those at high risk of overdose death to stay within immediate reach of urgent, lifesaving medical care at the critical moment of consumption. Medical supervision and direct access to treatment can reverse an overdose with medical certainty and ensures that participants in Safehouse's care will stay alive.

47. It would be entirely inconsistent with the CSA, recent Congressional changes to federal law, and federal agency policy to find that Section 856 requires doctors, nurses, and medically trained volunteers to turn their backs on patients at their most vulnerable moment. Section 856 does not prohibit overdose prevention services, including the medical supervision of drug consumption designed to provide immediate access to lifesaving care and to encourage entry into long-term drug treatment.

A. *The CSA Does Not Regulate Medical Treatment or Overdose Prevention Measures.*

48. Although the CSA creates a comprehensive statutory and regulatory regime regarding the manufacture, distribution, and possession of controlled substances, it does not regulate medical treatment or the practice of medicine. *See Oregon*, 546 U.S. at 270 ("[T]he statute manifests no intent to regulate the practice of medicine generally.").

49. Under Subchapter I of the CSA, a medical professional licensed by the DEA is empowered to administer controlled substances in accordance with its schedules and regulations. *See id.* § 829 (setting forth registration requirements for manufacture and distribution of controlled substances). Moreover, DEA regulations implementing Subchapter I of the CSA permit the dispensing, prescribing, and administering of non-Schedule I controlled substances "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." *See* 21 C.F.R. § 1306.04.

50. Neither the CSA nor the DEA regulate medical practitioners (or others providing wraparound services, counseling, or volunteer support) who are not dispensing, prescribing, or distributing controlled substances.

51. Section 856 does not dictate the appropriate means of preventing and treating opioid overdoses.

52. Safehouse's health care professionals and other volunteers will not distribute, dispense, prescribe, or administer controlled substances as part of its medically supervised consumption service. Safehouse will not administer any illicit drugs. Safehouse's health care professionals will supervise consumption with the singular goal of assessing and reversing overdoses using Naloxone and other opioid reversal agents (which are not prohibited or regulated by the CSA), with respiratory support, and by providing other lifesaving care.

53. In addition, Safehouse will provide comprehensive overdose prevention services including medical care, provision of sterile consumption equipment, education, counseling, and wraparound services such as housing, access to public benefits, and legal services. None of those activities are addressed by the CSA.

54. The CSA does not prohibit medical practitioners from supervising and remaining proximate to individuals at risk of overdose and death with the goal of providing immediate lifesaving care.

55. Section 856 accordingly does not prohibit Safehouse from providing urgent medical treatment through its proposed overdose prevention services, including medically supervised consumption.

B. ***Federal Law Endorses and Funds Syringe Exchange Programs.***

56. Recent changes in federal law demonstrate official federal approval of certain harm reduction strategies to address the opioid crisis.

57. In 2011, amid growing evidence of the positive effect of syringe exchange programs in treating drug abuse, the U.S. Surgeon General issued a determination "that a demonstration needle exchange program . . . would be effective in reducing drug abuse and the risk of infection."[29]

58. In pertinent part, the U.S. Surgeon General recognized that syringe exchange programs promote entry into treatment and can reduce a drug user's injections. The determination relied upon a 2000 study, which concluded that:

> [N]ot only were new [syringe services program] participants five times more likely to enter drug treatment than non-[syringe exchange program] participants, former [syringe exchange program] participants were more likely to report significant reduction in injection, to stop injecting altogether, and to remain in drug treatment.[30]

59. In 2012, the CDC implemented summary guidance to prevent HIV infection, viral hepatitis, sexually transmitted diseases, and tuberculosis for drug users. This guidance recommended the implementation of integrated prevention services that would enable drug users to receive comprehensive care at the time they participate in clean syringe exchange.[31] The CDC

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[29] *Determination That a Demonstration Needle Exchange Program Would be Effective in Reducing Drug Abuse and the Risk of Acquired Immune Deficiency Syndrome Infection Among Intravenous Drug Users,* 76 Fed. Reg. 10038 (Feb. 23, 2011).

[30] *Id.* (citing Holly Hagan et al., *Reduced injection frequency and increased entry and retention in drug treatment associated with needle-exchange participation in Seattle drug injectors*, 19 J. of Substance Abuse Treatment 247–252 (2000)).

[31] *See* CDC, *Morbidity And Mortality Weekly Report: Integrated Prevention Services For Hiv Infection, Viral Hepatitis, Sexually Transmitted Diseases, And Tuberculosis For Persons Who Use Drugs Illicitly: Summary*

guidance provided that "a comprehensive service program" may include "[p]rovision of sterile needles, syringes and other drug preparation equipment (purchased with non-federal funds) and disposal services" and "[p]rovision of Naloxone to reverse opioid overdoses."[32]

60. Federal law now permits federal funding of most elements of local- and state-sponsored syringe exchange programs, notwithstanding the criminalization of interstate distribution of drug paraphernalia in 21 U.S.C. § 863. In 2016, Congress drastically relaxed a nearly thirty-year ban on the use of federal funds for state and local programs that furnish "sterile needles or syringes for the hypodermic injection of any illegal drug." *See* Appropriations Act of 2016, § 520, 129 Stat. 2652. That same year, HHS adopted the CDC's 2012 Guidance to support the implementation of new federal funding for syringe exchange programs.[33]

61. Safehouse will provide comprehensive overdose protection services that are entirely consistent with the CDC and HHS guidelines, and will provide sterile syringes, other sterile consumption equipment, syringe disposal services, Naloxone, primary care, and wraparound services. Although Safehouse is not a local or state entity seeking federal funding, it is indisputable that its comprehensive syringe exchange and Naloxone services are entirely legal under, and indeed, encouraged by federal law.

62. Yet, under the DOJ's rationale, a syringe exchange program is transformed from a legal, federally endorsed public health measure into a 20-year felony simply by allowing participants to remain within the same facility and under the supervision of its medical practitioners at the critical moment of consumption when death is most likely to occur. That is the

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Guidance From Cdc And The U.S. Department Of Health And Human Services (2012), Https://Www.Cdc.Gov/Mmwr/Preview/Mmwrhtml/Rr6105a1.Htm (last visited Apr. 3, 2019).

[32] CDC, *Program Guidance for Implementing Certain Components of Syringe Services Programs* (2016), https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-syringe-exchange-services.pdf.

[33] *See* HHS, *Implementation Guidance to Support Certain Components of Syringe Services Programs* (Mar. 29, 2016), https://www.hiv.gov/federal-response/policies-issues/syringe-services-programs.

very moment when proximity to urgent medical care may mean the difference between life and death.

63. It cannot be that compassionate and conscientious medical providers may establish a clinic, well-stocked with emergency overdose reversal medication, staff the clinic with trained medical practitioners, and provide individuals with sterile consumption equipment (all plainly permitted by federal law) only to confront a stark choice: cast those individuals away from lifesaving medical care or else suffer serious criminal liability. That is not a reasonable interpretation of federal law.

64. The DOJ's interpretation of Section 856 cannot be reconciled with the medical facts recognized by Congress, the CDC, and federal health policy—syringe exchange programs and overdose prevention services save lives, decrease disease transmission, and reduce the harms of this opioid crisis.

65. Safehouse's modest extension of already-endorsed harm reduction measures will close a short, but critical gap in care at the time of drug consumption.

66. Medical supervision for those at risk of overdose advances federal policy and does not violate federal law.

C. *The Federal Government and Pennsylvania State Law Encourage Access to Naloxone to Combat the Opioid Crisis.*

67. Safehouse's overdose prevention model is entirely consistent with federal and state laws and policies that have expanded access to Naloxone and other opioid reversal agents.

68. Opioid receptor antagonists, like Naloxone, are highly effective—if given in time and in sufficient quantity, they will reverse an otherwise fatal overdose with medical certainty.

69. Naloxone can only work if someone is close by to administer it. A person experiencing an overdose loses consciousness and therefore cannot self-administer Naloxone.

Once a person loses respiratory function, which can occur within minutes of consumption, time is of the essence in providing respiratory support and Naloxone. The more time that elapses, the greater the risk of serious injury and death.

70. Naloxone is designed to be easily administered as an intra-nasal spray. It has been widely dispensed, with the help of federal, state, and local funding. At times, however, a single dose of Naloxone is not sufficient to reverse an overdose. Multiple doses or intramuscular injections of Naloxone are sometimes required. Oxygen and respiratory support may also be beneficial, and can serve as an alternative first-line treatment. Outside of a medically supervised environment, even when help does arrive for an overdose victim, first responders, family members, and Good Samaritans sometimes lack sufficient doses of Naloxone or lack training in other respiratory support required to resuscitate that person.

71. Congress recognized the importance of Naloxone access when it enacted the Comprehensive Addiction and Recovery Act. *See* CARA § 101, 130 Stat. 697. CARA established a coordinated, public health-focused strategy to address the opioid crisis, including increased funding for education and awareness campaigns and improved access to overdose treatment.

72. CARA also amended the CSA to expand prescribing privileges for MAT, like buprenorphine and suboxone, to nurses and physicians assistants. *See id.* § 303(a)(l)(C)(v)-(iv), 130 Stat. 720-723.

73. CARA includes several measures that expand and encourage access to opioid reversal agents such as Naloxone. Title I, Section 107 of CARA empowers HHS to award grants to eligible entities providing overdose reversal treatment, including Naloxone. *See id.* § 107, 130 Stat. 703 (42 U.S.C. § 290dd-3). Section 703 of CARA requires evaluation of state Good Samaritan laws that provide civil and criminal immunity to individuals who administer Naloxone

to an individual experiencing an overdose. *See id.* § 703, 130 Stat. 741. CARA also directs that "[t]he Secretary shall maximize the availability of opioid receptor antagonists, including [N]aloxone, to veterans." *See id.* § 911, 130 Stat. 759 (38 U.S.C. § 1701).

74. Pennsylvania state law similarly recognizes the importance of Naloxone access. In light of the growing opioid crisis, in 2010, the Pennsylvania General Assembly amended its state drug law (the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780–101 *et seq.*) by enacting the Drug Overdose Response Immunity statute ("the Good Samaritan Statute"). That statute provides immunity from prosecution for persons who call authorities to seek medical care for a suspected overdose victim. *See id.* § 780–113.7. The Good Samaritan Statute also provides criminal, civil, and professional immunity to anyone who, in good faith, administers Naloxone to an individual experiencing an overdose.[34] Former Governor of Pennsylvania, Tom Corbett, stated the Good Samaritan statute "will save lives and ensure those who help someone in need aren't punished for doing so."[35]

75. On April 18, 2018, the Pennsylvania Physician General issued Standing Order DOH-002-2018, providing a statewide prescription for eligible persons to obtain Naloxone. The purpose of the Order is to "ensure that residents of the Commonwealth of Pennsylvania who are at risk of experiencing an opioid-related overdose, or who are family members, friends or other persons who are in a position to assist a person at risk of experiencing an opioid-related overdose

[34] To date, forty States and the District of Columbia have enacted some form of a Good Samaritan statute or law that provides criminal immunity when an individual experiencing an opioid-related overdose or witnesses an opioid-related overdose calls 911, administers Naloxone, or seeks medical assistance. *See* Nat'l Conf. of State Legis., *Drug Overdose Immunity and Good Samaritan Laws* (June 5, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/drug-overdose-immunity-good-samaritan-laws.aspx.

[35] *See* David Wenner, *Pa. Painkiller-Heroin Crisis: Corbett Signs Bill Intended To Save Lives*, PennLive (Sept. 30, 2014), https://www.pennlive.com/midstate/2014/09/corbett_heroin_good_samaritan.html.

. . . , are able to obtain Naloxone."[36] The Pennsylvania Physician General has continued to renew this Standing Order, consistent with Pennsylvania Governor Tom Wolf's Proclamation and as the opioid crisis continues in Pennsylvania.

76. Safehouse's medically supervised consumption spaces will be staffed at all times by medically trained practitioners supplied with sufficient doses of Naloxone and able to provide other forms of respiratory support. This model permits proximity and access to Naloxone during and immediately after the time of use—which is the moment when Naloxone is most needed.

77. The Safehouse model is entirely consistent with CARA, federal policy, and Pennsylvania state law, all of which include strong measures to increase Naloxone access.

III. SECTION 856 DOES NOT PROHIBIT SAFEHOUSE'S PROPOSED OVERDOSE PREVENTION MODEL

78. Despite the federal endorsement of a public health-focused strategy to combat the opioid crisis, the DOJ seeks to prohibit Safehouse's overdose prevention services model under 21 U.S.C. § 856. The history, purpose, and text of Section 856 confirm that it has no application to Safehouse's proposed medical and public health response to the opioid crisis.

A. *Section 856 Was Enacted to Target Crack Houses and Rave Parties, Not Legitimate Medical Interventions to Prevent Drug Overdoses.*

79. The DOJ's proposed application of Section 856 to Safehouse's overdose prevention services model would be an unprecedented expansion of that discrete statutory provision.

80. Congress enacted Section 856 to target drug dealers and party promoters who established locations for manufacture, distribution, and use of illicit drugs to facilitate their for-profit enterprises.

[36] Pa. Dep't of Health, Standing Order DOH-002-2016: Naloxone Prescription for Overdose Protection, https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Documents/SN%20-%20Naloxone%20Prescription%20for%20Overdose%20Prevention%20(Standing%20Order%20DOH-002-2016).pdf.

81. The federal government has never sought to use Section 856 to prosecute or enjoin any public health measure or legitimate medical activity remotely analogous to Safehouse's proposed overdose prevention model.

82. In 1986, Congress enacted Section 856 as part of the Anti-Drug Abuse Act of 1986 ("1986 Act"), Pub. L. No. 99-570, 100 Stat. 3207. The 1986 Act established a comprehensive scheme that not only expanded federal drug enforcement and interdiction measures, but also sought "to provide strong Federal leadership in establishing effective drug abuse prevention and education programs," and "to expand Federal support for drug abuse treatment and rehabilitation effort[t]s." 132 Cong. Rec. S26473 (daily ed. Sept. 26, 1986).

83. The passage of Section 856 was intended to authorize federal prosecution of "crack houses" and similar premises. The Senate Report stated that Congress's purpose in enacting Section 856 was to "[o]utlaw[] operation of houses or buildings, so-called 'crack houses', where 'crack' cocaine and other drugs are manufactured and used." *See* 132 Cong. Rec. at S26474. In legislative debate on the 1986 Act, sponsoring Senator Lawton Chiles noted that this provision would address law enforcement's difficulties in arresting "crack house" operators: "When police raid these crack houses, the dealers and users can easily dispose of the drugs, thus avoiding arrest. This bill makes it a felony to operate such a house, to be present at the house." *See* 132 Cong. Rec. at S26447 (statement of Sen. Chiles).

84. Likewise, in 2003, Congress amended Section 856 to add subsection (a)(2), "after holding a series of hearings regarding the dangers of Ecstasy [*i.e.*, MDMA, a synthetic drug with combined stimulant and hallucinogenic effects] and the rampant drug promotion associated with some raves." 149 Cong. Rec. S10606 (daily ed. July 31, 2003) (statement of Sen. Biden); Illicit Drug Anti-Proliferation Act of 2003 ("2003 Amendment"), Pub. L. No. 108-21, 117 Stat. 691.

("Rave," in this context, refers to commercial dance parties, popular in the 1990s, featuring electronic "club" music and often involving widespread drug use, in particular MDMA.) Senator Biden, who sponsored the 2003 Amendment, noted that the new provision clarified that Section 856 prohibited not only the operation of premises with ongoing drug distribution activities, but also "'single-event' activities, including an event where the promoter has as his primary purpose the sale of Ecstasy or other illegal drugs." *Id.* Thus, Senator Biden stated that it was appropriate under the amendment "to prosecute rogue rave promoters who profit off of putting kids at risk," by "knowingly and intentionally hold[ing] an event for the purpose of drug use, distribution or manufacturing." *See id.*

85. Plainly, Safehouse's lifesaving medical and public health mission is far from the concerns that led Congress to originally enact Section 856 or the 2003 amendment. Nothing in Section 856's legislative history suggests Congress ever contemplated that Section 856 would be used to prosecute medical professionals, public health workers, and volunteers who seek to prevent opioid overdoses, reduce disease transmission, encourage drug treatment, and provide urgent lifesaving care, as Safehouse now proposes to do.

B. *Section 856 Does Not Apply Where Conduct Is "Authorized by this Subchapter," Which Permits Legitimate Medical Practice.*

86. Section 856 expressly exempts conduct "authorized by [Subchapter I]" from its criminal and civil penalties. Section 856 does not regulate the practice of medicine nor does it dictate the appropriate means of preventing and treating opioid overdoses. Neither the CSA nor the DEA regulate medical practitioners (or others providing wraparound services, counseling, or volunteer support) who are not dispensing, prescribing, or distributing controlled substances.

87. In any event, DEA regulations implementing Subchapter I of the CSA expressly permit the dispensing, prescribing, and administering of non-Schedule I controlled substances "for

a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." *See* 21 C.F.R. § 1306.04.

88. Safehouse's overdose prevention services are a legitimate medical and public health measure that have been recognized and endorsed by prominent national and international medical and public health associations including American Medical Association, the American Public Health Association, AIDS United, the European Monitoring Center for Drugs and Drug Addiction, the Infectious Diseases Society of America, the HIV Medical Association, the International Drug Policy Consortium, and innumerable public health experts, physicians, and addiction researchers.

89. Safehouse's overdose prevention model is also a measure that has been endorsed and encouraged by Philadelphia's Public Health Commissioner and its Commissioner of the Department of Behavioral Health and Intellectual disAbility Services, who have announced that overdose prevention, including supervised consumption, is a critical medical and public health intervention.

90. Safehouse's overdose prevention services are legitimate medical services that fall under Section 856's express exemption.

C. *Section 856 Does Not Apply to Safehouse Because It Will Not Operate "For The Purpose Of" Illegal Drug Use.*

91. The CSA, 21 U.S.C. § 856(a) states:

> Except as authorized by this subchapter, it shall be unlawful to—
>
> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, ***for the purpose of*** manufacturing, distributing, or using any controlled substance;
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

Id. (emphasis added).

92. Safehouse's singular purpose is to provide lifesaving medical treatment, primary care, and wraparound services to a vulnerable population at high risk of overdose death and complications from opioid use disorder.

93. Safehouse will not provide these services "for the purpose" of unlawful drug use within the meaning of Section 856—they are for the purpose of providing immediate, proximate access to lifesaving medical care to those at high risk of overdose death.

94. Safehouse's legitimate and urgent medical and public health mission and purpose removes its proposed activities from Section 856's scope.

D. ***The CSA Does Not Define "Unlawful . . . Use" of Controlled Substances.***

95. Section 856(a)(2) prohibits management or control of a place for the purpose of "***unlawfully*** manufacturing, storing, distributing, or ***using a controlled substance***." 21 U.S.C. § 856(a)(2) (emphases added). Although the CSA elsewhere expressly defines and prohibits the unauthorized manufacture, storage, or distribution of controlled substances (*see generally id.* §§ 802 (definitions), 841(a) (prohibition of manufacture, possession and distribution)), nowhere does it define or proscribe "unlawful[] . . . us[e]." It is unclear from either Section 856 or the CSA as a whole what "unlawful[] . . . us[e]" means.

96. Safehouse will not manufacture, store, or distribute any controlled substances. The only possible portion of Section 856(a)(2) that could apply is the prohibition against providing a place for "unlawful[] . . . us[e]"—an undefined term that does not plainly encompass Safehouse's

medically supervised consumption services model, which allows drug use in its facility only for the purpose of enabling access to a critical medical intervention.

E. ***The Rule of Lenity Forecloses the DOJ's Expansive Interpretation of Section 856.***

97. The DOJ's unprecedented interpretation of Section 856 cannot be reconciled with several canons of construction, including the rule of lenity and the clear statement canon.

98. If the Court is left with "any doubt about the meaning of" Section 856 it should invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"—*i.e.*, in favor of a criminal defendant. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (citation omitted); *see United States v. Flemming*, 617 F.3d 252 (3d Cir. 2010).

99. The rule of lenity favors adopting Safehouse's interpretation of a criminal statute where both interpretations of the government and the defendant are "plausible." *Flemming*, 617 F.3d at 270. Similarly, when a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952); *Yates*, 135 S. Ct. at 1089.

100. The phrases "except as authorized by," "for the purpose of," and "unlawful[]. . . us[e]" in Section 856 are ill-defined and cast substantial doubt on the statute's application to Safehouse's proposed overdose prevention services.

101. That doubt is only magnified when Section 856 is examined in the context of the CSA as a whole. Because a court's "duty . . . is 'to construe statutes, not isolated provisions,'" the Supreme Court instructs that "when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citations omitted). The Supreme Court thus observed that

"oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *Id.* (citation omitted).

102. Here, the words of Section 856 must be read in the context of the CSA as a whole, its purpose, and its history, which evince no intent to criminalize Safehouse's medical and public health intervention to prevent overdose deaths, much less do so unambiguously.

103. Section 856 must also be interpreted in harmony with other federal statutes, including CARA and the Appropriations Act of 2016, which endorse and provide federal funding to a continuum of overdose prevention and harm reduction services. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret [a] statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.' Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." (citations omitted)).

104. The DOJ's incongruous interpretation of Section 856 would criminalize the provision of medical care in the short gap between otherwise legal and federally endorsed syringe exchange services and overdose reversal administration. That result would be entirely inconsistent with the federal scheme established by the CSA, CARA, and HHS and CDC federal guidance and policy.

105. The rule of lenity therefore strongly counsels in favor of Safehouse's proposed interpretation of Section 856.

IV. APPLICATION OF SECTION 856 TO REGULATE LOCAL, NON-COMMERCIAL CONDUCT WOULD EXCEED THE AUTHORITY GRANTED BY THE COMMERCE CLAUSE AND UNCONSTITUTIONALLY UPSET THE BALANCE BETWEEN FEDERAL AND STATE AUTHORITY.

106. The DOJ's proposed interpretation of Section 856, as applied to Safehouse, exceeds the bounds of Congress's constitutional authority to regulate interstate commerce.

107. Congress lacks a general police power. *See United States v. Morrison*, 529 U.S. 598, 618–19 (2000); *Jones v. United States*, 529 U.S. 848, 850 (2000). Such power is granted only to the States. While "[t]he States have broad authority to enact legislation for the public good" through their "police power," the "Federal Government, by contrast, has no such authority." *Bond v. United States*, 572 U.S. 844, 854 (2014).

108. "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *Bond*, 572 U.S. at 853–54.

109. In light of those limits on federal authority, the Supreme Court found that the CSA "manifests no intent to regulate the practice of medicine generally," and observed, "[t]he silence is understandable given the structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Oregon*, 546 U.S. at 269–70 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

110. Through this action, however, the DOJ interprets Section 856 in a way that would create a general police power for Congress.

111. Safehouse's proposed conduct has no substantial effect on interstate commerce. It is not activity that is economic in nature.

112. Safehouse is a non-profit corporation. Its operation will charge no fees, and will produce no revenue. Safehouse's facility will be entirely local and will not be engaged in facilitating commerce of any kind. Safehouse will not charge participants for its harm reduction and overdose prevention services; will not manufacture, sell, or administer unlawful drugs; will not permit the distribution or sale of drugs on site; will not provide any of its services across state lines; will not permit the exchange of any currency; will not allow participants to share consumption equipment or help another person consume drugs; and will not allow staff to handle illegal drugs or help participants consume drugs. No link therefore exists between Safehouse's proposed conduct and interstate commerce.

113. The operation of Safehouse's overdose prevention services will have no adverse impact on the legitimate CSA goal of suppressing the interstate market for illegal drugs. In fact, studies show that medically supervised consumption sites actually reduce drug use.

114. Section 856 lacks a jurisdictional element to ensure that the reach of the law has an explicit connection with or effect on interstate commerce.

115. Congress has never found that any conduct remotely similar to Safehouse's proposed model affects interstate commerce. In particular, while Congress found in 21 U.S.C. § 801(2) that "illegal importation, manufacture, distribution, and possession *and improper use* of controlled substances have a substantial and detrimental effect on *the health and general welfare* of the American people," its finding in Section 801(3) with respect to the effect on interstate commerce of local drug activities extends only to "manufacture, local distribution, and possession," *not* "use." *See id.* § 801(3) (emphases added). Similarly, the findings in Sections 801(4), (5) and (6) concerning the interstate impact of local drug activities conspicuously omit

"use" from the listed activities. The application of Section 856 to entirely local and noncommercial "use" is therefore of doubtful constitutionality.

116. States and localities, under our constitutional regime, are laboratories of experimentation that may develop new and innovative solutions to pressing issues of public health and policy. Safehouse attempts to employ such a solution to a pressing local health crisis.

117. Local officials, including the Philadelphia's Mayor, Public Health Commissioner, Director of the Department of Behavioral Health, and District Attorney, support Safehouse's efforts to mitigate the opioid crisis.

118. Similar overdose prevention efforts have proven to be effective in other countries and by clinically sound data.

119. Serious federalism concerns are raised by the DOJ's extension of federal law to interfere with traditionally local activities and to exercise powers traditionally reserved to the State, such as the regulation of volunteer medical treatment.

120. This Court should avoid an interpretation of Section 856 that implicates these serious constitutional concerns. "[S]o long as the statute is found to be susceptible of more than one construction"—one of which "raises a serious doubt as to its constitutionality"—the constitutional avoidance canon applies. *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 223 (3d Cir. 2018) (citation and internal quotation marks omitted). But the DOJ seeks to disrupt the traditional balance of federal and state authority over public health initiatives, without any clear indication that Congress intended to thwart the traditional rights of States and localities.

121. To preserve these principles of federalism, "it is incumbent upon the federal courts to be *certain* of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 858 (citation and internal quotation marks

omitted). No such certainty exists with respect to Section 856, however, because the CSA "manifests no intent to regulate the practice of medicine generally." *Oregon*, 546 U.S. at 270.

122. Because the government's proposed interpretation of Section 856 would significantly disrupt the traditional balance of state and federal authority in the realm of public health, this Court should reject the government's unprecedented interpretation of Section 856. *See Jones*, 529 U.S. at 858 (explaining that, where Congress enacts criminal law that touches on areas traditionally falling within the authority of the States, courts will assume—"unless Congress conveys its purpose clearly"—that Congress "will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." (citation and internal quotation marks omitted)).

123. This Court could avoid these constitutional concerns about federalism and the scope of Congress's power to regulate commerce by rejecting the DOJ's interpretation of Section 856 and declaring that Section 856 does not prohibit Safehouse's provision of urgent, lifesaving medical treatment.

V. SAFEHOUSE'S LIFESAVING MISSION IS AN EXERCISE OF ITS FOUNDERS' AND DIRECTORS' RELIGIOUS BELIEFS

124. Safehouse's board members are adherents of religions in the Judeo-Christian tradition. For example:

i. Frank A. James III is a Christian and President of Missio Seminary (formerly known as Biblical Theological Seminary).

ii. Chip Mitchell is an adherent of and Lead Evangelist at the Greater Philadelphia Church of Christ.

iii. Board President José Benitez was raised and educated as a Roman Catholic; his entire professional life, including as Director of Prevention Point, has been an exercise in living out that faith and those teachings.

iv. Board Vice President Ronda Goldfein was raised with strong Jewish values and still worships in the small South Jersey synagogue cofounded by her grandfather; her entire professional life, including as Executive Director of the AIDS Law Project of Pennsylvania, has been an exercise in living out that faith and those teachings.

125. The board members' religious beliefs have been ingrained in them by their religious schooling, their devout families, and their practices of worship.

126. At the core of all board members' faith is the principle that the preservation of human life is paramount and overrides any other considerations.

127. This principle is rooted in scripture, and appears throughout the Old and New Testaments. For example:

i. According to the Shulchan Aruch, the Code of Jewish Law, "the Torah has granted the physician permission to heal, and it is a religious duty which comes under the rule of saving an endangered life. If he withholds treatment, he is regarded as one who sheds blood." Shulchan Aruch, Yoreh De'ah 336:1.

ii. The Book of Leviticus contains the clear commandment: "You shall not go up and down as a talebearer among your people; neither shall you stand idly by the blood of your neighbor: I am the Lord." Leviticus 19:16.

iii. In Deuteronomy, Moses conveys God's commandment: "You shall open wide your hand to your brother, to the needy and to the poor, in your land." Deuteronomy 15:11.

iv. The Talmud teaches: "It was for this reason that man was first created as one person [Adam], to teach you that anyone who destroys a life is considered by Scripture to have destroyed an entire world; and anyone who saves a life is as if he saved an entire world." Mishnah Sanhedrin 4:5

v. In the Gospel of John, Jesus refused to condemn to death a woman who had sinned, and cautioned fellow believers, "[l]et any one of you who is without sin be the first to cast a stone." John 8:7-11.

vi. The Gospel of John also counsels Christians: "The way we came to know love was that [Jesus] laid down his life for us; so we ought to lay down our lives for our brothers. If someone who has worldly means sees a brother in need and refuses him compassion, how can the love of God remain in him? Children, let us love not in word or speech but in deed and truth." 1 John 3:16-18.

vii. Matthew 25:34-40 directs believers to take in and care for the sick: "Then the king will say to those on his right, 'Come, you who are blessed by my Father. Inherit the kingdom prepared for you from the foundation of the world. For I was . . . ill and you cared for me. . . . Amen, I say to you, whatever you did for one of the least brothers of mine, you did for me.'"

viii. And in his Epistle to the Galatians, Paul the Apostle instructs Christians to "[b]ear one another's burdens, and so fulfill the law of Christ." Galatians 6:2.

128. The board members' religious beliefs obligate them to take action to save lives in the current overdose crisis, and thus to establish and run Safehouse in accordance with these tenets. Specifically, the board members believe that the provision of overdose prevention services

effectuates their religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick.

129. The DOJ's threats and the initiation of a lawsuit against Safehouse burdens Safehouse by forcing it to choose between the exercise of its founders' and directors' religious beliefs and conformity with the DOJ's interpretation of Section 856.

130. The DOJ's interest in enforcement of Section 856 against Safehouse furthers no legitimate, much less a compelling interest, and the DOJ will be unable to meet its burden under RFRA to prove that it does.

131. To the contrary, enforcement of Section 856 against Safehouse will result in preventable deaths.

132. The government will also not be able to meet its burden of proving that preventing Safehouse from opening is the least restrictive means of fostering any compelling interest it may invoke.

133. Declaring Safehouse to be illegal will not reduce the manufacture, distribution, or possession of illegal drugs. Rather, when Safehouse does open, the demand for illegal drugs will decrease because some of its beneficiaries will seek and be provided with drug treatment.

CAUSES OF ACTION

COUNT I
Declaratory Judgment Regarding the Application of Section 856 to Safehouse

134. Safehouse repeats and re-alleges Paragraphs 1 through 133 as if fully set forth herein.

135. The CSA provides, in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful to—

> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, ***for the purpose of*** manufacturing, distributing, or ***using*** any controlled substance;
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

21 U.S.C. § 856(a) (emphases added).

136. Safehouse will not make its premises available "for the purpose of unlawfully . . . using a controlled substance."

137. Safehouse will operate only for the purpose of providing lifesaving medical treatment and critical wraparound services to a vulnerable population at risk of overdose death and complications from substance use disorder.

138. Safehouse will furnish legitimate and urgent medical services, which are not prohibited under 21 U.S.C. § 856.

139. Accordingly, pursuant to 28 U.S.C. § 2201, Safehouse is entitled to a declaration that it will not violate 21 U.S.C. § 856(a) by operating in accordance with its overdose prevention services model.

140. Safehouse is also entitled to a permanent injunction preventing the U.S. Attorney General from enforcing 21 U.S.C. § 856 against Safehouse.

COUNT II

Violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

141. Safehouse repeats and re-alleges Paragraphs 1 through 140 as if fully set forth herein.

142. Allowing individuals at risk of an overdose to remain under medical supervision and in close proximity to urgent medical care is an exercise of the religious belief of Safehouse

and its board members that the preservation of human life is paramount and overrides other considerations. In the exercise of their religion, Safehouse and its principals intend to open and operate Safehouse as described above in this Counterclaim, as they are called to do.

143. The DOJ's interpretation of 21 U.S.C. § 856, and in particular its present effort to enforce that interpretation, substantially burdens Safehouse's exercise of its religious commitments.

144. The DOJ's threat to prosecute Safehouse substantially burdens Safehouse's exercise of its religion.

145. The DOJ's ongoing litigation against Safehouse substantially burdens Safehouse's exercise of its religion.

146. Counterclaim Defendant and Third-Party Defendants will not be able to carry its burden of proof to show that their attempts to prevent Safehouse's religious exercise are in furtherance of a compelling governmental interest.

147. Counterclaim Defendant and Third-Party Defendants will not be able to carry their burden of proof to show that these attempts are the least restrictive means of furthering any compelling governmental interest.

148. The DOJ's actions violate Safehouse's right to free religious exercise guaranteed by RFRA, 42 U.S.C. § 2000bb *et seq*.

149. Without injunctive and declaratory relief against the government, Safehouse has been and will continue to be harmed.

PRAYER FOR RELIEF

Safehouse respectfully requests that this Court enter judgment in its favor and grant the following relief:

i. A declaration that Safehouse's establishment and proposed operation of its overdose prevention services model will not violate 21 U.S.C. § 856;

ii. A declaration that a prohibition or penalizing of Safehouse's establishment and proposed operation of its overdose prevention services model will violate 42 U.S.C. § 2000bb;

iii. A declaration that 21 U.S.C. § 856, as applied to Safehouse, violates the Commerce Clause of Article I of the U.S. Constitution;

iv. An injunction permanently enjoining the Third-Party Defendants from enforcing or threatening to enforce 21 U.S.C. § 856 against Safehouse;

v. An order awarding such additional relief as the Court may deem appropriate and just under the circumstances.

Dated: April 3, 2019

Respectfully submitted,

DLA PIPER LLP (US)

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2019, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system.

Notice will be sent to all CM/ECF registrants in this action via the CM/ECF system. Pursuant to Federal Rule of Civil Procedure 4(i), a copy of the foregoing was also sent via USPS certified mail to:

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/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

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

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	Civil Action No. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation;	:	
JOSE BENITEZ, as President and Treasurer of Safehouse;	:	
Defendants.	:	

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

While our country is in the midst of an opioid epidemic, this is not the first time we have faced a drug crisis. From crack cocaine, to methamphetamine, to heroin and fentanyl, our country has faced the challenge and tragedy of drug addiction for many years. Congress and the President have sought to address the challenges of drug addiction, abuse, and diversion with the Controlled Substances Act ("CSA"), enacted in 1970.

The CSA established a comprehensive and carefully balanced regulatory scheme that has been updated and revised over time, but remains in full force and effect. Among other things, the CSA created a tiered structure of controlled substances based on their risk of abuse and medical purpose; controlled the flow of these substances from their manufacture through the distribution chain; established important record-keeping requirements; determined which substances were illegal without an administrative application and waiver; and established a comprehensive scheme for the treatment of those afflicted with substance use disorder through narcotic treatment programs.

The legislation's calculated scheme includes the prohibition of certain conduct involving controlled substances. Most relevant to the suit at hand, the CSA provides that it is wholly unlawful to manage or control any place, regardless of compensation, for the purpose of unlawfully using a controlled substance. Defendant Safehouse seeks to disregard the law and override Congress' carefully balanced regulatory scheme by establishing, managing, and controlling sites in Philadelphia that will allow individuals to engage in the illicit use of controlled substances, namely, heroin and fentanyl.

For purposes of this action, it does not matter that Safehouse claims good intentions in fighting the opioid epidemic. What matters is that Congress has already determined that Safehouse's conduct is prohibited by federal law, without any relevant exception. To prevent Safehouse from violating federal law, the United States asks the Court to declare illegal the Defendants' proposed establishment and operation of a place for the unlawful use of controlled substances.

Plaintiff, the United States of America, by and through its attorneys, alleges as follows:

1. This is a civil action seeking declaratory judgment under the Declaratory Judgment Act, as amended, 28 U.S.C. § 2201, and under the Controlled Substances Act, as amended, 21 U.S.C. §§ 801 *et seq.*, and its implementing regulations, 21 C.F.R. §§ 1301 *et seq.*

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 21 U.S.C. §§ 856(e), 843(f), and 28 U.S.C. §§ 1331, 1345.

3. Venue is proper in the Eastern District of Pennsylvania pursuant to 21 U.S.C. § 843(f)(2) and 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff is the United States of America.

5. Defendant Safehouse, a privately held Pennsylvania nonprofit corporation, was formed in or around August of 2018. Safehouse's mailing address is 1211 Chestnut Street, Suite 600, in Philadelphia, Pennsylvania, 19107.

6. Safehouse seeks to establish and operate one or more sites in Philadelphia where, among other things, intravenous drug users will be permitted to use illegal controlled substances (primarily, heroin and fentanyl) in "consumption rooms" under medical supervision (hereinafter, "Consumption Room(s)").

7. Defendant Jose Benitez is Safehouse's President and Treasurer. He also serves as the Executive Director of Prevention Point Philadelphia, which operates on Kensington Avenue in Philadelphia.

FACTUAL ALLEGATIONS

8. Existing nonprofit community organizations, such as Prevention Point Philadelphia, provide a wide range of medical and non-medical services intended to reduce the harms of the opioid crisis in Philadelphia. These services include, but are not limited to, access to addiction treatment, wound care, clean needle exchange, social services, testing, free distribution of the opioid overdose reversal medication Naloxone (Narcan), and training on how to administer Naloxone.

9. Safehouse states on its website that its mission is "sav[ing] lives by providing a range of overdose prevention services" in Philadelphia, including "[m]edically supervised safe consumption and post-consumption observation." (*See* Safehouse FAQ, attached hereto as Exhibit A).

10. Safehouse further states on its website that drug users – called "participants" – who seek supervised consumption will be directed to a Consumption Room where they will be provided with syringes and related paraphernalia by Safehouse staff, who will observe them while they prepare and inject illegal narcotics within the Safehouse Consumption Room. (*Id.*).

11. "From the consumption area, participants will be directed to" what Safehouse calls an "observation room," where they will be "offered on-site initiation of Medication Assisted Treatment (MAT), wound care, and referrals to primary care, social services, and housing opportunities." (*Id.*). Safehouse states that it will "provide overdose reversal and other emergency care" and "advise on sterile injection technique," but its staff will not "administer any narcotic or opioid," nor will they make any such drug available "other than those that are FDA-approved for treating opioid addiction[.]" (*Id.*).

12. Heroin and fentanyl are controlled substances. 21 U.S.C. § 812; 21 C.F.R. §§ 1308.11, 1308.12. Heroin is a Schedule I substance, and fentanyl is a Schedule II substance. 21 U.S.C. § 812(c) ("Schedule I" at (b)(10)); "Schedule II" at (b)(6)).

13. Knowing or intentional possession of Schedule I or II substances such as heroin or fentanyl, without satisfying certain exceptions that do not apply to Safehouse participants, violates federal law. 21 U.S.C. § 844(a).

14. The Controlled Substances Act, 21 U.S.C. §§ 801-971, provides, in pertinent part, that:

> it shall be unlawful to . . . manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

21 U.S.C. § 856(a), (a)(2).

15. Section 856(a)(2) applies to any person who "manage[s] or control[s] any place" that they "knowingly and intentionally . . . make available for use, with or without compensation . . . for the purpose of unlawfully . . . using a controlled substance." Defendants' operation of Consumption Rooms would do exactly that.

16. Therefore, Defendants will violate section 856(a)(2) of Title 21 if they open a Consumption Room.

17. Defendants have publically stated their position that the operation of such a Consumption Room would not violate federal law and that they intend to open one or more Consumption Rooms notwithstanding section 856 of Title 21 of the United States Code. (*See* Exhibit A).

18. By a letter to Safehouse's President and Vice President dated November 9, 2018, the United States Attorney for the Eastern District of Pennsylvania, William M. McSwain, advised Safehouse that its planned operation of one or more Consumption Rooms would clearly violate federal law. (*See* Nov. 9, 2018, letter, attached hereto as Exhibit B). The government requested assurance that Safehouse would comply with federal law, and advised that the government would pursue appropriate legal remedies should Safehouse fail to ensure its compliance. *Id.*

19. By letter dated November 26, 2018, Safehouse's President and Vice President advised the government that Safehouse would not comply, asserting, "[w]e respectfully disagree with the conclusion that Safehouse's proposed consumption room would violate federal law." (*See* Nov. 26, 2018, letter, attached hereto as Exhibit C, at 1).

20. On or about December 24, 2018, Safehouse announced that it had retained DLA Piper to represent it in potential litigation against the United States regarding Safehouse's legality.

21. Upon information and belief, Defendants will imminently open one or more Consumption Rooms in Philadelphia. Defendants' initial plan was to be operational by January 2019.[1] Even after the United States initiated this lawsuit, Defendants have continued to take steps toward opening a site.

COUNT I

Violation of the Controlled Substances Act, 21 U.S.C. § 856(a)(2) – Declaratory Judgment

22. The United States repeats and re-alleges Paragraphs 1 through 21 as if fully set forth herein.

23. Pursuant to 21 U.S.C. § 856(a) and (a)(2), "it shall be unlawful to . . . manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance."

24. Defendants intend to manage and control one or more Consumption Rooms in Philadelphia and they will knowingly and intentionally provide a place for drug users to use controlled substances unlawfully, such as heroin and fentanyl.

25. Accordingly, Defendants imminently will violate 21 U.S.C. § 856(a)(2).

[1] Colleen Slevin, *Denver is latest city pushing for 1st US drug injection site* (Nov. 28, 2018), https://www.apnews.com/86a3aca99f72489082fcfa7ff0ab3a83 ("A private nonprofit is raising money for a supervised injection site in Philadelphia but has pushed back its potential opening date from January to mid-March, the group Safehouse said.").

26. Pursuant to 21 U.S.C. § 856(e), "[a]ny person who violates subsection (a) of this section shall be subject to declaratory and injunctive remedies as set forth in section 843(f) of this title."

27. Section 843(f), provides, in turn, that "the Attorney General is authorized to commence a civil action for appropriate declaratory or injunctive relief relating to . . . [section] 856 of this title." 21 U.S.C. § 843(f)(1).

28. Under 28 U.S.C. § 2201(a), "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

29. Declaratory relief is especially appropriate where illegal conduct is imminent.

30. The United States is accordingly entitled to appropriate declaratory relief through this civil action pursuant to 21 U.S.C. § 843(f) and 28 U.S.C. § 2201, stating that Defendants' establishment and operation of any Consumption Rooms will violate section 856 of Title 21 of the United States Code.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that judgment be entered in its favor and against Defendants declaring that Defendants' establishment and operation of any Consumption Room, or similar sites made available for the unlawful use of controlled substances, will violate 21 U.S.C. § 856(a)(2).

Dated: May 24, 2019

Respectfully submitted,

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EXHIBIT A

FREQUENTLY ASKED QUESTIONS

- **GENERAL**
  - **What is Safehouse?**

    Safehouse 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.

    The leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in us from our religious schooling, our devout families and our practices of worship. At the core of our faith is the principle that preservation of human life overrides any other considerations.

    Safehouse is one element of a much-needed comprehensive plan to address a public health crisis. The organization seeks to open the first safe injection site in the U.S. providing a range of overdose preventions services, including safe consumption and observation rooms staffed by a medical staff prepared to administer overdose reversal if needed. Additional services would include on-site initiation of Medically Assisted Treatment (MAT), recovery counseling, education about substance use treatment, basic medical services, and referrals to support services such as

housing, public benefits, and legal services.

Safehouse is working with community partners to find suitable locations to deliver this unified range of services.

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- **Where will Safehouse be located?**

  Safehouse locations will be determined by community and city input, as well as data that show the areas where the greatest need exists. Safehouse considers it a priority to be a good neighbor, so locations will be selected in consultation with local leaders, businesses and residents.

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- **Who will deliver services at Safehouse?**

  Medically trained professionals, certified peer specialists, recovery specialists, social workers, and case managers specializing in overdose prevention and harm reduction will provide Safehouse services.

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- **When will Safehouse begin operating in Philadelphia?**

  Safehouse remains committed to opening as soon as possible, but is awaiting the resolution of a civil lawsuit the U.S. Attorney for the Eastern District of Pennsylvania filed against it. Safehouse has

asked the Court to declare its planned operations legal.

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- **Why do we need overdose prevention services in Philadelphia?**

Philadelphia is experiencing an overdose crisis of unprecedented proportion. In 2015, the city's rate of 46.8 drug overdose deaths per 100,000 residents dramatically outpaced those of Chicago (11.8) and New York (13.7).[4], [5] In 2017, the 1,217 overdose deaths in Philadelphia [6] represented a 34 percent increase from 907 in 2016.[7] In 2018, fatalities slightly decreased to 1,116 overdose deaths. Since 2009, overdose deaths in the city have risen by nearly 200 percent.[8] Philadelphia has not had a public health crisis of this magnitude in more than 100 years.[9] Across all racial and ethnic groups, more people have died from drug overdose than from homicide.[10],[11]

This crisis led the Mayor's Task Force to Combat the Opioid Epidemic in Philadelphia to recommend that the city further explore implementing overdose prevention services and expand treatment access and capacity. Overdose prevention services have a long record of success in reducing harms of injecting heroin and other opioids.[12]

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- **Will Safehouse provide illegal drugs to participants?**

  Under no circumstances will Safehouse make available any narcotic or opioid, other than those that are FDA-approved for treating opioid addiction.

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- **Will Safehouse encourage people to use drugs?**

  We are not aware of any credible evidence that suggests supervised consumption sites encourage increased drug use or initiate new users.

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- **How will Safehouse help participants to learn more about treatment for substance use?**

  Participants will be presented with rehabilitation options at multiple points during their Safehouse visit, beginning with when they arrive and go through a registration process. A physical and behavioral health assessment will be conducted, and a range of overdose prevention services offered.

  From the consumption area, participants will be directed to the medically supervised observation room and offered on-site initiation of Medication Assisted Treatment (MAT), wound care, and referrals to primary care, social services, and housing opportunities. Upon arrival, participants may choose to go directly

to the observation room to access MAT and other services.

Certified peer specialists, recovery specialists, social workers, and case managers will encourage treatment readiness and facilitate access to medical and social services. As participants leave, additional data will be collected, treatment, medical and social services will be offered again, and naloxone will be distributed.

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- **How will Safehouse prevent fatal overdoses?**

  Medical personnel will always be on duty to observe and assess participants in both the consumption room and the post-consumption observation room. Medical personnel will immediately intervene in the event of an overdose, administering oxygen and/or naloxone. No overdose deaths have been reported at any of the more than 120 supervised consumption sites worldwide.[17],[18]

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- **Which drugs will Safehouse provide supervised injection oversight?**

  Safehouse staff will not monitor the type of consumption by participants. Safehouse personnel will be available to advise on sterile injection technique in order to reduce the risks of skin infections but will not place needles or administer any narcotic or opioid, nor encourage the use of any drug. No consumption by

smoking will be allowed unless appropriate ventilation is available.

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- **SAFE INJECTION SITES AND HARM REDUCTION**
  - **What is harm reduction?**

    Harm reduction in substance use treatment is aimed at decreasing the negative consequences of substance use, and it includes elements of safer use, managed use, and medication-supported treatment plans. Harm reduction is designed to address the circumstances of the addiction in addition to the addiction itself, striving to minimize the harmful effects of addiction while recognizing that drug addiction cannot be completely eliminated. Current leading scholarship establishes that a demonstrably effective approach to combating substance use disorder is to encourage treatment while providing harm reduction.[3]

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  - **Do safe injection sites exist elsewhere?**

    Yes. The first government-authorized supervised consumption room opened more than 30 years ago in Switzerland. Today, more than 120 supervised consumption sites are operating in Europe, Australia, and Canada. The availability of overdose prevention services is increasing as research confirms the effectiveness and the advantages to the broader community. Currently, no such program exists in the United States.

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- **What are the benefits of overdose prevention services?**

  Overdose prevention services are part of a multifaceted public health approach to combating the opioid crisis. Extensive research has demonstrated the benefits of overdose prevention services for people who use drugs and the communities where drug use occurs.[13],[14],[15],[16]

  Overdose prevention services:

  - SAVE LIVES by reducing the number of fatal drug overdoses through education on safer use practices, overdose prevention, and intervention.
  - REDUCE THE SPREAD OF INFECTIOUS DISEASES such as HIV and hepatitis C among people who use drugs by providing sterile consumption supplies.
  - CONNECT PEOPLE who use drugs with other health, treatment, and social services.
  - CREATE A SAFER COMMUNITY by reducing drug use in public spaces and publicly discarded paraphernalia.

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- **Is there a financial benefit to the community?**

  Overdose prevention services will reduce fatal opioid overdoses. As Safehouse will provide immediate reversal in the event of

overdoses, the strain on emergency medical services and health systems will be decreased. By reducing ambulance rides, emergency room trips, and hospital visits, overdose prevention services are expected to save Philadelphia at least $2 million a year in health care costs. [28]

In addition, by providing a supervised place to consume drugs, fewer people will use drugs on the streets. Less drug paraphernalia will be publicly discarded.

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- **PROTOCOL AND SAFETY**
  - **Will data be collected at Safehouse?**

    Yes. Data will be collected on a range of information points, including: client demographics, needs assessments, utilization, and referrals for treatment. An evaluation of the impact of the services on overdose fatalities and use of drug treatment will be conducted. Data collection and analysis will be conducted in a manner that respects and preserves client privacy and confidentiality.

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  - **Do supervised consumption sites increase neighborhood crime?**

    No. Considerable research on neighborhoods around safe

consumption sites has shown no increase in crime.[25] In fact, a decrease in drug-related crime has been reported.[26],[27] Safehouse believes in a partnership with law enforcement and supports appropriate law enforcement measures to address public safety issues resulting from the opioid epidemic. Safehouse will actively discourage loitering.

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- **What safety and security protocols will exist at Safehouse for both users and the community?**

  Safehouse will provide appropriate security for its facilities and immediate surroundings. All participants will be expected to comply with rules to ensure the safety of participants, employees, volunteers, and the public. Safehouse is developing detailed policies and procedures, which it will post in a conspicuous place on location and on its website.

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- **What are Safehouse's rules of use?**

  Safehouse's rules of use include:

  - No one under age 18 may use the services. Appropriate referrals will be provided to minors.
  - No drug dealing.
  - No drug sharing.
  - No exchange of currency.

- No sharing of consumption equipment.
- No participant may help another consume drugs.
- No staff person may help a participant consume drugs.
- Staff will not handle controlled substances.
- All participants must properly dispose of consumption equipment before leaving the premises.
- Violence, intimidation, and harassment will not be tolerated.
- All participants will treat the staff and other participants with respect.

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- **Will Safehouse seek a partnership with law enforcement?**

Yes. Safehouse hopes to have a mutually beneficial, productive partnership with law enforcement, as we have a shared goal of making the community safer.

In Vancouver, police leaders strongly support overdose prevention services.[33] Bill Spearn, a longtime inspector with the Vancouver Police Department, formerly a staunch opponent of the sites, now admits that he was wrong. In May 2018, he said: "If you want to keep these people alive long enough to get them into treatment, you have to give them a space to use."

In reflecting on the benefit of Vancouver's overdose prevention services, Spearn said "it made sense to me that the reason that

the number of overdoses that I was attending, or my members were attending, had dropped significantly, was because of Insite." [Insite is North America's first public supervised injection facility.] [34]

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- **THE LEGALITY OF SAFEHOUSE**
  - **Does the law allow overdose prevention services like those provided by Safehouse?**

    We believe it does. Safehouse's overdose prevention services are designed to save lives, which is consistent with the intent of federal drug laws.

    We believe that 21 U.S. Code § 856 ("Section 856") was never intended to apply, and does not apply, to a nonprofit providing a good faith, public health approach to overdose prevention services, including a supervised consumption room. The purpose of a supervised consumption room is to carry out legitimate medical and public health initiatives that offer scientifically proven interventions effective for encouraging treatment and rehabilitation of individuals addicted to opioids.

    Section 856 prohibits maintaining any place "for the purpose of . . . using any controlled substance." The purpose of a supervised consumption room is to save lives by preventing fatal overdoses

and encouraging participants to enter into treatment. It is intended solely as a place to address the public health crisis of opioid addiction by providing harm reduction and emergency response in the event of an overdose or other medical emergency, in addition to providing counseling about safer injection practices and referrals to other social and health services including referrals to addiction treatment, medical care, housing, and other related comprehensive social services.

The express statutory restrictions set forth under Section 856 are not clearly applicable to a supervised consumption room that will be utilized as part of Safehouse's holistic approach to saving lives and providing overdose prevention services.

Philadelphia has a history of creative public health initiatives and prosecutorial discretion. In 1992, then-Mayor Edward G. Rendell and the Board of Health authorized by executive order Prevention Point Philadelphia's syringe exchange program to protect public health by preventing the transmission of HIV. Syringe exchange in Philadelphia has been found to be an effective harm reduction method. Indeed, syringe exchange has reduced new HIV cases in injection drug users in Philadelphia by more than 95 percent, from 819 cases in 1992 when Prevention Point opened to just 27 cases in 2016.[29]

Effective syringe exchange programs also increase the number of injection drug users referred to and retained in substance use treatment. In addition, they increase referral and entry opportunities for social services such as housing, case management, and medical care.[30] Studies also have found that syringe exchange programs do not increase injection drug use.[31]
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EXHIBIT B

U.S. Department of Justice

United States Attorney

Eastern District of Pennsylvania

William M. McSwain
United States Attorney

615 Chestnut Street
Suite 1250
Philadelphia, Pennsylvania 19106-4476
(215) 861-8200

November 9, 2018

Via Certified Mail (Return Receipt Requested)
and First Class Mail

Jose A. Benitez, M.S.W.
President
Ronda B. Goldfein, Esquire
Vice President
Safehouse
c/o Prevention Point Philadelphia
2913-15 Kensington Avenue
Philadelphia, PA 19134

Re: Safehouse/Proposed Injection Site

Dear Mr. Benitez and Ms. Goldfein:

Earlier this month, Safehouse announced its formation as a nonprofit and intention to open at least one facility in Philadelphia where, among other things, "participants" could inject controlled substances such as heroin and fentanyl in a "consumption room" under medical supervision. It also plans to offer onsite medical care and referral services such as wound care, onsite initiation of medication-assisted treatment for substance abuse, and referrals to primary care. In addition, it will offer a series of "wrap-around social services" such as referrals to social services, legal services, and housing opportunities.

While the U.S. Attorney's Office supports many of the services that Safehouse proposes to offer, including the medical and social referral services, Safehouse's proposed "consumption room" for injection of illicit drugs would violate federal law. Specifically, Title 21, United States Code, Section 856 provides in relevant part that "it shall be unlawful to":

> (a)(1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;
>
> (a)(2) manage or control any place whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

Section 856(a)(2), in particular, encompasses a broad range of relationships and conduct. It reaches a person or entity who has management or control over a place made available for the unlawful use of controlled substances, whether "permanently" or "temporarily." It covers not only landlords, but also lessees, agents, employees, occupants, and even mortgagees (*i.e.*, lending institutions). It applies whether the place is made available "with or without compensation," explicitly encompassing a situation such as this one where Safehouse does not plan to profit from the use of the property. Moreover, the statute makes no exception for entities, such as Safehouse, who claim a benevolent purpose or purpose other than the use of controlled substances. *See, e.g., United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991).

Please ensure that your organization, board members, and employees comply with federal law. The Department of Justice will pursue appropriate legal remedies should you fail to ensure your organization's compliance.

The Department of Justice is committed to ending the opioid epidemic through prevention, enforcement, and treatment efforts. We recognize that Safehouse and its proponents share our goal of combatting the scourge of opioid abuse. I appreciated the recent opportunity to tour Prevention Point with Mr. Benitez and I thank Ms. Goldfein for proactively contacting my office to keep us apprised of Safehouse's intentions. Many of the services Safehouse intends to provide appear worthwhile and commendable. While we do not and cannot approve of Safehouse's "consumption room," we invite a continuing dialogue with you to hear more about your proposal and to discuss how we can work together to fight this epidemic within existing federal law.

Very truly yours,

WILLIAM M. McSWAIN
United States Attorney

EXHIBIT C

Safehouse
A public health approach to overdose prevention in Philadelphia

November 26, 2018

2018 NOV 30 P 3:01

William M. McSwain
U.S. Department of Justice
U.S. Attorney
Eastern District of Pennsylvania
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106-4476

Dear U.S. Attorney McSwain:

Thank you for letter of November 9 and the invitation to continue the dialogue about our efforts to provide overdose prevention services. We are grateful for a Department of Justice that embraces the need to combat the scourge of opioid abuse.

To ensure candor in our ongoing dialogue, we would like to share our thoughts about this initiative.

We respectfully disagree with the conclusion that Safehouse's proposed consumption room would violate federal law. The legislative intent of Title 21, United States Code, Section 856 is to prohibit individuals from knowingly allowing their property to be used for the purpose of distributing or using drugs for profit. We believe that a proper and constitutional application of Section 856 does not prohibit our primary purpose of preventing fatal overdoses.

Overdose prevention is part of a multifaceted public health approach to combating the opioid crisis. Extensive research has demonstrated the benefits of overdose prevention services for people who use drugs and the communities where drug use occurs. For more on the services to be offered, please see safehousephilly.org.

Moreover, the leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in us from our religious schooling, our devout families and our practices of worship. At the core of our faith is the principle that preservation of human life overrides any other considerations. As witnesses to great losses of life in our community, we are compelled by our religious beliefs to take action to save lives.

Finally, we hope that the U.S. Attorney's office will exercise prosecutorial discretion in assessing our proposed overdose prevention services. This is not a request that your office approve or ignore Safehouse's proposed consumption room, but rather that the

P. O. Box 36788, Philadelphia, PA 19107
safehousephilly.org

same discretion in prosecution, that is shown in a range of activities that may be considered unlawful, be exercised here.

We welcome the opportunity to meet and discuss our shared goals of fighting this epidemic.

Respectfully,

José A. Benitez /mc
Jose A. Benitez, M.S.W.

Ronda L. Goldfein /mc
Ronda B. Goldfein, Esq.

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*.	

DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS TO PLAINTIFF'S AMENDED COMPLAINT

Defendants Safehouse and Jose Benitez, by and through their counsel, answer the Amended Complaint of Plaintiff United States of America ("Plaintiff") and aver as follows:

1. Defendants admit that Plaintiff purports to seek a declaratory judgment under the Declaratory Judgment Act, as amended, 28 U.S.C. § 2201, and under the CSA, 21 U.S.C. § 843(f) (as made applicable by *id*. § 856(e)) and its implementing regulations, 21 C.F.R. § 1301 *et seq*., but denies that Plaintiff is entitled to such relief.

2. Admitted.

3. Admitted.

PARTIES

4. Admitted.

5. Admitted.

6. Denied as stated.

7. Admitted.

FACTUAL ALLEGATIONS

8. Admitted. Despite the existence of such nonprofits providing services intended to reduce the harms of the opioid crisis, Philadelphians continue to die of overdoses at rates higher than nearly every other major city.[1]

9. Admitted in part and denied in part. Safehouse's mission, as stated on its website, "is to save lives by providing a range of overdose prevention services."[2] Also as stated, "[t]he leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in [them] from [their] religious schooling, [their] devout families and [their] practices of worship. At the core of [their] faith is the principle that preservation of human life overrides any other considerations."[3] Safehouse will save lives by providing a range of overdose prevention

[1] In 2016, Philadelphia had the second-highest rate of drug overdose deaths among counties with a population of more than one million residents. *See* Pew Tr., *Philadelphia's Drug Overdose Death Rate Among Highest in Nation* (Feb. 15, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/15/philadelphias-drug-overdose-death-rate-among-highest-in-nation.

In 2017, Philadelphia had the highest overdose death rate (65/100,000 residents) of the counties in the top ten largest U.S. cities. Its overdose death rate was three times the rate of the second highest county (Cook County, 23/100,000 residents). *See* CDC, *CDC WONDER Online Database*: *About Underlying Cause of Death, 1999-2017*, https://wonder.cdc.gov/ucd-icd10.html (last visited June 7, 2019).

[2] Safehouse, *Frequently Asked Questions*, https://www.safehousephilly.org/about/faqs (last visited June 7, 2019).

[3] *Id.*

services, including medically supervised consumption and observation. Exhibit A to the Amended Complaint is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit A is therefore denied.

10. Denied as stated. Upon arrival at Safehouse, all participants must register and provide demographic information. A physical and behavioral health assessment will be conducted and a range of overdose prevention services offered. "[P]articipants will be directed to the medically supervised observation room," where they will be "offered on-site initiation of Medication Assisted Treatment (MAT), wound care, and referrals to primary care, social services, and housing opportunities."[4] Participants may seek supervised consumption, in which case they will be directed to the medically supervised consumption room and provided sterile consumption equipment and fentanyl test strips.[5] Participants will safely dispose of used consumption equipment before leaving the supervised consumption area.[6] Under no circumstance will Safehouse make available any illicit narcotic or opioid. From the consumption area, participants will be directed to the medically supervised observation room and again offered opportunities for drug treatment, medical care, and social services. Exhibit A is a printout of the Safehouse website as of May 24, 2019. Exhibit A to the Amended Complaint is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit A is therefore denied.

---

[4] *Id.*

[5] The provision of sterile consumption equipment will reduce of the risk of transmission of infectious diseases. Fentanyl test strips are used to detect the presence of fentanyl prior to consumption. By alerting the participant to the presence of fentanyl and the increased risk of overdose, Safehouse would be practicing a harm reduction strategy that encourages a dosage adjustment to a safer level.

[6] The safe disposal of consumption equipment will reduce the risk of transmission of intravenous diseases, and will further the goals of city-sponsored programs like the Philadelphia Resilience Project, which aim to alleviate the public littering of consumption equipment that is prevalent in areas of Philadelphia with high drug use. *See* City of Phila., *Philadelphia Resilience Project*, https://www.phila.gov/programs/philadelphia-resilience-project/.

11. Admitted in part and denied in part. Paragraph 11 selectively quotes from the Safehouse website as of May 24, 2019, as reflected in Exhibit A. Exhibit A to the Amended Complaint is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit A is therefore denied.

12. Denied. The averments contained in Paragraph 12 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

13. Denied. The averments contained in Paragraph 13 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

14. Denied. The averments contained in Paragraph 14 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

15. Denied. The averments contained in Paragraph 15 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied. Safehouse's provision of overdose prevention services would not violate Section 856(a)(2).

16. Denied. The averments contained in Paragraph 16 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied. Safehouse's overdose prevention services would not violate Section 856(a)(2).

17. Admitted in part and denied in part. Safehouse has publicly stated that its planned operations would not violate federal law. The remainder of Paragraph 17 is denied.

18. Admitted in part and denied in part. It is admitted that Safehouse received a letter from U.S. Attorney for the Eastern District of Pennsylvania, Third-Party Defendant William M. McSwain, dated November 9, 2018. Exhibit B to the Amended Complaint is a copy of that letter, which is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit B is therefore denied.

19. Admitted in part and denied in part. It is admitted that Safehouse sent a letter to U.S. Attorney for the Eastern District of Pennsylvania, Third-Party Defendant William M. McSwain, dated November 26, 2018, explaining (among other things) that a proper and constitutional application of Section 856 does not prohibit Safehouse's overdose prevention services model that would combat the opioid crisis and prevent fatal overdoses. Exhibit C to the Amended Complaint is a copy of that letter, which is a writing that speaks for itself. Any attempt by Plaintiff to characterize or interpret Exhibit C is therefore denied.

20. Admitted.

21. Admitted as stated.

COUNT I

Violations of the Controlled Substances Act, 21 U.S.C. § 856(a)(2) – Declaratory Judgment

22. Defendants incorporate by reference their responses to paragraphs 1 through 21 of Plaintiff's Amended Complaint as if set forth fully herein.

23. Denied. The averments contained in Paragraph 23 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

24. Denied. The averments contained in Paragraph 24 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

25. Denied. The averments contained in Paragraph 25 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

26. Denied. The averments contained in Paragraph 26 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

27. Denied. The averments contained in Paragraph 27 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

28. Denied. The averments contained in Paragraph 28 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

29. Denied. The averments contained in Paragraph 29 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and are therefore denied.

30. Denied. The averments contained in Paragraph 30 constitute conclusions of law to which no response is required by the Federal Rules of Civil Procedure, and is therefore denied.

PRAYER FOR RELIEF

Defendants deny that Plaintiff is entitled to any relief in connection with the allegations set forth in its Amended Complaint, including, but not limited to, the allegations set forth in Plaintiff's Prayer for Relief.

AFFIRMATIVE DEFENSES

As affirmative defenses to Plaintiff's Amended Complaint, Defendants assert as follows without assuming the burden of proof or persuasion on matters for which it has no such burden. In doing so, Defendants incorporate herein by reference, as though fully set forth in full, the allegations contained in the Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint in the action styled *Safehouse v. United States of America et al*., No. 2:19-cv-00519, ECF No. 3, together with paragraphs 1 through 30 above, and further reserve the right to restate, re-evaluate, or recall any defenses and to assert additional defenses:

1. The cited provision of the CSA, 21 U.S.C. § 856(a)(2), does not apply to Defendants' proposed conduct.

2. Defendants' proposed conduct is justified by medical necessity to avoid imminent serious bodily injury and death.

3. The application of Section 856 to Defendants is barred by RFRA, 42 U.S.C. § 2000bb *et seq.*

4. Section 856(a)(2) is unconstitutional under the Commerce Clause, both facially and as applied to Defendants.

COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

Counterclaim Plaintiff Safehouse incorporates herein by reference, as though set forth in full, the allegations, counterclaims against Counterclaim Defendant United States of America,

and claims against Third-Party Defendants U.S. Department of Justice, William P. Barr, and William M. McSwain set forth in the Answer, Affirmative Defenses, Counterclaims, and Third Party Complaint in the action styled *Safehouse v. United States of America et al.*, No. 2:19-cv-00519, E.D. Pa. (ECF No. 3).[7] As a result, Safehouse reasserts the affirmative counterclaims and claims it previously asserted in this action on April 3, 2019.

WHEREFORE, Answering Defendants Safehouse and Jose Benitez request that judgment be entered in their favor, and against Plaintiff United States of America, for the same relief requested in the action styled *Safehouse v. United States of America et al*., No. 2:19-cv-00519, E.D. Pa. (ECF No. 3).

Dated: June 7, 2019

Respectfully submitted,

DLA PIPER LLP (US)

By: */s/ Ilana H. Eisenstein*
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Tel: 410.580.3000

[7] Counterclaim Plaintiff Safehouse incorporates its Counterclaims and Third-Party Complaint by reference and without waiver to the right to file a consolidated Answer and Counterclaim in a single pleading, if instructed to do so by the Court.

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AIDS LAW PROJECT OF PENNSYLVANIA

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Attorneys for Defendant and Counterclaim Plaintiff Safehouse and Defendant Jose Benitez

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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	

ORDER

AND NOW, this _____ day of _____, 2019, upon consideration of the Motion for Judgment on the Pleadings filed by Plaintiff/Counterclaim Defendant United

States of America and Third-Party Defendants United States Department of Justice, United States Attorney General William P. Barr, and United States Attorney for the Eastern District of Pennsylvania William M. McSwain, and any response thereto, it is ORDERED that:

1. The motion is GRANTED;

2. Judgment is ENTERED in favor of 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, and against Safehouse and Jose A. Benitez;

3. It is DECLARED that the establishment and operation of a "Consumption Room," in which Defendants knowingly and intentionally provide a place for drug users to use illegal controlled substances, including heroin and fentanyl, violates 21 U.S.C. § 856(a)(2); and

4. The clerk is directed to CLOSE this case.

IT IS SO ORDERED.

BY THE COURT:

_____
GERALD A. McHUGH
United States District Judge

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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	

MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff/Counterclaim Defendant United States of America and Third-Party Defendants United States Department of Justice, United States Attorney General William P. Barr, and United

States Attorney for the Eastern District of Pennsylvania William M. McSwain (collectively, "the United States") move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). For the reasons set forth in the attached memorandum of law, which is incorporated herein by reference, *see* Local Rule 7.1(c), the United States requests that its motion be granted, and that judgment be entered in its favor and against Defendants/Counterclaim Plaintiffs Safehouse and Jose A. Benitez.

Dated: June 11, 2019

Respectfully submitted,

WILLIAM M. McSWAIN
United States Attorney

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Consumer Protection Branch

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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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

What Safehouse proposes is illegal under federal law. This is not a difficult question or a close call. Even Safehouse's chief spokesperson, former District Attorney and Governor Ed Rendell – somebody with a reputation for plain speaking – has candidly admitted in public that injection sites would violate federal law.[1] So, the relevant question in this case is not whether the sites would be illegal – but whether the rule of law will be vindicated in the face of pressure from well-intentioned (but ultimately misguided) injection site proponents.

Safehouse proposes to operate a place called a "Consumption Room" where people can inject heroin and other illegal drugs. This would plainly violate the Controlled Substances Act ("CSA"), which makes it unlawful to manage any place where people use such drugs, regardless of compensation or the property owner's motive. Rather than seek a change in the law through the democratic process, Safehouse asks this Court to change it for them, by seeking to close a supposed "gap in care at the time of drug consumption" by declaring Consumption Rooms legal.

But there is no "gap" in the law; the CSA prohibits Consumption Rooms. Consistent with that prohibition, no doctor can prescribe heroin; there is no currently accepted medical use for it; and no one can legally possess it or another drug that was not dispensed via a valid prescription (like street fentanyl). These facts repudiate the very concept of a "safe" injection site. Even if there were a "gap," it would be incumbent upon Congress – and not the Court – to fill it.

Safehouse's legal arguments in favor of Consumption Rooms find no support in the law. In substantially similar cases, the U.S. Supreme Court has squarely rejected two of Safehouse's defenses – "medical necessity" and its challenge under the Commerce Clause. And while

[1] "[T]he Prevention Point people came to me . . . and said we want to set up new non-profit for safe injection," at approximately 48:50, "and I knew it was against the law," at approximately 51:05. Cato Institute panel on "Safe Syringe Programs/Safe Consumption Facilities" held on March 21, 2019 (video available at https://www.cato.org/events/harm-reduction-shifting-war-drugs-war-drug-related-deaths).

Safehouse falls back on a half-hearted argument that the CSA's prohibition would substantially burden Safehouse's founders' expression of religious freedom ("that's not our strongest argument," Ed Rendell said to a crowd's laughter[2]), the law requires consideration of alternative forms of expression before it will recognize a claim under the Religious Freedom Restoration Act ("RFRA"). Given the multitude of potentially lifesaving options such as medication-assisted treatment that do not involve inviting thousands of people onto Safehouse's property to use illegal drugs, enforcement of the CSA presents no substantial burden on Safehouse as a matter of law.

Without question, our nation presently faces a crisis of the first order in the illegal use and abuse of opioids, which has reached epidemic proportions and caused an intolerable number of deaths and misery throughout the United States. The undersigned are dedicated to using all lawful means to address this problem. But all actions undertaken to address the issue must comply with the law, and the law applicable to consumption sites is clear at this time. The remedy for those who disagree with this law lies in the legislative arena, not in the U.S. Attorney's Office or in the courts.

In short, Safehouse's proposed operation of Consumption Rooms is illegal under current law, with no relevant exceptions. This Court should declare it so and strike a blow for the rule of law – something that is sorely needed and that the Court is uniquely qualified to deliver.

I. PROCEDURAL AND FACTUAL BACKGROUND

The United States commenced this action on February 5, 2019, by filing a Complaint for Declaratory Judgment against Safehouse, a Pennsylvania nonprofit corporation ("Safehouse"),

[2] Cato Institute panel on "Safe Syringe Programs/Safe Consumption Facilities" held on March 21, 2019, starting at approximately 56:06 (video available at https://www.cato.org/events/harm-reduction-shifting-war-drugs-war-drug-related-deaths).

and Jeanette Bowles, as Safehouse's Executive Director ("Bowles"). (ECF No. 1). The day after the United States filed suit, Safehouse informed Jeanette Bowles she would no longer serve as its Executive Director. (ECF No. 29 at 4). Then, on April 10, 2019, Bowles' employment by Safehouse ceased in its entirety. *Id*. Accordingly, on May 23, 2019, the parties stipulated to Bowles' dismissal without prejudice, and the United States amended its complaint, naming Jose Benitez, Safehouse's president and treasurer, in Bowles' place. (ECF No. 35). Defendants subsequently answered the Amended Complaint on June 7, 2019. (ECF No. 45).

In its Amended Complaint, the government alleges that "Safehouse seeks to establish and operate one or more sites in Philadelphia where, among other things, intravenous drug users will be permitted to use illegal controlled substances (primarily, heroin and fentanyl) in 'consumption rooms' under medical supervision[.]" (ECF No. 35 at ¶ 6). The Amended Complaint's core contention is that Consumption Rooms violate § 856(a)(2). That section, in relevant part, makes it a felony for persons to "manage or control any place" that they "knowingly and intentionally . . . make available for use, with or without compensation . . . for the purpose of unlawfully . . . using a controlled substance." (*Id*. at ¶¶ 14, 15). Asserting that Safehouse's "operation of Consumption Rooms would do exactly that" (*id*. at ¶ 15), the United States seeks a declaratory judgment that Safehouse's "establishment and operation of any Consumption Room . . . will violate 21 U.S.C. § 856(a)(2)." (*Id*. at 8).

In its Answer, Safehouse describes its planned operation as follows:

> Upon arrival at Safehouse, all participants must register and provide demographic information. A physical and behavioral health assessment will be conducted and a range of overdose prevention services offered. Participants will be directed to the medically supervised observation room, where they will be offered on-site initiation of Medication Assisted Treatment (MAT), wound care, and referrals to primary care, social services, and housing opportunities. Or participants may seek supervised consumption, in which case they will be directed to the medically supervised consumption room and provided sterile consumption equipment and

> fentanyl test strips. [After injecting illegal controlled substances, such as heroin and fentanyl,] [p]articipants will safely dispose of used consumption equipment before leaving the supervised consumption area. . . . From the consumption area, participants will be directed to the medically supervised observation room and again offered opportunities for drug treatment, medical care, and social services.

(ECF No. 45 at ¶ 10) (internal marks and footnotes omitted). Accordingly, Safehouse intends to invite people possessing illegal drugs to inject those drugs within its facility under observation.

The government now moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).[3]

II. ARGUMENT

A. Safehouse's Proposed Consumption Rooms Plainly Violate 21 U.S.C. § 856(a)(2).

Defendants' proposed Consumption Rooms would violate 21 U.S.C. § 856(a), which generally makes it a crime and an offense subject to civil remedies to either:

> (1) knowingly open . . . or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; [or]
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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.

21 U.S.C. § 856(a). Safehouse's proposed operation of a place in which people would be invited to use illegal drugs falls within the plain prohibition of § 856(a)(2).

[3] On June 10, 2019, the United States filed its Answer to Safehouse's Counterclaims/Third-Party Complaint. (ECF No. 46). The pleadings are now "closed" and a motion for judgment on the pleadings is permitted. *See* Fed. R. Civ. P. 12(c). A Rule 12(c) motion is subject to the same legal standard as a motion to dismiss under Rule 12(b)(6). *See*, *e.g.*, *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989). Accordingly, the Court must accept as true all well-pleaded factual allegations and draw all reasonable inferences therefrom in favor of the non-moving party. *See Turbe v. Gov't of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991).

In all statutory construction cases, a court must "begin with the language of the statute." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id*. (internal citations omitted). The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id*. Only "[w]hen the language of a statute is ambiguous, [do courts] look to its legislative history to deduce its purpose." *United States v. Hodge*, 321 F.3d 429, 437 (3d Cir. 2003).

None of the five circuit courts that has examined Section 856(a)(2) has found it ambiguous. *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990); *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991); *United States v. Wilson*, 503 F.3d 195 (2d Cir. 2007); *United States v. Ramsey*, 406 F.3d 426 (7th Cir. 2005); *United States v. Harrison*, 133 F.3d 1084 (8th Cir. 1998); *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013).

Safehouse's plan violates subsection (a)(2) because: (1) it would manage and control a place as either an owner or lessee, that (2) it would knowingly and intentionally make available, (3) for the purpose of unlawfully using a controlled substance. This plain reading of the statute is consistent with § 856(a)(2)'s broad language, which encompasses a range of relationships and conduct as to a person who manages or controls "any place," whether "permanently" or "temporarily." The statute covers not only property owners, but also lessees, agents, employees, occupants, and mortgagees. It applies whether the place is made available "with or without compensation," explicitly encompassing a situation such as this one where Defendants state they would not commercially profit from allowing illegal use at their facility. The statutory language plainly applies to a much larger set of conduct and potential relationships than a "crack house" or "drug-fueled rave," as Defendants contend. (*See* ECF. No. 3, Preliminary Statement at 4.)

Section 856's prohibition on Consumption Rooms, especially as it relates to the illegal use of a Schedule I drug such as heroin (or, worse, heroin mixed with fentanyl), aligns with the CSA's overall structure. First, § 856's prohibition on Consumption Rooms is consistent with the CSA's prohibition of illegal possession of heroin and street fentanyl in the first place. *See* 21 U.S.C. § 844. Consumption Room users would illegally possess controlled substances in the Consumption Room – one must possess drugs in order to use them. Second, Congress placed heroin on Schedule I of the CSA after determining that heroin has "no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B), and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision," *id.* § 812(b)(1)(C). Accordingly, physicians cannot prescribe Schedule I drugs (with exceptions that do not apply here). *Id*. § 829 (allowing prescriptions for only Schedule II-V drugs).

One of the government's concerns with purported "safe" injection sites – beyond their illegality – is that they would give people who use opioids and the public the false impression that using these deadly drugs can be safe given the right environment and supervision. That is exactly what Safehouse purports to offer: "assurance, to a medical certainty, that people within its care will not die of a drug overdose." (ECF No. 3 at ¶ 34; *see also id.* at ¶¶ 23, 46.) Safehouse's guarantee is an impermissible attempt to substitute its own judgment for that of Congress, which has already determined that heroin has a "lack of accepted safety for use," even "under medical supervision." 21 U.S.C. § 812(b)(1)(C).

Safehouse contends that the Court should interpret § 856 to permit Consumption Rooms because: (1) the U.S. Surgeon General and the CDC encourage clean needle exchange, (2) Congress has, in recent years, loosened restrictions on the use of funding for certain programs that provide sterile syringes, and (3) the federal government has authorized funding for overdose

reversal treatment, including the opioid overdose reversal drug Naloxone. (ECF No. 3 at ¶¶ 56-60, 71-73). Allowing clean needle exchanges, however, does not constitute a judgment that injection of illegal drugs is safe or even safe under supervision. And it certainly does not constitute a judgment that injection of illegal drugs is somehow legal or that Consumption Rooms themselves are legal. Rather, it reflects the policy judgment that allowing clean needle exchanges reduces the spread of communicable disease such as HIV and Hepatitis and promotes entry into treatment, outweighing any potential facilitation of underlying illegal drug use. *See* 76 Fed. Reg. 10038 (Feb. 23, 2011); 2016 Appropriations Act, 114 P.L. No. 113, 129 Stat. 2242 at § 520.[4] As to Naloxone (also known by its brand name Narcan), this reflects an effort to arm front-line overdose responders, not a judgment that illegal drugs are safe to use if Naloxone is nearby. Increased federal funding for fire fighters does not mean that arson can be done safely if near a fire station. Safehouse is wrong when it professes that the CSA currently reflects its own view that illegal drug use can be safe under supervision. Rather, the CSA specifically prohibits *precisely* Safehouse's proposed conduct.

Safehouse itself separately recognizes that its Complaint seeks a judicial "extension" of legislative measures authorizing needle exchanges and Naloxone availability to fill what it perceives to be a "gap at the time of drug consumption." (ECF No. 3 at ¶ 65). Safehouse is more than welcome to make this policy argument to Congress. But there is no corresponding "gap" in the law, and it is Congress' task, not the Court's—and certainly not Safehouse's—to decide whether such perceived gaps should be filled. *See Oakland Cannabis Buyers' Coop.*, 532 U.S.

[4] The 2016 Appropriations Act, which Safehouse cites in support of its assertion that sterile syringe services have broad support from the federal government (*see* ECF No. 3 at ¶ 60), provides that *no* appropriated funds shall be used to purchase sterile syringes, but that federal funds *may* be used for *other* elements of a drug-treatment program *if* the CDC and local health authorities determine that a locality is experiencing a significant increase in hepatitis infections or an HIV outbreak due to injection drug use, *and* provided that such program is otherwise operating in accordance with law. *See* 114 P.L. No. 113 at § 520.

483, 490 (2001) ("whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial interference") (internal quotes omitted).

Accordingly, the Court should enter a judgment declaring that Safehouse's maintenance and operation of a Consumption Room would violate § 856(a)(2).

B. Contrary to Safehouse's Contention, the Phrases "for the purpose of," "except as authorized by this subchapter," and "illegal . . . use" are Not Ambiguous.

Safehouse contends that three specific phrases within § 856 are ambiguous: (1) "for the purpose of," (2) "except as authorized by this subchapter," and (3) "unlawful[]. . .us[e]." (ECF No. 3 at ¶ 100). As discussed below, each phrase is unambiguous and supports the government's plain reading of the statute.

1. "For the purpose of": Defendants' Purportedly Beneficent Purposes Do Not Exempt Them from § 856(a)(2) Because *the Drug User's* Purpose is at Issue.

Even though it would be openly inviting illegal drug use within its location, Safehouse contends that its "singular purpose is to provide lifesaving medical treatment," and thus it would not be making the property that it manages available "for the purpose of unlawfully" using controlled substances. (*Id*. at ¶¶ 92-93). In making this contention, Safehouse interprets "for the purpose" as meaning that it – rather than those who would use the Consumption Rooms – must have the purpose that illegal drugs be used on the property it manages.

As discussed in detail below, every court that has interpreted the phrase "for the purpose of" has rejected Safehouse's statutory interpretation and found § 856(a)(2) to be unambiguous. *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990); *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991); *United States v. Wilson*, 503 F.3d 195 (2d Cir. 2007); *United States v. Ramsey*, 406 F.3d 426 (7th Cir. 2005); *United States v. Harrison*, 133 F.3d 1084 (8th Cir. 1998); *United States*

v. Tebeau, 713 F.3d 955 (8th Cir. 2013). Each of these cases holds that the pertinent "purpose" is not that of the property manager – here, Safehouse. Rather, the "purpose" that matters under § 856(a)(2) is that of the so-called "participants" who would use illegal drugs at Safehouse's facility.

While not directly addressing the issue of whether § 856(a)(2) is ambiguous, decisions of this Court and the Third Circuit construing the statute are in full accord. *See United States v. Cole*, 558 F. App'x 173, 181 (3d Cir. 2014) (not precedential) (affirming conviction under § 856(a)(2), finding sufficient evidence permitting the jury to "infer [the defendant] intended that the property be used [by others] for manufacturing and storing controlled substances"); *United States v. Blake*, Crim. No. 06-30, 2009 WL 1124957, at *2 (D.V.I. Apr. 24, 2009) (holding, in challenge to conviction under § 856(a)(2), "the Government has proven that [the defendant] knowingly and intentionally allowed her home to be used for the purpose (albeit [her brother's] purpose) of manufacturing cocaine base and storing cocaine powder"); *United States v. Butler*, Crim. Nos. 02-300-01, 02-300-02, 2004 WL 2577631, at *3 (E.D. Pa. Oct. 6, 2004) (upholding conviction for violation of § 856(a)(2), reasoning "the evidence linking [the defendant] to the apartment was enough for a jury to conclude that he was the lessee or occupant and that he had made the space available for drug distribution"). The critical issue, then, is something that is not in dispute – *i.e.*, whether Safehouse knowingly would allow people onto its property who have the purpose to use illegal drugs. The answer to that question, of course, is yes.

In *Tamez*, the defendant was convicted of violating § 856(a)(2) after he allowed his car dealership to be used for cocaine distribution. The government presented evidence that officers made undercover cocaine purchases at the dealership from Tamez's employees and that other witnesses had delivered and purchased cocaine there. There was no evidence that Tamez himself

sold or bought cocaine. Like Safehouse, Tamez contended that a violation of § 856(a)(2) required that he personally intend to use the building for the purpose of manufacturing drugs or other prohibited activities, and argued his sole purpose was to run a car dealership.

The Ninth Circuit held that § 856(a)(2) is "not ambiguous" and rejected Tamez's claim, holding that his suggested interpretation would make section 856(a)(2) superfluous:

> Tamez' assertion that the statute requires that he *intend* to use the building for a prohibited purpose under section 856(a)(2) also ignores the plain meaning and interrelation of the two § 856 provisions. Section 856(a)(1) states: '[I]t shall be unlawful to—(1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance...' This provision applies to purposeful activity and as such, if illegal purpose is, as Tamez suggests, a requirement of 856(a)(2), the section would overlap entirely with 856(a)(1) and have no separate meaning.

Tamez, 941 F.2d at 774 (emphasis in original). Rather, the Ninth Circuit held that "[b]oth provisions of § 856 must have meaning[.]" *Id*.; *cf. Pomper v. Thompson*, 836 F.2d 131, 133 (3d Cir. 1987) ("The cardinal principle of statutory construction" requires courts to "give effect, if possible, to every clause and word of [a] statute.") (internal citations omitted).

Further, the *Tamez* court stated, "it is clear that (a)(1) was intended to apply to deliberate maintenance of a place for a proscribed purpose, whereas (a)(2) was intended to prohibit an owner from providing a place for illegal conduct, and yet to escape liability on the basis of lack of illegal purpose, or of deliberate indifference." *Id*. Even though there was "no evidence that the business or its buildings were established or maintained for the purpose of drug activities, section

856(a)(2) requires only that proscribed activity was present, that Tamez knew of the activity and allowed that activity to continue." *Id*.[5]

The *Tamez* court noted that its decision was consistent with the holding in *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990). The Fifth Circuit was the first circuit court to address § 856(a)(2)'s purpose requirement. In *Chen*, the defendant purchased a motel that became an area for illegal drug dealing and use. *Id*. at 185. Chen conceded that she was aware that drug transactions were taking place in her motel and a jury convicted her under both 21 U.S.C. § 856(a)(1) and (a)(2). The trial court charged the jury to find the defendant guilty under both § 856(a) provisions if she deliberately ignored unlawful conduct that should have been obvious. The Fifth Circuit reversed with regard to § 856(a)(1), holding it requires the defendant to have the purpose or intention to manufacture, distribute, or use a controlled substance. *Id*. By contrast, the Fifth Circuit held that § "856(a)(2) is designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use . . . for the purpose of unlawfully'" engaging in such activity. *Id*. Affirming the § 856(a)(2) conviction, the court held that "under § 856(a)(2), the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose)." *Id*. (internal citation omitted).

[5] The Ninth Circuit reaffirmed *Tamez*'s key holding in *United States v. Ford*, 371 F.3d 550 (9th Cir. 2004), considering whether double jeopardy barred the government from prosecuting the defendant under § 856(a)(2) following his acquittal under § 856(a)(1). The defendant contended that "similar language in both (a)(1) and (a)(2) should be read to contain the same intent requirement—that is, the defendant must be shown to have acted 'for the purpose of' manufacturing, distributing, or using drugs." *Id*. The Ninth Circuit rejected this argument, invoking its holding in *Tamez* and the "twin conclusions that both subsections [of § 856] 'must have meaning' and have different intent requirements," namely that § 856(a)(2) requires that the manager or the controller of the property make the property available to *others*, knowing that illegal use will occur. *Id.* at 554.

Several other circuits considering the same issues have cited the holdings of *Tamez* and *Chen*. The Second Circuit held that it was the drug dealer's purpose, not the property owner's, that mattered under § 856(a)(2): "[t]he phrase 'for the purpose,' as used in this provision, references the purpose and design *not* of the person with the premises, but rather of those who are permitted to engage in drug-related activities there." *Wilson*, 503 F.3d at 197-98 (emphasis in original). In that case, the court held that the defendant's illegal act was making the property available for drug use or drug dealing by other people. *Id*.

The Seventh Circuit followed suit, holding that, "[s]everal circuits, including this one, have held that knowing or 'remaining deliberately ignorant' satisfies the knowledge component of § 856(a)(2)." *Ramsey*, 406 F.3d at 431 (citing *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993) ("In (a)(2) the 'purpose' may be that of others; the defendant is liable if he manages or controls a building that others use for an illicit purpose, and he either knows of the illegal activity or remains deliberately ignorant of it.")).

Most recently, the Eighth Circuit explored the issue in depth, agreeing with the other courts' unanimous views in *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013). That case concerned the owner of a large property in Missouri who held music festivals at which drug use was widespread. The owner was aware of the drug activity and, echoing Safehouse's proposal here, even operated a medical facility on the campground known as "Safestock," where campers who had overdosed during the festival could go for medical treatment. *Id*. at 958. In entering a conditional guilty plea, Tebeau admitted that he had intended to make the campground available for individuals who had the intent to sell and use controlled substances. Tebeau argued on appeal that § 856(a)(2) required proof that he had the specific intent that illegal drugs would be stored, distributed, manufactured, or used on his property. The Eighth Circuit rejected his argument,

agreeing with the other circuit courts that § 856(a)(2) requires only that a defendant know that the drug selling and use were taking place on his property. *Id*. at 959-61 (stating that statutory interpretation requires consideration of the "bare meaning" of critical words or phrases, and that the "bare meaning" of the purpose requirement in § 856(a)(2) did not require specific intent). Considering that the drug sellers openly marketed their products and campers who overdosed were taken to "Safestock," the court held that "[s]uch open and obvious use is precisely the conduct prohibited by § 856(a)(2)'s plain language[.]" *Id*.

The statutory language, contrary to Safehouse's suggestion, is not ambiguous. The government is not required to show that a defendant has the purpose to manufacture, distribute, store or use illegal drugs on the defendant's premises to establish a § 856(a)(2) violation. Instead, the government must show merely that Safehouse knowingly would allow people onto its property who have the purpose to use illegal drugs.

2. The Phrase "Except as Authorized by This Subchapter": Nothing in Subchapter I of the CSA Authorizes Consumption Rooms.

Safehouse contends that the phrase "except as authorized by this subchapter" in § 856 is ambiguous. (ECF No. 3 at ¶ 100). Tellingly, Safehouse does not describe how this phrase is ambiguous or what alternative meanings it may have. And most importantly, no provision *anywhere* in the CSA authorizes Consumption Rooms.[6]

The CSA is divided into two subchapters. Subchapter I is entitled "Control and Enforcement" and Subchapter II is entitled "Import and Export." Subchapter I is further divided

[6] Instead, Safehouse contradicts its own argument when it separately argues that § 856 "expressly exempts conduct authorized by Subchapter I from its civil and criminal penalties," thereby acknowledging the unambiguous scope of the "except as authorized" language. (ECF No. 3 at ¶ 86 (internal quotation marks and brackets omitted)). According to the plain language of the statute, as Safehouse apparently concedes, the phrase "[e]xcept as authorized by this subchapter" in § 856 refers to Subchapter I of the CSA.

into six parts. Relevant here, Part C governs the registration of and requirements for manufacturers, distributors, and dispensers of controlled substances. Part D establishes criminal offenses and penalties. Section 856(a)(2) is within Part D. Thus, the phrase that begins § 856, "[e]xcept as authorized by this subchapter," refers to Subchapter I. Use of this phrase is common throughout Part D of Subchapter I. As one court explained:

> This phrase – "except as authorized by this subchapter" – pervades the CSA's criminal prohibitions in Part D. *See*, *e.g.*, § 841(a)(1), (c)(1), (h)(1)(B); § 842(a)(6), (a)(8); § 843(c)(2)(A); § 856(a). Except for rare and limited instances, however, this Part of the CSA describes what is prohibited but does not elucidate what is authorized. *See id*. § 841(h)(3) (providing limited exceptions for some online offenses).

United States v. Akinyoyenu, 199 F. Supp. 3d 106, 113 (D.D.C. 2016) (emphasis in original). The *Akinyoyenu* court explained that "Part D is rife with sections that lay out actions that constitute criminal offenses unless they are authorized by the administrative requirements of Part C – for instance, the prerequisite that a practitioner register before she dispenses prescription drugs." *Id.* (emphasis in original). As "illustrated by these cross-referencing exceptions, 'except as authorized by this subchapter' means what its plain language suggests." *Id*. Specifically, any section of the CSA "can 'authorize' conduct." *Id*. "If a person does what is so authorized, the CSA prevents her from being prosecuted criminally." *Id*. (citing §§ 841(a)(1), (h)(1)(A)). Through this interlocking scheme, Congress "devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Gonzales v. Raich*, 545 U.S. 1, 13 (2005).

In asserting that its "overdose prevention services are legitimate medical services that fall under § 856's express exemption" (ECF No. 3 at ¶ 90), Safehouse improperly attempts to shoehorn its Consumption Room into conduct that Part C of Subchapter I authorizes. Safehouse contends that 21 C.F.R. § 1306.04, which is titled "[p]urpose of issue of prescription," permits its

operation of a Consumption Room. This section provides, in relevant part, that "[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." (*See* ECF No. 3 at ¶ 87). While § 1306.04 may govern medication-assisted treatment,[7] the conduct at issue in this suit – providing a space for the supervised consumption of illegal drugs – is not authorized by this section nor any other section within Subchapter I. Safehouse's Consumption Rooms would *not* involve a prescription, and therefore § 1306.04 cannot authorize the relevant conduct, which is otherwise a violation of § 856.[8]

Safehouse similarly relies on *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), for the proposition that "[t]he CSA does not generally 'regulate the practice of medicine,' except 'insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood.'" (*See* ECF No. 3 at ¶ 44). But

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[7] Where medication-assisted treatment involves the dispensing of controlled substances (*i.e.*, methadone or buprenorphine), it must be carried out in conformity with the CSA. *See* 21 U.S.C. § 823(g).

[8] Safehouse contends that Consumption Rooms have been endorsed by professional associations and international bodies. (*See* ECF No. 3 at ¶ 88). Whether that is true does not change the illegality of such facilities. To the extent that is relevant at all, Safehouse does not contend that its proposed Consumption Rooms have the support of the U.S. Surgeon General or the Centers for Disease Control and Prevention, both of which Safehouse cites as authorities on the opioid crisis and supporters of sterile syringe exchange services. (*See id.* at ¶¶ 30, 57-59). Indeed, the U.S. Surgeon General does not support Consumption Rooms:

> The Administration and the Surgeon General do not support so called "safe" injection sites as a means to combat the opioid epidemic and its consequences. In addition, there is no evidence to demonstrate that these illegal sites reduce drug use or significantly improve health outcomes for those with opioid use disorder. So called "safe" injection sites lack the necessary scientific support to be considered a standardized evidence-based practice in the U.S.

Surgeon General urges ER docs to advocate for evidence-based opioid treatment, Steven Ross Johnson, Modern Healthcare (May 23, 2018) (available at https://www.modernhealthcare.com/article/20180523/NEWS/180529976/ surgeon-general- urges-er-docs-to-advocate-for-evidence-based-opioid-treatment).

Additionally, the CDC published a guide outlining ten evidence-based strategies for preventing opioid overdose. This publication discusses targeted Naloxone distribution, and syringe services programs, among other measures, but does not include or endorse supervised injection. *See* Centers for Disease Control and Prevention. *Evidence-Based Strategies for Preventing Opioid Overdose: What's Working in the United States*. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, 2018 (available at www. cdc.gov/drugoverdose/pdf/pubs/2018-evidence-based-strategies.pdf).

Consumption Rooms are predicated on "participants" possessing illegal drugs and Safehouse making its facility available for the use of illegal drugs – two things the CSA expressly forbids. In any event, *Oregon* has no application here. *Oregon* addressed whether the U.S. Attorney General could unilaterally prohibit doctors in Oregon from prescribing drugs to assist in suicide by taking the position that assisting suicide is not a "legitimate medical practice" within the meaning of 21 C.F.R. § 1306.04, which governs the prescription of drugs. *Oregon*, 546 U.S. at 254-55. Safehouse's proposed prescribing and/or dispensing are not at issue; its proposed operation of a Consumption Room is. That falls outside the prescribing conduct authorized in 21 C.F.R. § 1306.04, and which § 856 explicitly prohibits.

3. The Phrase "illegal…use": § 856(a)(2) Squarely Applies to Safehouse Because People Would Use Illegal Drugs in Its Consumption Rooms.

Safehouse next contends that § 856(a)(2) is ambiguous and should not apply to its proposed Consumption Rooms because the CSA purportedly does not define the phrase "unlawfully … using a controlled substance." (ECF No. 3 at ¶¶ 95-96). More specifically, Safehouse argues that the terms "unlawfully … using," when read together, render § 856 ambiguous because the CSA does not expressly criminalize drug "use." *Id.* Safehouse concludes that § 856(a)(2) therefore does not "plainly encompass" Safehouse's proposed activity. *Id*.

Safehouse's argument is irreconcilable with fundamental tenets of statutory construction and basic common sense. Section 856(a)(2) unambiguously provides that the consumption of illegal drugs by others is among the illicit drug activities that a property owner cannot knowingly allow on his or her property. *See Tebeau*, 713 F.3d at 961 ("[O]pen and obvious drug use is precisely the conduct prohibited by § 856(a)(2)'s plain language."). Safehouse fails to provide any alternative interpretation that would provide meaning to all parts of § 856(a)(2); indeed, there is no other reasonable interpretation.

Section 856(a)(2) provides that a person cannot "manage or control any place … and make available for use, with or without compensation, the place for the purpose of unlawfully … using a controlled substance." While the CSA does not specifically criminalize the act of "using" a controlled substance, it criminalizes a necessary predicate to use – possession – and extensively contemplates the distinction between lawful and unlawful use. In passing the CSA, Congress found that many controlled substances "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," but that "[t]he illegal importation, manufacture, distribution, and possession *and improper use* of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(1)-(2) (emphasis added).

The CSA provides for the lawful use of controlled substances with a valid prescription to an "ultimate user." *See id*. § 829 ("Prescriptions"). The CSA defines an "ultimate user" as "a person who *has lawfully obtained*, and who possesses, a controlled substance for his own use or for the use of a member of his household[.]" *Id*. § 802(27) (emphasis added). For example, a terminal cancer patient under the care of a doctor may lawfully use a controlled substance like fentanyl with a valid prescription. By contrast, simple possession of a controlled substance is illegal "unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II." *Id*. § 844. Congress thus criminalized possession of illegally obtained controlled substances intended for personal use. *See United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008) ("Simple possession, in violation of 21 U.S.C. § 844, refers to possession for one's own use[.]") (internal quotation omitted). This made criminalizing illicit use unnecessary, because a user must first possess the illicit drug.

The Court must give effect to all parts of § 856(a)(2). *See Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004). Section 856(a)(2) refers to "unlawfully … using a controlled substance" to distinguish the prohibited conduct, set forth in Part D of Subchapter I of the CSA, from the lawful uses of controlled substances contemplated by Part C. Otherwise § 856(a)(2) could apply to hospitals, nursing homes, and other properties where people legally use controlled substances. Safehouse offers no alternative interpretation, much less a plausible interpretation, that would exclude Consumption Rooms from the CSA's prohibitions.[9]

C. None of Safehouse's Affirmative Defenses Has Merit

1. Contrary to Safehouse's Contention, "Medical Necessity" Does Not Excuse a Violation of the CSA.

Safehouse raises as an affirmative defense that its "proposed conduct is justified by medical necessity to avoid imminent serious bodily injury and death." (ECF No. 3, Affirmative Defense No. 2). The Supreme Court has already rejected this proposition in *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

In *Oakland Cannabis Buyers' Cooperative*, California voters approved a measure permitting the possession and cultivation of marijuana for medical use. The Oakland Cannabis Buyers' Cooperative was a nonprofit organization with a physician serving as its medical

[9] The Court should reject Safehouse's invocation of the rule of lenity because "[t]his case involves no ambiguity for the rule of lenity to resolve." *Gozlon-Peretz v. United States*, 498 U.S. 395, 410 (1991). Under the rule of lenity, "when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant." *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992). The rule "requires more than a difficult interpretive question." *United States v. Flemming*, 617 F.3d 252, 270 (3d Cir. 2010). It applies only "if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 64-65 (1995) (internal quotations omitted) (holding that even differing judicial interpretations of a statute is insufficient to invoke the rule of lenity); *see also Huddleston v. United States,* 415 U.S. 814, 831 (1974) (the rule of lenity does not apply without a "grievous ambiguity"). Indeed, the rule only "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz,* 498 U.S. at 410 (internal quotation omitted). As set forth above, § 856(a)(2) is not ambiguous at all, and certainly not so grievously ambiguous that the rule of lenity could apply.

director and with a staff of registered nurses. The United States sued to enjoin the Cooperative's operation. The Cooperative argued its members would suffer severe pain without the cannabis the Cooperative could medically provide. *United States v. Cannabis Cultivator Club*, 5 F. Supp. 2d 1086, 1101 (N.D. Cal. 1998). Like Safehouse, the Cooperative contended that, in violating federal law, it was choosing the lesser of two evils for the benefit of its members. It argued that § 841(a)(1), which prohibits the manufacture, distribution, dispensing, or possession of a controlled substance, was subject to an implied medical necessity exemption.

The Supreme Court expressly rejected a medical necessity exception to the CSA. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 490. The Court held that, because Congress classified marijuana as a Schedule I drug, the CSA reflects a determination that marijuana has no benefits warranting a medical exception. *Id.* ("[W]e need only recognize that a medical necessity exception for marijuana is at odds with the terms of the [CSA].") The Court also declared that "whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial interference." *Id.* (internal quotation omitted).

Here, at the outset, Safehouse's argument is even less compelling than the Cooperative's because there is no state legislation supporting Safehouse's proposal. Additionally, the CSA contains no medical exception for heroin – a Schedule I drug – that would allow Safehouse's staff to "medically supervise" its injection. As Safehouse acknowledges and Congress has found, heroin has a high potential for abuse. It has no currently accepted medical use, and is not safe even under medical supervision. 21 U.S.C. § 812(b)(1)(B), (C). Safehouse's claimed medical necessity exception is an issue for legislative judgment, not judicial interference. Thus, the only lawful mechanism for Safehouse to pursue its goals is to petition Congress to amend the CSA.

2. Safehouse's Affirmative Defense that the CSA is Unconstitutional as Applied is Foreclosed by *Gonzales v. Raich*.

Equally flawed is Safehouse's contention that § 856 of the CSA is unconstitutional as applied to it because it intends to "produce no revenue" and to operate an "entirely local" "facility" that will not, for example, sell or manufacture unlawful drugs. (ECF No. 3 at ¶ 112).[10] The Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), squarely rejected a similar Commerce Clause challenge to the application of the CSA to individuals who grew or obtained marijuana at no cost for alleged "medicinal purposes." *Id.* at 5. The Supreme Court explained that its prior "case law firmly establishe[d] Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce." *Id.* at 17; *see also Delaware Cty., Pa. v. Fed. Hous. Fin. Agency*, 747 F.3d 215, 226 (3d Cir. 2014) (same).

"[A] primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets." *Raich*, 545 U.S. at 19. "[W]hen it enacted comprehensive legislation to regulate the interstate market in a fungible commodity [such as marijuana, heroin, and other Schedule I drugs], Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States[.]'" *Id.* at 22 (quoting U.S. Const. Art. I, § 8)). That the CSA may "ensnare[]some purely intrastate activity is of no moment." *Id.* As the Supreme Court explained, "the CSA is a statute that directly regulates economic, commercial activity," and Congress permissibly chose to include "intrastate, noncommercial cultivation, possession and use of marijuana" within the CSA's prohibitions. *Id.* at 26.

[10] To the extent that Safehouse is also challenging § 856(a)(2)'s facial constitutionality (*see* ECF No. 45, Affirmative Defense No. 4), the government reserves its right to address such a challenge in its reply brief.

The *Raich* holding applies squarely here. As the Supreme Court explained, "the activities regulated by the CSA are quintessentially economic"; "[t]he CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id*. at 25-26. No CSA provision creates an exemption from the CSA's categorical prohibition against maintaining or controlling drug-involved premises where, as here, the facility will be used by individuals who will possess or use Schedule I drugs such as heroin or other illegal drugs at the facility. As in *Raich*, the absence of such an exemption is not "of doubtful constitutionality," as Safehouse suggests. (*See* ECF No. 3 at ¶ 115). To the contrary, based on Congress' detailed findings regarding the flow of Schedule I drugs in the interstate market, "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial." *Raich*, 545 U.S. at 32.

For example, when Congress enacted the CSA, it expressly found that "[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce," and that even "[i]ncidents of the traffic [in controlled substances] which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and *possession*, nonetheless have a substantial and direct effect upon interstate commerce." 21 U.S.C. § 801(3)(A) (emphasis added). That is because "controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution and controlled substances normally flow through interstate commerce prior to such possession." *Id.* § 801(3)(B), (C); *see also id.* § 801(4) ("Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances."). These findings foreclose Safehouse's assertion that Congress intended to exempt from § 856's scope its proposed Consumption Rooms. As Congress

expressly found, even purely "local" use and possession of controlled substances have a substantial impact on interstate commerce as evidenced by the fact that these drugs typically have moved through the interstate market before ending up in the hands of the individuals for whom Safehouse seeks to provide a Consumption Room. *See id.*; *see also Raich*, 545 U.S. at 32.

Nor do principles of federalism support Safehouse's claim that this Court should invalidate § 856 of the CSA. (*See* ECF No. 3 at ¶¶ 107-10) (alleging that the government's interpretation of § 856 wrongly creates "a general police power" and that the regulation of health and safety is generally left to the States). No provision of Pennsylvania law permits Safehouse to maintain or control its premises in a manner that directly conflicts with the prohibitions in § 856. Even if such a law existed, it could not "serve to place [Safehouse's] activities beyond congressional reach." *Raich*, 545 U.S. at 29. Indeed, "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Id.* (internal citation omitted).

3. Safehouse's Claim that the Religious Freedom Restoration Act Protects Its Religious Expression Fails as a Matter of Law.

Finally, Safehouse asserts that maintaining a place for the supervised consumption of illegal drugs "is an exercise of the religious beliefs of its Board of Directors, who hold as core tenets preserving life, providing shelter to neighbors, and ministering to those most in need of physical and spiritual care." (*See* ECF No. 3, Preliminary Statement at 3). While Safehouse does not contend that its founders' faiths explicitly direct them to operate Consumption Rooms, it contends that "the provision of overdose prevention service *effectuates* their religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the

sick." (*Id.* at 40, ¶ 128) (emphasis added). Safehouse[11] therefore seeks a declaration that any prohibition on its operation of a supervised Consumption Room would violate the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA").

RFRA prevents the federal government from "substantially burden[ing] a person's exercise of religion" unless the government "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* § 2000bb-1(a), (b). To invoke RFRA in the first place, however, a claimant must make out a *prima facie* case that (1) it possesses a sincerely held belief that (2) is religious in nature, and (3) application of the challenged law would substantially burden the litigant's religious belief. *See United States v. Stimler*, 864 F.3d 253, 267-68 (3d Cir. 2017), *vacated on other grounds by United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018).

Defendants assert that § 856's application to Safehouse violates RFRA inasmuch as it "burdens Safehouse by forcing it to choose between the exercise of its founders' and directors' religious beliefs" and conformity with the law. (ECF No. 3 at ¶ 129). Safehouse's RFRA claim fails as a matter of law. Safehouse cannot show that application of § 856(a) is a substantial burden upon its religious exercise because its founders and board members have multiple legal alternatives for effectuating their religious beliefs. (*See, e.g.*, ECF No. 3 at ¶ 33). Furthermore, even accepting all well-pleaded allegations in Defendants' counterclaim as true, Safehouse

[11] For the limited purposes of this Rule 12 motion, the government does not contest that Safehouse is an entity that can engage in religious exercise, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), or that Safehouse has standing to assert the religious free exercise rights of its board members, *see Curto v. A Country Place Condo. Ass'n*, 921 F.3d 405, 410 n.2 (3d. Cir. 2019) (stating a condo association lacked associational standing to assert the religious free exercise rights of its Orthodox Jewish members where the association did not have a religious purpose). The government reserves its right to raise such arguments in the future.

continually asserts that its true motivation is socio-political or philosophical – not religious – and thus not protected by RFRA.

a. Application of § 856(a) to Safehouse Does Not Substantially Burden Defendants' Claimed Religious Beliefs.

Whether the government has imposed a "substantial burden" under RFRA is a legal conclusion, not an issue of fact. *Geneva College v. Sec'y U.S. HHS*, 778 F.3d 422, 436 (3d Cir. 2015); *see also Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) ("[C]ourts – not plaintiffs – must determine if a law or policy substantially burdens religious exercise."); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (not "accepting as true" the legal conclusion regarding substantial burden in reviewing a district court's dismissal of a RFRA claim). A court must not accept every allegation of substantial burden without question. *Real Alternatives, Inc. v. Sec'y of HHS*, 867 F.3d 338, 357 (3d Cir. 2017). "To the contrary, RFRA's demand for judicial review has been recognized by the Supreme Court, [the Third Circuit] in *Geneva*, and by virtually all of our sister circuits, which have not hesitated to examine whether an alleged burden is sufficiently 'substantial' under RFRA." *Id*. at 357.

Government action does not constitute a substantial burden if it "does not coerce the individuals to violate their religious beliefs or deny them the 'rights, benefits, and privileges enjoyed by other citizens.'" *Geneva*, 778 F.3d at 442 (quoting *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)). Rather, a substantial burden only exists if: "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the Government puts substantial pressure on an adherent to

substantially modify his behavior and to violate his beliefs." *Real Alternatives*, 867 F.3d at 356 (quoting *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016)).

In enforcing the CSA, the government is not coercing Safehouse, its founders, or board members to act. There is no affirmative obligation on Safehouse to act at all, or to act in a way that violates its religious beliefs. *See Lyng*, 485 U.S. at 450-51. *Cf. Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995) (no substantial burden where plaintiffs were neither compelled to engage in conduct proscribed by their religious beliefs nor forced to abstain from any action which their religion mandates that they take). The government is also not preventing Safehouse from engaging in activity in which others may engage. There is no generally available right to possess illegal drugs or to provide a forum for using them. This prohibition applies to everyone with equal force – regardless of religion.

The government also is not pressuring Safehouse to modify its behavior or cease a religious exercise. Safehouse does not contend that its founders or board members have or are maintaining a place for the supervised use of illegal drugs. Instead, Defendants assert their wish to do so. However, in the absence of active religious exercise or a history of practice, Safehouse cannot assert that the government is forcing it to modify its behavior. Rather, the government is asking Safehouse to maintain the *status quo* and refrain from embarking on a path of illegality without legislative action authorizing it to do so. The government asks Safehouse only to obey the law by refraining from maintaining a place for the illegal use of deadly drugs. "A government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from . . . acting in a way that is not otherwise generally allowed." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004); *cf. Washington v. Klem*, 497 F.3d 272, 279 (3d Cir. 2007); *Smith v. Kyler*, 295 F. App'x 479, 483 (3d Cir. 2008)

(noting that the plaintiff had not been denied a benefit because of his religious beliefs or forced to modify his behavior).

Even if this Court accepts Safehouse's contention that it seeks to begin a new religious exercise, without history or precedent, and that enforcement of the CSA burdens its ability to do so, this Court can rule as a matter of law that there is no substantial burden here. Enforcement of § 856 of the CSA does not require Safehouse to abandon its founders' core tenants of preserving life, providing shelter to neighbors, and helping the sick. At most, it restricts "one of a multitude of means," which does not constitute a substantial burden. *Henderson v. Kennedy*, 253 F.3d 12, 15 (D.C. Cir. 2001).

In determining whether any asserted burden is substantial, this Court can consider whether Safehouse's founders and board members have acceptable alternative legal means to practice their religion that do not involve violating the CSA. *See Stimler*, 864 F.3d at 268. *See Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden in Act restricting access to abortion clinics where plaintiffs did not allege that their religion required them to physically obstruct clinic areas and the plaintiffs otherwise had "ample avenues open" by which they could express their deeply held beliefs); *Planned Parenthood Ass'n v. Walton*, 949 F. Supp. 290, 296 (E.D. Pa. 1996) (same); *Mahoney v. Doe*, 642 F.3d 1112, 1120-21 (D.C. Cir. 2011) (no RFRA violation for plaintiff barred from chalking the sidewalk in front of the White House

where plaintiff did not claim that chalk art was the exclusive medium through which he could express his religious views).[12]

In *Stimler*, the Third Circuit affirmed the district court's denial of a motion to dismiss a criminal indictment under RFRA. The defendants were three Orthodox Jewish rabbis who were charged with various kidnapping-related offenses in connection with their religiously inspired attempts to forcibly help Orthodox Jewish women obtain divorces from their recalcitrant husbands. *Stimler*, 864 F.3d at 259. In weighing whether the criminal prosecution imposed a substantial burden, the district court considered that when a husband refuses to consent to divorce, it is considered a religious commandment or a "mitzvah" in Orthodox Judaism to assist a woman in obtaining consent, and that Jewish law authorizes "certain forms of force" in providing such assistance. *United States v. Epstein*, 91 F. Supp. 3d 573, 580 (D.N.J. 2015).

While the district court accepted that helping a woman to obtain a religious divorce was authorized by Jewish law and therefore part of the defendants' legitimate religious exercise, it held that "there is also no dispute that there are alternative means of coercion to perform this mitzvah," including secular legal methods. *Id.* at 582. The court held that "[t]hese alternative and meaningful means . . . do not violate the criminal laws of the United States, yet still permit Orthodox Jews to participate in the mitzvah[.]" *Id.* at 582. Because "acceptable alternative means of religious practice . . . remained available to the defendants," the Third Circuit affirmed the

[12] *See also Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813-14 (8th Cir. 2008) (BOP's refusal to provide halal meat meals did not constitute a substantial burden on inmate's religion where inmate had not "exhausted alternative means of accommodating his religious dietary needs"); *Watkins v. Shabazz*, 180 F. App'x 773, 775 (9th Cir. 2006) (not precedential) (no substantial burden because defendants gave the inmate two alternatives – eating the nutritionally adequate meat-substitute meals or finding an outside organization to provide halal meat); *cf. Cash v. IRS*, 2019 U.S. Dist. LEXIS 11603, at *26 (M.D. Pa. 2019) (individual mandate of Affordable Care Act did not put substantial pressure on an individual to modify his behavior and violate his religious beliefs where he had the option to make a shared responsibility payment in lieu of obtaining health insurance); *Allah v. Stachelek*, 1998 U.S. Dist. LEXIS 7972, at *42 (E.D. Pa. May 29, 1998) (no RFRA violation where plaintiffs had alternatives available to comply with their religious beliefs).

district court's determination that indictment for kidnapping did not substantially burden the defendant's religious exercise. *Stimler*, 864 F.3d at 268, *affirming Epstein*, 91 F. Supp. 3d 573.

Similarly, in *Henderson v. Kennedy*, the D.C. Circuit considered a RFRA claim by claimants challenging a ban on t-shirt sales on the National Mall, who contended they were Christians obligated to preach the gospel "to the whole world . . . by all available means," including offering religious t-shirts for sale. 253 F.3d 12, 15 (D.C. Cir. 2001). The D.C. Circuit held the claimants could not show a substantial burden because they could not claim that a ban on certain commercial activity on the Mall either forced them to engage in conduct forbidden by their religion or prevented them from engaging in conduct their religion required. *See id.* Furthermore, the claimants' broad religious conviction that they must spread the gospel by "all available means" was not substantially burdened by a restriction on the sales of t-shirts because claimants had other means to satisfy their religious requirement, including distributing t-shirts for free or selling them in surrounding areas. *Id.* at 17.

Like the RFRA claimants in *Stimler* and *Henderson*, Safehouse, too, has multiple legal ways in which its founders and board members may satisfy their religious beliefs that they must shelter their neighbors, administer to the sick, and work to save lives. In fact, Safehouse's Complaint details multiple beneficial ways in which its organizers plan to work to ease the toll of the opioid crisis. Safehouse contends it plans to assess an individual's physical and behavioral health status, provide sterile drug consumption equipment, offer overdose reversal, wound care, and primary care services, on-site education and counseling, on-site medication-assisted treatment and recovery counseling, distribution of Naloxone, and access to social services such as housing, public benefits, and legal services. (ECF No. 3 at ¶ 33).

Assuming compliance with applicable statutory and regulatory requirements, *e.g.,* 21 U.S.C. §§ 822, 823(g) and 21 C.F.R. § 1301.12, none of these measures runs afoul of the CSA, and all align with Safehouse's asserted religious beliefs. The government does not seek to block those lawful activities. Accordingly, Safehouse's founders and board members remain able to follow the precepts of their religion through methods other than maintaining a place for the use of illegal drugs. Given the myriad ways in which Safehouse and its organizers can act to help people with opioid use disorder within the bounds of the law, Safehouse cannot show that the exercise of its asserted religious beliefs is substantially burdened by enforcement of the CSA's prohibition on maintaining a place for the illegal use of drugs.

Because Safehouse cannot show a substantial burden on its religious practice, this Court should hold that Safehouse has failed to make out a *prima facie* RFRA defense. *See Stimler*, 864 F.3d 253 at 268; *Cheffer*, 55 F.3d at 1522-23 (where no substantial burden on religious practice existed, the Court need not reach whether the challenged Act was the least restrictive means to further a compelling state interest). *See also Adams v. Comm'r*, 170 F.3d 173, 176 (3d Cir. 1999) (before the government must prove that enforcement of a law is the least restrictive means of advancing a compelling state interest, a plaintiff first must "demonstrate a substantial burden on [its] exercise of [its] religious beliefs"). The Court should therefore hold as a matter of law that applying § 856(a) to Safehouse does not violate RFRA.

b. Safehouse Admits that It Seeks to Engage in Activity that is Motivated by Socio-Political or Philosophical Reasons, Not Religious Ones.

Safehouse's failure to establish a substantial burden on religious exercise means this Court need go no further in evaluating Defendants' RFRA claim, which fails as a matter of law. Additionally, however, repeated allegations in Safehouse's pleading reveal that Defendants

cannot meet the second element of a *prima facie* RFRA claim—that their asserted belief is religious in nature. *See Stimler*, 864 F.3d at 267-268. Safehouse generally alleges that its founders have sincere religious beliefs regarding providing aid to those in need. However, Safehouse's specific allegations fail to show that these beliefs are in fact what animates its declared intention to operate an injection site. When Safehouse discusses its intention to operate an injection site, it explains that its plans are actually motivated by its view of the opioid crisis and the views of parts of the medical community. These beliefs are socio-political, medical, or moral – not religious.

While courts may not question the *bona fides* of an asserted belief, Third Circuit and Supreme Court precedent permits courts to identify with particularity the belief motivating the adherent's activity and assess whether it is religious or secular in nature. *See Sutton v. Rasheed*, 323 F.3d 236, 251-52 (3d Cir. 2003) (evaluating whether a proffered viewpoint was religious or secular in nature); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (in a case under Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), inquiry into the truth of an asserted belief is impermissible, but not inquiry into the religiosity of a belief). "An individual's assertion that the belief he holds [is religious] does not . . . automatically mean the belief is religious."*Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 51 (2d Cir. 1988) (conducting threshold inquiry into whether belief is religious or based on secular or scientific principles).[13] *Cf. Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 430 (E.D.N.Y. 2010) (construing the applicability of a New York state law exemption to vaccination, and finding that plaintiff's "reluctance to have her daughter vaccinated did not arise from a religious belief, but from a personal, moral, or cultural feeling against vaccination*"*); *Check v. N.Y.C. Dep't of Educ.*,

[13] *But see Wiggins v. Sargent*, 753 F.2d 663, 666-67 (8th Cir. 1985) (belief that is both religious and secular can qualify for Constitutional protection); *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981).

2013 U.S. Dist. LEXIS 71124, at *22 (E.D.N.Y. 2013) (denying claim for religious exemption to vaccine requirement brought by Catholic plaintiff, given plaintiff's "extensive testimony" regarding her perception that vaccines are dangerous).

Not all sincerely held beliefs are religious in nature and therefore eligible for Constitutional protection. *See Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *see also United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). Secular activity inspired by an individual moral imperative or a philosophical disagreement with the law is not protected. *See Real Alternatives*, 867 F.3d at 350 (stating this country has a "vast history of legislative protections that single out and safeguard religious freedom but not moral philosophy.") The government does not challenge the sincerity of Defendants' asserted religious belief in the value of human life, which Safehouse contends arises from the teachings and scriptures of Christianity and Judaism and its founders' and board members' religious upbringings. (*See* ECF No. 3 at ¶ 126). But, where Safehouse seeks to open a Consumption Room because of its nonreligious beliefs concerning the current state of opioid abuse in Philadelphia – as it repeatedly states throughout its pleading – it asserts a moral philosophy. The Court can therefore identify with particularity the beliefs actually motivating Safehouse's plans to operate a supervised injection site, and determine whether they are religious. *See Yoder*, 406 U.S. at 216 (noting that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief," rather than being "based on purely secular considerations").

Defendants' Answer and Counterclaim is replete with allegations demonstrating that the driving rationale for Safehouse's proposal to maintain a site for the supervised use of drugs is socio-political, medical, and philosophical. Safehouse contends that it seeks to engage in "harm reduction," with the purpose of "reduc[ing] harm for individuals 'who, for whatever reason, may

not be ready, willing, or able to pursue full abstinence as a goal.'" (ECF No. 3 at ¶ 31). Safehouse categorizes its proposed action as a "modest extension of already-endorsed harm reduction measures" and states that supervised injection has been endorsed by authorities in the medical community. (*Id.* at ¶¶ 65, 88). Safehouse contends that "compassionate and conscientious medical providers"[14] should be permitted to operate a location for the medically supervised use of drugs, and that this is supported by "medical facts recognized by Congress, the CDC, and federal health policy." (*Id.* at ¶¶ 63-64).

In these examples and throughout its counterclaim, Safehouse repeatedly asserts a socio-political belief that its board members and founders are justified in ignoring the CSA because of a philosophical disagreement with its scope. Defendants seek to open a Consumption Room based on their view of medical practice and appropriate public health treatment. This is an individual, medical, and public health-based judgment, not a religious belief. *See Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 492 (3d Cir. 2017).

In *Fallon*, the Third Circuit considered, in the context of a Title VII suit, whether an individual established a sincere religious belief in opposing a vaccination requirement imposed by his employer. *See* 877 F.3d at 490. Under Third Circuit precedent, to evaluate the religiosity of a belief, the Court determined whether the plaintiff's beliefs "'address[] fundamental and ultimate questions having to do with deep and imponderable matters,' are 'comprehensive in nature,' and are accompanied by 'certain formal and external signs.'" *Id.* at 491 (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981)); *see also id.* n.18 (noting the *Africa* court's standard has "met with considerable agreement"). The plaintiff asserted that his beliefs, which

[14] Safehouse makes no claim regarding the religious beliefs of the medical providers who would staff its proposed Consumption Rooms.

were partially inspired by Buddhism—though he did not contend he was Buddhist—counseled him not to harm his own body, and to make his own decision regarding whether a flu shot would harm him. He argued that consenting to be inoculated against the flu would violate his strongly held beliefs that the vaccination would do him more harm than good. *See id.* at 492.

In rejecting the argument that this belief qualified as religious, the Third Circuit explained that the plaintiff had applied "one general moral commandment (which might be paraphrased as, 'Do not harm your own body') to come to the conclusion that the flu vaccine is morally wrong." The Court held this moral commandment was an "isolated moral teaching," not a comprehensive system of beliefs about fundamental or ultimate matters warranting Constitutional protection. *Id.* (citing *Africa*, 662 F.2d at 1032). The Court also held that the plaintiff's underlying belief that the flu vaccine may do more harm than good was a medical belief, not a religious one. *Id.*

Similarly, Safehouse has emphasized, throughout its pleading, its judgment that supervised injection sites do more good than harm, based on medical, socio-political, and moral beliefs. The basis of defendants' claims – that Safehouse will reduce the harm of the opioid crisis and therefore justify acting in contravention of the law – reveals that defendants have made personal, philosophical judgments based on their understanding of the current medical, social, and political climate. The allegations in Safehouse's pleading show the socio-political and moral rationale behind its plan to open a Consumption Room. Defendants' admissions in this regard should guide this Court's determination about the secular nature of their proposal. RFRA does not protect such beliefs.

And as a practical matter, RFRA simply cannot protect such beliefs. If supposed "harm reduction" were enough to trigger RFRA protection, there would be no end to the possible RFRA challenges that well-meaning but ill-advised claimants could conjure based on their moral beliefs. What of, for example, the bank robber who claims that he steals from the rich to give to the poor in order to "reduce harm" to the underprivileged community or even to "save lives"? Or, what of the embezzler who does the same? What if, in another step toward contemplated "harm reduction," Safehouse proposed to distribute clean heroin to drug users to reduce the harm of fentanyl contamination, or the dangers of buying from drug dealers? Should courts entertain RFRA challenges arising from individual philosophical views of justice or "harm reduction"? Of course not. This is a nation of laws, and Safehouse's asserted RFRA claim that it can violate these laws to "reduce harm" consistent with its philosophical mission must fail.

Finally, even if Safehouse were to show that maintaining a drug-involved premises is a religious exercise by its founders or board members, it does not argue, and lacks standing to argue, that the illegal use of drugs *by others* is part of Safehouse's founders' or board members' religious beliefs. Possession of illegal drugs is still prohibited under federal law. See 21 U.S.C. § 844(a). Under § 844(a), it is illegal to possess fentanyl without a valid prescription or order issued by a licensed practitioner and it is always illegal to possess heroin. Where the underlying activity Safehouse seeks to invite remains illegal, Safehouse's RFRA argument fails as a practical matter. In other words, even if this Court were to recognize an exception to § 856(a) for Safehouse, the activity Safehouse invites to occur within a place it would control and maintain is still illegal, penalized through fines or a term of imprisonment, and subject to federal enforcement. *See* § 844(a).

In short, Defendants present a sincerely held belief that affording a safe injection site for unlawful users of heroin, fentanyl, and other opioids would do more good than harm. This conclusion is not religious, but instead is a judgment based on social and medical practice. Most importantly, Defendants' conclusion runs afoul of a flatly contradictory Congressional determination, *i.e.*, that it is unlawful to provide a site for the illegal use of controlled substances, and that the use of heroin in particular serves no medical purpose. Defendants may not violate this law. Instead, they should seek recourse, if any, through the ordinary political and legislative process – not in the courts.

III. CONCLUSION

For the foregoing reasons, the United States requests that its motion for judgment on the pleadings be granted, and that this Court enter a judgment in its favor and against Defendant/Counterclaim Plaintiffs Safehouse and Jose A. Benitez.

Dated: June 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a true and correct copy of the foregoing Motion for Judgment on the Pleadings, which was filed electronically and is available for viewing and download from the court's CM/ECF system, to be served upon all counsel of record.

GREGORY B. DAVID
Assistant United States Attorney
Chief, Civil Division

Dated: June 11, 2019

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 DEPARTMENT OF JUSTICE'S MOTION FOR JUDGMENT ON THE PLEADINGS

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MISCELLANEOUS

Defendants Safehouse and Jose Benitez (collectively, "Safehouse") respectfully submit this brief in opposition to the motion for judgment on the pleadings 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 (collectively, "the DOJ"). *See* DOJ Mot. for J. on Pleadings, ECF No. 47 ("DOJ Mot."). This Court should deny the DOJ's motion because 21 U.S.C. § 856 does not—and cannot—prohibit Safehouse from providing lifesaving, overdose prevention services in the City of Philadelphia.

OVERVIEW

Safehouse and the DOJ agree that the opioid crisis "has reached epidemic proportions and caused an intolerable number of deaths and misery throughout the United States." DOJ Mot. 2. But according to the DOJ's motion for judgment on the pleadings, the fact that Safehouse will save lives, reduce public drug consumption, slow the spread of infectious disease, facilitate pathways to treatment and recovery, and provide lifesaving care for our most vulnerable neighbors as an exercise of religious and moral conscience is less important than the "rule of law." *Id.* at 2, 12. Under a correct interpretation of the applicable law, these facts do matter. The Controlled Substances Act ("CSA"), including 21 U.S.C. § 856, does not prohibit Safehouse from establishing a medical facility for the purpose of providing critical, lifesaving care at the time of drug consumption, when the risk of overdose death is most acute.

The DOJ's interpretation of Section 856 is not supported by the statutory text, purpose, or history, and is inconsistent with federal law and policy that endorse the harm-reduction strategies developed to mitigate the nation's opioid and overdose crisis. Taking the facts of Safehouse's counterclaims as true (facts that Safehouse will readily prove at an evidentiary hearing), Section

856 does not criminalize Safehouse's overdose prevention and medically supervised consumption services. To the contrary, Safehouse will advance, not violate, federal law and policy. The "rule of law" includes the constitutional system of federalism and the provisions of Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*., both of which preclude the DOJ's efforts to prevent Safehouse from saving lives. Accordingly, this Court should deny the DOJ's motion for judgment on the pleadings and schedule an evidentiary hearing at which Safehouse will prove the essential facts that establish the legality of its overdose prevention site under Section 856.

I. Section 856's plain text, statutory purpose, and legislative history establish that it *does not apply* to Safehouse. As relevant here, Section 856 makes it unlawful to "knowingly open, lease, rent, use, or maintain" or to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. §§ 856(a)(1), (2). Section 856 does not prohibit Safehouse from opening an overdose prevention site because: (A) Safehouse will operate a medical facility "for the purpose of" saving lives, not "for the purpose" of unlawful drug use; (B) Safehouse will operate its medically supervised consumption site in the course of legitimate medical practice and therefore its operation is "authorized by" the CSA, and the site is consistent with federal law and policy endorsing harm-reduction strategies to mitigate the opioid crisis; and (C) the CSA does not define "unlawful[]. . . us[e]," further casting doubt on Section 856's application to Safehouse's public-health approach to overdose prevention. To the extent that any doubt remains that Section 856 applies to Safehouse, moreover, the rule of lenity and clear statement rule require interpreting the provision in Safehouse's favor.

A. Section 856's plain text makes clear that an essential statutory element of that offense is that the property is maintained, opened, or made available "for the purpose" of unlawful drug activity. Safehouse's medically supervised consumption facility will not be a place made available "for the purpose of unlawfully . . . using a controlled substance." 21 U.S.C. § 856(a)(2).

The DOJ does not dispute that Safehouse will operate its facility for the purpose of saving lives and providing medical care and drug treatment. Yet the DOJ incorrectly contends that the purpose of Safehouse's facility does not matter. The DOJ asserts that Section 856 "makes it unlawful to manage any place where people use [illegal] drugs," and therefore contends that the only "'purpose' that matters" is that of Safehouse participants, not the purpose of the Safehouse facility.

The DOJ's broad reading of Section 856(a)(2) is contrary to the statute's syntax and is not supported by the cases on which the DOJ relies. The DOJ's argument misconstrues Section 856's purpose requirement, which requires the *property* to be maintained for an unlawful purpose. The DOJ further conflates the potential criminal liability of drug users (who may come to Safehouse in possession of small quantities of drugs), with the entirely legal, and indeed vital medical services proposed by Safehouse and its staff. Section 856 does not apply to Safehouse because the purpose of its facility will be to provide lifesaving medical care, not to promote unlawful drug use.

B. Section 856 does not apply to activities "authorized by" the CSA. *See* 21 U.S.C. § 856 (providing the statute applies "[e]xcept as authorized by this subchapter"). Safehouse is "authorized by" the CSA because its medically supervised consumption services will be conducted in the course of legitimate medical practice, which the CSA does not regulate or prohibit. Safehouse's harm-reduction strategies are consistent with federal law and policy, which promote access to clean and sterile equipment for drug consumption, proximity and availability of opioid

reversal agents like Naloxone, and medical care for drug users to prevent infection and transmission of disease.

The DOJ disregards the U.S. Supreme Court's determination that the CSA is not designed to regulate legitimate medical practice. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996))).

The CSA affords registered medical practitioners wide discretion to use reasonable clinical judgment in the regulated practice of prescribing, administering, or distributing controlled substances. Section 856 therefore should not be interpreted to override medical and public-health judgment about how and where medical staff will offer opioid *reversal* agents and other urgent and primary care for individuals suffering from opioid and substance use disorder—medical interventions that the CSA does not regulate.

To the extent that the DOJ disagrees that Safehouse's overdose prevention model is consistent with legitimate medical practice, that is a question of fact. Safehouse has pleaded and will prove that supervised consumption sites are a medically accepted means of preventing overdose deaths, borne out by years of public-health and clinical data and the basic, indisputable pharmacologic mechanism of opioid overdose and overdose reversal. Safehouse will establish that its medical supervision model—which allows medical practitioners to supervise and remain in close proximity to drug users at the time of consumption—guarantees timely access to lifesaving overdose reversal agents and potentially urgent medical care.

C. Section 856 does not define what constitutes "unlawfully . . . using" a controlled substance. Whereas manufacture, storage, distribution, and possession of controlled substances are all defined terms under the CSA, *see* 21 U.S.C. §§ 802, 841(a), 844, nowhere does the CSA define the circumstances under which "use" of controlled substances is prohibited. This omission is particularly troubling given that many opioids, including fentanyl, may be lawfully prescribed and distributed, and Safehouse will offer medical supervision and care without necessarily knowing the identity of the drugs used by its participants, or how they were obtained.

D. Section 856's statutory purpose and legislative history further undermine the DOJ's case. Safehouse's public-health approach to overdose prevention is plainly far removed from the conduct that Congress targeted when it enacted—and subsequently amended—Section 856, namely, "crack houses" and rave parties. The rule of lenity and the clear statement rule compel this Court to adopt Safehouse's proposed interpretation of Section 856.

II. The DOJ's threat to prosecute Safehouse is without merit because Section 856 cannot apply to Safehouse within the constitutional bounds of the Commerce Clause or in light of Safehouse's RFRA claim.

A. The DOJ's expansive interpretation of Section 856 to target Safehouse's overdose prevention site would exceed the constitutional limits on Congress's Commerce Clause authority, which does not permit Congress to adopt a freestanding regulation of purely local, non-commercial activity that has no direct and substantial effect on interstate commerce. Under the facts alleged in the pleadings, Safehouse's free medical and drug treatment services would not increase the interstate market for controlled substances. This Court may avoid the serious constitutional question and federalism concerns raised by the DOJ's broad interpretation of Section 856 by adopting the alternative construction urged by Safehouse.

B. RFRA precludes the DOJ's threatened prosecution of Safehouse. The DOJ's threatened prosecution of Safehouse substantially burdens Safehouse's sincerely held religious beliefs that call it to provide shelter and lifesaving care to individuals suffering from opioid and substance use disorder. The DOJ mischaracterizes Safehouse's claim of religious exercise by focusing on whether there is a religious "right to possess illegal drugs or to provide a forum for using them." DOJ Mot. 25. Safehouse's pleadings demonstrate that Safehouse and its board hold the sincere religious conviction that preservation of human life is paramount—a belief deeply rooted in both Jewish and Christian traditions. This is not a "philosophical disagreement" with the scope of the CSA, or a "half-hearted" assertion of religious faith, as the DOJ suggests. *Id.* at 2, 24. Rather, the facts alleged demonstrate that Safehouse's services will save lives, and Safehouse and its board sincerely believe that overdose prevention is an exercise of their religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick.

Safehouse's religious obligation to save lives is not diminished by its reliance on medical and public-health evidence, which demonstrate that an overdose prevention site is an effective way to achieve its goals. Faith-based social action does not ignore the agonies of the world; to the contrary, faith-based action may be informed by utilizing the best social, economic, and medical evidence. The DOJ's assertion that there are "myriad ways" to alternatively "ease the toll of the opioid crisis" (*id.* at 28–29) further ignores the facts as pleaded, which establish that existing harm-reduction measures have failed to prevent thousands of needless overdose deaths. Those facts rebut the DOJ's claim that forcing Safehouse to stand aside, while lives are lost, serves any legitimate, much less compelling government interest.

For these reasons, Safehouse respectfully requests that this Court deny the DOJ's motion for judgment on the pleadings.

BACKGROUND[1]

I. THE OPIOID EPIDEMIC IN THE CITY OF PHILADELPHIA

Philadelphia is in the midst of an unprecedented public-health emergency due to the opioid epidemic and the opioid overdose crisis. Counterclaims ¶ 17, ECF No. 3. Between 2011 and 2014, most opioid-related deaths in Philadelphia had been caused by heroin. *Id*. ¶ 20. In the last several years, however, Philadelphia has experienced a dramatic increase in the number of deaths related to fentanyl—a powerful and fast-acting opioid that was involved in 87% of the overdose deaths that occurred in Philadelphia in 2017.[2] *Id*., Prelim. Statement.

The widespread proliferation of fentanyl has exacted a devastating human toll. In the last two years, more than 2,300 individuals died because of an opioid overdose in Philadelphia.[3] *Id*. ¶ 18. Philadelphia's overdose fatality rate is nearly four times its homicide rate, with the City losing three of its citizens each day to opioid overdoses.[4] *Id*.

The influx of fentanyl has also wreaked havoc on Philadelphia's neighborhoods. On October 3, 2018, the Mayor of Philadelphia issued an Opioid Emergency Response Executive Order declaring that "Kensington and its surrounding neighborhoods are in the midst of a disaster"

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[1] This Court must accept the allegations in the pleadings and reasonable inferences therefrom as true for purposes of resolving its motion for judgment on the pleadings, as acknowledged by the DOJ. DOJ Mot. 4 n.3 (citing cases). As a result, the factual background is drawn from the allegations in DOJ's Amended Complaint, ECF No. 35, Safehouse's Answer to the DOJ's Amended Complaint, ECF No. 45, Safehouse's Counterclaims and Third-Party Complaint against the DOJ ("Counterclaims"), ECF Nos. 3, 45, and the DOJ's Answer to Safehouse's Counterclaims, ECF No. 46.

[2] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf.

[3] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf; City of Phila., *Combating the Opioid Epidemic*, https://www.phila.gov/programs/combating-the-opioid-epidemic/reports-and-data/opioid-misuse-and-overdose-data/ (last visited June 28, 2019); *see also* WHYY, *Fatal opioid overdoses expected to dip in Philly for first time in 5 years* (Dec. 24, 2018), https://whyy.org/articles/fatal-opioid-overdoses-expected-to-dip-in-philly-for-first-time-in-5-years/.

[4] City of Phila., Dep't of Pub. Health, *Philadelphia's Community Health Assessment: Health of the City 2018*, at 5, https://www.phila.gov/media/20181220135006/Health-of-the-City-2018.pdf (last visited June 28, 2019).

due to the opioid crisis, and empowering city agencies and officials to lead efforts to reduce opioid deaths and transmission of disease and to increase entry into drug treatment.[5] *Id.* ¶ 19.

To combat this growing crisis, the Mayor of Philadelphia also created the Task Force to Combat the Opioid Epidemic in Philadelphia (the "Task Force"). *Id.* ¶ 27. The Task Force issued a report recommending the implementation of overdose prevention services and expansion of treatment access and capacity.[6] *Id.*

As of 2016, more than 70,000 Philadelphians were active heroin users. *Id.* ¶¶ 20-21, 30. Multiple people die every day from an opioid overdose.[7] *Id.* ¶ 18. Philadelphia's Emergency Medical Services ("EMS") is inundated with calls to respond to overdoses. *Id.* ¶ 24. EMS response times are variable, and for 46 percent of calls in 2017, more than 9 minutes elapsed before EMS arrived at the scene.[8] *Id.* In 2017, Philadelphia's EMS personnel administered Naloxone—an overdose reversal agent—to more than 5,400 overdose victims.[9] *Id.* ¶ 25. This number increased in 2018. *Id.* Emergency rooms are not equipped to provide the wraparound services needed to

[5] City of Phila., Office of the Mayor, *Executive Order No. 3-18 – Opioid Emergency Response Executive Order* (Oct. 3, 2018), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/eo99318.pdf.

[6] *See* City of Phila., *The Mayor's Task Force To Combat The Opioid Epidemic in Philadelphia: Final Report and Recommendations* (May 19, 2017), https://dbhids.org/wp-content/uploads/2017/04/OTF_Report.pdf ("*Task Force Report*").

[7] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf; City of Phila., *Combating the Opioid Epidemic*, https://www.phila.gov/programs/combating-the-opioid-epidemic/reports-and-data/opioid-misuse-and-overdose-data/ (last visited June 28, 2019); *see also* WHYY, *Fatal opioid overdoses expected to dip in Philly for first time in 5 years* (Dec. 24, 2018), https://whyy.org/articles/fatal-opioid-overdoses-expected-to-dip-in-philly-for-first-time-in-5-years/.

[8] Adam Thiel, Fire Comm'r, *Philadelphia Fire Department Fiscal Year 2018 Budget Testimony*, at 6, http://phlcouncil.com/wp-content/uploads/2017/04/FY18-Fire-Budget-Testimony-final-version-4.12.17.pdf (last visited June 28, 2019).

[9] *See* City of Phila., Dep't of Pub. Health, *Opioid Misuse and Overdose Report* (Nov. 29, 2018), https://www.phila.gov/media/20181129123743/Substance-Abuse-Data-Report-11.29.18.pdf; City of Phila., *Combating the Opioid Epidemic*, https://www.phila.gov/programs/combating-the-opioid-epidemic/reports-and-data/opioid-misuse-and-overdose-data/ (last visited June 28, 2019)

overcome opioid addiction.[10] *Id.* ¶ 26. Safehouse would fulfill Philadelphia's dire need for overdose prevention services. *Id.* ¶ 28.

II. THE PROLIFERATION OF FENTANYL AND GROWING NEED FOR INCREASED ACCESS TO NALOXONE

Fentanyl. Fentanyl is a synthetic opioid now found in many of the opioids sold on the street in Philadelphia. *Id.* Fentanyl is often sold to drug users who mistakenly believe that they are purchasing less lethal drugs. *Id.* ¶ 21. Fentanyl is 50-to-100 times more potent than heroin, and its effects are felt within the human body much faster. *Id.* In the event of a fentanyl overdose, a person may stop breathing *2-to-3 minutes* after consumption. *Id.* Absent intervention, serious injury or death can occur as quickly as *3-to-5 minutes* consumption. *Id.* ¶ 22. Every second counts when responding to an opioid overdose. *Id.*

Naloxone. The immediate administration of Naloxone and similar opioid receptor antagonists provides lifesaving treatment by reversing an overdose. *Id.* ¶ 23. This is not speculation. An intervention using Naloxone or a similar opioid receptor antagonist will resuscitate and keep a person alive with medical certainty. *Id.* ¶¶ 23, 68. Although Naloxone is designed to be easily administered as an intra-nasal spray, a person experiencing an overdose (and thus losing consciousness) cannot self-administer Naloxone. *Id.* ¶ 69. As a result, Naloxone can work only if someone else is close by to administer it. *Id.* And since a person overdosing can lose respiratory function within minutes of consumption, time is of the essence in providing respiratory support and Naloxone to reverse an overdose. *Id.* The more time that elapses, the greater the risk of serious injury and death.

[10] Hoag Levins, *Optimizing Heroin Users' Treatable Moments in the ER* (June 2017), https://ldi.upenn.edu/news/optimizing-heroin-users-treatable-moments-er (last visited June 28, 2019).

Government Efforts to Increase Naloxone Access. With the help of federal, state, and local funding, Naloxone has been widely dispensed as a proven means of combatting opioid deaths. *Id.* ¶ 70. Despite increased availability of Naloxone, people are continuing to die from overdoses at alarming rates. Outside of a medically supervised environment, even when help does arrive for an overdose victim, first responders, family members, and Good Samaritans sometimes lack sufficient doses of Naloxone or lack training in other respiratory support required to resuscitate that person. *Id.*[11] Medical supervision of opioid consumption ensures prompt and effective overdose reversal using a variety of available techniques.

Congress recognized the importance of Naloxone access when it enacted the Comprehensive Addiction and Recovery Act of 2016 ("CARA"), Pub. L. No. 114-198, 130 Stat. 695. *Id.* ¶ 71; *see* CARA § 101, 130 Stat. 697. CARA established a coordinated, public-health strategy to address the opioid crisis, including increased funding for education and awareness campaigns and improved access to overdose treatment. Counterclaims ¶ 71. CARA also amended the CSA to expand prescribing privileges for medically-assisted treatment ("MAT"), like buprenorphine and suboxone, to nurses practitioners and physicians assistants. *See id.* § 303(a)(l)(C)(v)-(iv), 130 Stat. 720-723; Counterclaims ¶ 72. CARA includes several measures that expand and encourage access to opioid reversal agents such as Naloxone. For example, CARA empowers the Department of Health and Human Services ("HHS") to award grants to eligible entities providing overdose reversal treatment, including Naloxone. *See id.* § 107, 130 Stat. 703 (42 U.S.C. § 290dd-3); Counterclaims ¶ 73. CARA requires evaluation of state Good Samaritan laws that provide civil and criminal immunity to individuals who administer Naloxone to an

[11] For example, at times a single dose of Naloxone is not sufficient to reverse an overdose. Counterclaims ¶ 70. Multiple doses or intramuscular injections of Naloxone are sometimes required. *Id.* Oxygen and respiratory support may also be beneficial, and can serve as an alternative first-line treatment. *Id.*

individual experiencing an overdose. *See id.* § 703, 130 Stat. 741; Counterclaims ¶ 73. CARA also directs the Secretary of HHS to "maximize the availability of opioid receptor antagonists, including [N]aloxone, to veterans." *See id.* § 911, 130 Stat. 759; Counterclaims ¶ 73.

Pennsylvania state law similarly recognizes the importance of Naloxone access. Counterclaims ¶ 74. In light of the growing opioid crisis, in 2010, the Pennsylvania General Assembly amended its state drug law (the Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa. Stat. § 780–101 *et seq.*) by enacting the Drug Overdose Response Immunity statute ("the Good Samaritan Statute"). *Id.* That statute provides immunity from prosecution for persons who call authorities to seek medical care for a suspected overdose victim. *See* 35 Pa. Stat. § 780–113.7. Counterclaims ¶ 74. The Good Samaritan Statute also provides criminal, civil, and professional immunity to anyone who, in good faith, administers Naloxone to an individual experiencing an overdose. Former Governor of Pennsylvania, Tom Corbett, stated the Good Samaritan statute "will save lives and ensure those who help someone in need aren't punished for doing so." *Id.*

On April 18, 2018, the Pennsylvania Physician General issued a Standing Order that provides a statewide prescription for eligible persons to obtain Naloxone. *Id.* ¶ 75. The purpose of the Order is to "ensure that residents of the Commonwealth of Pennsylvania who are at risk of experiencing an opioid-related overdose, or who are family members, friends or other persons who are in a position to assist a person at risk of experiencing an opioid-related overdose . . . , are able to obtain Naloxone."[12] *Id.* (alteration in original). The Pennsylvania Physician General has continued to renew this Standing Order, consistent with Pennsylvania Governor Tom Wolf's Proclamation and as the opioid crisis continues in Pennsylvania. *Id.*

[12] Pa. Dep't of Health, Standing Order DOH-002-2016: *Naloxone Prescription for Overdose Protection* (Mar. 1, 2016), https://www.dos.pa.gov/ProfessionalLicensing/BoardsCommissions/Documents/SN%20-%20Naloxone%20Prescription%20for%20Overdose%20Prevention%20(Standing%20Order%20DOH-002-2016).pdf ("Standing Order DOH-002-2016").

III. OPIOID USE DISORDER AND HARM REDUCTION AS AN ESSENTIAL TOOL IN THE FIGHT AGAINST THE OPIOID EPIDEMIC

Opioid Use Disorder. "Opioid use disorder" is defined by the Centers for Disease Control and Prevention ("CDC") to be a medical condition diagnosed "based on specific criteria such as unsuccessful efforts to cut down or control use, or use resulting in social problems and a failure to fulfill obligations at work, school, or home, among other criteria."[13] *Id.* ¶ 30. The Office of the Surgeon General has defined it as "[a] disorder characterized by loss of control of opioid use, risky opioid use, impaired social functioning, tolerance, and withdrawal."[14] The Office of the Surgeon General has reported that more than eleven million Americans use illicit drugs or misuse prescription drugs, but that only one out of four of those people seek specialized treatment for opioid use disorder.[15] *Id.* In 2016, the Mayor's Task Force reported that more than 14,000 Medicaid recipients in Philadelphia sought treatment for opioid use disorder—a small fraction of those actually suffering from that condition.[16] *Id.*

Harm-reduction strategies are an essential aspect of public-health initiatives. *Id.* ¶ 31. "Harm reduction" is an umbrella term for interventions that aim to reduce problematic or otherwise harmful effects of certain behaviors. In the context of substance and opioid use disorders, such interventions are necessary to minimize harm for individuals "who, for whatever reason, may not be ready, willing, or able to pursue full abstinence as a goal." *Id.* Harm reduction can include reducing the frequency of substance use, preventing the transmission of diseases such as HIV and

[13] CDC, *Commonly Used Terms: Opioid use disorder*, https://www.cdc.gov/drugoverdose/opioids/terms.html (last visited June 28, 2019).

[14] HHS, *Facing Addiction in America: The Surgeon General's Spotlight on Opioids* 6 (Sept. 19, 2018), https://addiction.surgeongeneral.gov/sites/default/files/Spotlight-on-Opioids_09192018.pdf.

[15] *Id.* at 6-7.

[16] *Task Force Report*, *supra* note 6, at 7-8.

Hepatitis C, providing syringe exchange, and offering medication-assisted treatments, overdose prevention, and wound care. *Id.* Harm-reduction strategies are necessary in light of the psychology of addiction and substance use disorder, and seek to help individuals engage in treatments to reduce, manage, and stop their substance use when appropriate.[17] *Id.* As the government has recognized, "[h]arm reduction programs provide health-oriented, cost-effective, and often cost-saving services to prevent and reduce substance use-related risks among those actively using substances, *and substantial evidence supports their effectiveness*."[18]

IV. SAFEHOUSE, THE SAFEHOUSE MODEL, AND SUPERVISED CONSUMPTION AND OBSERVATION

Formation of Safehouse. Safehouse, a privately funded nonprofit corporation, was established in 2018 with the mission to save lives by providing a range of overdose prevention services. *Id.* ¶ 29. Safehouse's singular purpose is to offer lifesaving medical treatment, primary care, and wraparound services to a vulnerable population at high risk of overdose death and complications from opioid use disorder. *Id.* ¶ 92.

The Safehouse Model. Safehouse will combat the opioid crisis through the use of a comprehensive harm-reduction strategy to mitigate the catastrophic losses resulting from the opioid epidemic and overdose crisis in Philadelphia. *Id.* ¶ 32. In particular, Safehouse's overdose prevention services include the assessment of an individual's physical and behavioral health status, provision of sterile consumption equipment, provision of drug testing (*i.e.*, fentanyl test strips), medically supervised consumption and observation, overdose reversal, wound care and other primary care services, on-site education and counseling, on-site MAT and recovery counseling,

[17] *See* Diane E. Logan & G. Alan Marlatt, *Harm Reduction Therapy: A Practice-Friendly Review of Research,* 66 J. Clinical Psychol. 201 (2010).

[18] *Id.* at 18.

distribution of Naloxone, and access to wraparound services such as housing, public benefits, and legal services. *Id.* ¶ 33.[19]

Upon arrival at Safehouse, all participants will register and provide demographic information. Answer ¶ 10. A physical and behavioral health assessment will be conducted and a range of overdose prevention services offered. *Id.* Participants then will be directed to the medically supervised observation room, where they will be "offered on-site initiation of medically-assisted treatment, wound care, and referrals to primary care, social services, and housing opportunities." *Id.* Alternatively, participants may utilize Safehouse's medically supervised consumption room, and will be provided with sterile consumption equipment and fentanyl test strips. *Id.*[20] At that time, participants will be permitted to consume opioids or other drugs (none of which will be provided by Safehouse or sold at Safehouse) under the watchful eye of trained medical professionals supplied with sufficient doses of Naloxone and the ability to provide other forms of respiratory support. *Id.*; Counterclaims ¶ 76. From the consumption area, participants will be directed to the medically supervised observation room and again offered opportunities for drug treatment, medical care, and social services. *Id.*

Safehouse Will Save Lives, Improve Public-Health, and Reduce Drug Use. Under this model, Safehouse can offer assurance—to a medical certainty—that people within its care will not die of a drug overdose. *Id.* ¶¶ 37, 76. The Safehouse model provides those at highest risk of an opioid overdose with immediate access to medical care, including overdose reversal agents during

[19] In Philadelphia, an existing nonprofit community organization, Prevention Point Philadelphia, provides a wide range of medical and non-medical services intended to reduce the harms of the opioid crisis—but it does not provide medically supervised consumption or observation. Am. Compl. ¶ 8, ECF No. 35.

[20] The provision of sterile consumption equipment will reduce of the risk of transmission of infectious diseases. Participants will safely dispose of used consumption equipment before leaving the supervised consumption area. *Id.* Fentanyl test strips are used to detect the presence of fentanyl prior to consumption. *Id.* n.12. By alerting the participant to the presence of fentanyl and the increased risk of overdose, Safehouse would be practicing a harm-reduction strategy that encourages a dosage adjustment to a safer level. *Id.*

and immediately after the time of use—which is the moment when Naloxone is most needed. *Id.* ¶ 34. By providing these services, Safehouse will save lives by preventing overdose deaths; similar overdose prevention efforts, including supervised consumption sites, have proven to be effective in other countries, and are backed by clinically sound data. *Id.* ¶¶ 37, 76, 118, 131. In fact, studies estimate that an overdose prevention site like Safehouse could reduce overdose deaths annually by 30% in the site's immediate vicinity.[21] *Id.* ¶ 38. Moreover, in a 30-year period, no person has died of a drug overdose in any safe consumption site worldwide.

In addition, Safehouse's comprehensive services will encourage entry into drug treatment, reduce the burden on emergency services and first responders, prevent the transmission of infectious diseases, and create a safer community by reducing public consumption of illicit drugs and discarded consumption equipment. *Id.* ¶ 36. Allowing Safehouse to operate will not increase the manufacture, distribution, or possession of illegal drugs. *Id.* ¶¶ 131-33. Instead, when Safehouse does open, the demand for illegal drugs will decrease because some of its beneficiaries will seek and be provided with drug treatment. *Id.* ¶ 133. These facts matter.[22]

Safehouse's Overdose Prevention Services Are a Legitimate Medical and Public-Health Measure. The medical and public health measures that Safehouse will provide have been recognized and endorsed by prominent national and international medical and public-health associations including the American Medical Association, the American Public Health Association, AIDS United, the European Monitoring Center for Drugs and Drug Addiction, the

[21] Sharon Larson et al., *Supervised Consumption Facilities – Review of the Evidence* 20 (2017), https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf ("*Supervised Consumption Facilities*").

[22] The only "facts" the DOJ addresses are out-of-context statements made by Safehouse Board Member Ed Rendell. DOJ Mot. 1 n.1, 2 n.2. Those statements are outside the scope of the pleadings and irrelevant to the issues pending before the Court. Governor Rendell's concern that there is potential criminal exposure for Safehouse, is not surprising, in light of the DOJ's widely publicized (and misguided) interpretation of Section 856(a)(2).

Infectious Diseases Society of America, the HIV Medical Association, the International Drug Policy Consortium, and innumerable public-health experts, physicians, and addiction researchers. *Id.* ¶ 88. Safehouse's overdose prevention model has been endorsed and encouraged by Philadelphia's Public Health Commissioner and its Commissioner of the Department of Behavioral Health and Intellectual disAbility Services, who have announced that overdose prevention, including supervised consumption, is a critical medical and public-health intervention. *Id.* ¶ 89. Additionally, local officials, including Philadelphia's Mayor and District Attorney, support Safehouse's efforts to mitigate the opioid crisis. *Id.* ¶ 117.[23]

Safehouse Code of Conduct. Under no circumstance will Safehouse make available any illicit narcotic or opioid. Answer ¶ 10. Nor will it manufacture, sell, administer, or permit the distribution or sale of unlawful drugs on site. Counterclaims ¶ 112. Safehouse will not allow participants to share consumption equipment or help another person consume drugs. Nor will it allow staff to handle illegal drugs or help participants consume drugs. *Id.*

Safehouse, a non-profit corporation, will not charge participants for its harm-reduction and overdose prevention services. *Id.* It will not produce any revenue. In fact, it will not even permit the exchange of currency. Safehouse's services will be entirely local intrastate activity and its proposed conduct will not affect interstate commerce whatsoever. Safehouse will not adversely affect or otherwise undermine Congress's goal of suppressing the interstate market for illegal drugs, since studies show that medically supervised consumption sites actually reduce drug use. *Id.* ¶ 113. Allowing Safehouse to operate will not increase the manufacture, distribution, or

[23] Although the DOJ asserts that the U.S. Surgeon General made a "correction" about his support for supervised consumption sites (two weeks before its motion was filed), the Surgeon General's spokesman clarified nonetheless that the "conversation about harm reduction can range from basic education to condoms to SSPs *and all the way to safe injection sites*. Each community needs to look at their burden of disease, examine what the science says and to decide what is right for them." Michaela Winberg, Billy Penn, *HHS disputes report that nation's top doc came out in support of safe injection sites* (May 26, 2019), https://billypenn.com/2018/05/24/nations-top-doc-comes-out-in-support-of-safe-injection-sites/.

possession of illegal drugs. *Id.* ¶¶ 131-33. When Safehouse does open, the demand for illegal drugs will decrease because some of its beneficiaries will seek and be provided with drug treatment. *Id.* ¶ 133.

V. SAFEHOUSE'S BOARD MEMBERS

The members of Safehouse's Board, including Defendant Benitez, are Jews or Christians. *Id.* ¶124. Their religious beliefs are sincerely held and have been ingrained in them by their religious schooling, their devout families, and their practices of worship. *Id.* ¶ 125. In particular:

- **Frank A. James III** is a Christian and President of Missio Seminary (formerly known as Biblical Theological Seminary).
- **Chip Mitchell** is an adherent of Christianity and Lead Evangelist at the Greater Philadelphia Church of Christ.
- **Board President Defendant José Benitez** was raised and educated as a Roman Catholic. His entire professional life, including as Director of Prevention Point Philadelphia, has been an exercise in living out that faith and those teachings.
- **Board Vice President Ronda Goldfein** was raised with strong Jewish values and still worships in the small South Jersey synagogue cofounded by her grandfather. Her professional life, including as Executive Director of the AIDS Law Project of Pennsylvania, has been an exercise in living out that faith and those teachings.

Id. At the core of all board members' faith is the principle that the preservation of human life is paramount and overrides any other considerations. *Id.* ¶ 126. This principle is rooted in scriptures, and appears throughout the Hebrew Bible, the Talmud, and the New Testament. *Id.* ¶ 127.

The board members' religious beliefs obligate them to take action to save lives in the current overdose crisis, and thus to establish and run Safehouse in accordance with these tenets. *Id.* ¶ 128. Specifically, the board members believe that establishing an overdose prevention site effectuates their religious obligation to preserve life, provide shelter to their neighbors, and to do everything possible to care for the sick. *Id.* The DOJ's threats and the initiation of a lawsuit against Safehouse burden Safehouse's religious expression by forcing it to choose between the

exercise of its founders' and directors' religious beliefs and conformity with the DOJ's interpretation of Section 856. *Id.* ¶ 129.

VI. THE DOJ'S THREAT TO PROSECUTE SAFEHOUSE FOR LAWFUL, LIFESAVING CONDUCT

On November 9, 2018, the U.S. Attorney for the Eastern District of Pennsylvania, William M. McSwain, sent a letter to Safehouse declaring the DOJ's intent to pursue "appropriate legal remedies" for a purported "violation of the CSA." *Id.* ¶ 39, Ex. B. Similarly, in a widely published op-ed, then–U.S. Deputy Attorney General Rod Rosenstein argued that supervised consumption sites violate federal law and could result in "up to 20 years in prison."[24] *Id.* ¶ 40.

On February 5, 2019, the DOJ filed a complaint for a declaratory judgment that Safehouse's medically supervised consumption room would violate 21 U.S.C. § 856(a)(2). *Id.* ¶ 41. Violation of Section 856 carries with it severe criminal and civil penalties, including fines of up to $2,000,000 and imprisonment for up to twenty years. *See* 21 U.S.C. § 856(b) and (d). Safehouse has counterclaimed, seeking (i) a declaration that Section 856 does not—and cannot consistent with the U.S. Constitution and RFRA—prohibit Safehouse from operating a medically supervised consumption site, and (ii) an injunction preventing the DOJ from enforcing Section 856 against Safehouse.

To advance its erroneous interpretation of Section 856, the DOJ now moves for a judgment on the pleadings on its claim for declaratory relief—*i.e.*, a declaration from this Court allowing the DOJ to prosecute Safehouse for providing lawful and lifesaving overdose prevention services.

[24] *See* Rod J. Rosenstein, *Fight Drug Abuse, Don't Subsidize It,* N.Y. Times (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html.

ARGUMENT

I. SECTION 856(a)(2) DOES NOT APPLY TO SAFEHOUSE

The DOJ's interpretation of Section 856 is contrary to basic principles of statutory construction, is inconsistent with the CSA's deference to the practice of medicine, and it is at odds with the federal government's endorsement of other, closely related harm-reduction strategies to mitigate the opioid crisis. Section 856, as properly construed, does not apply to Safehouse, which seeks to prevent overdose deaths, reduce public drug consumption, prevent disease transmission, and encourage entry into drug treatment. Providing medical care and treatment to an individual at a life-threatening moment is legitimate medical practice, which the CSA does not regulate, much less criminally proscribe.

A. Section 856 Does Not Apply Because Safehouse Would Not Be A Place Made Available "*For the Purpose of*" Unlawfully Using Controlled Substances.

Section 856 prohibits property owners or managers from making available a property "for the purpose of" unlawful drug activities. The DOJ does not dispute that the purpose of Safehouse's planned facility, including its supervised consumption site, is to save lives through an evidence-based public-health approach to overdose prevention. It argues instead that the only relevant question is "whether Safehouse knowingly would allow people onto its property who have the purpose to use illegal drugs." DOJ Mot. 9. The language of Section 856 makes clear that the DOJ's interpretation is wrong: Section 856 turns on the purpose *of the place* itself, not the purpose of individual Safehouse participants. Safehouse's purpose is to save lives by preventing overdose death. It will not be a place made available "for the purpose of . . . using a controlled substance" within the meaning of Section 856. 21 U.S.C. § 856(a).

i. Section 856 requires evidence that the primary or principal purpose of the property is unlawful use

To interpret a statute, one must look to the plain meaning of its language. Section 856(a) states in pertinent part:

> Except as authorized by this subchapter, it shall be unlawful to- . . .
>
> (1) ***knowingly open, lease, rent, use, or maintain any place***, whether permanently or temporarily, ***for the purpose of*** manufacturing, distributing, or ***using*** any controlled substance;
>
> (2) ***manage or control any place***, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, ***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.

See id. § 856(a) (emphasis added).[25]

Since it is unlawful under Section 856(a)(1) and (a)(2) to maintain or make available a "*place for the purpose* of . . . using a controlled substance," interpreting the term "purpose" is critical. The phrase "for the purpose" modifies the immediately preceding term "place." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140-43 (2012) (The Grammar Canon: "Words are to be given the meaning that proper grammar and usage would assign them."). It is a well-recognized interpretative principle that "[a] word is given more precise content by the neighboring words with which it is associated." *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)). In other words, Section 856 only applies to a *place* that is "open[ed]," use[d]," or "maintain[ed]" "for the purpose of" unlawful drug activity.

[25] The facts alleged in the pleadings allow this Court to narrow its interpretive inquiry. Safehouse will not be used for the purpose of unlawfully manufacturing, storing, or distributing any controlled substances and Safehouse will not permit anyone to use its facilities for any of those purposes. Counterclaims ¶ 112. Safehouse will not rent, lease, or profit from its facility or seek compensation from its participants. *Id.*

The term "purpose" means "[a]n objective, goal, or end." Black's Law Dictionary (11th ed. 2019); *see also* Merriam-Webster Dictionary (defining "purpose" as "something set up as an object or end to be attained"). Thus, the *purpose* for which a place is opened, maintained, or made available is the property's ultimate objective, *not* the *means* by which that objective is achieved. The purpose of Safehouse and its facility is not to facilitate the unlawful use of drugs, but rather to provide necessary, urgent, lifesaving medical care and treatment to people with opioid and substance use disorder. That singular *purpose* is unaltered by the fact that the *means* by which it achieves its goals is to provide shelter, proximity to medical care, and supervision to drug users at the time of consumption.

Courts analyzing Section 856 have acknowledged that it is the purpose of the property is an essential element. For example, in *United States v. Chen*, 913 F.3d 183 (5th Cir. 1990)—a case relied upon by the DOJ—the Fifth Circuit concluded that, under Section 856(a)(1) "it is strictly incumbent upon the government to prove beyond a reasonable doubt *not* that a defendant knowingly maintained a place *where* controlled substances were used or distributed, but rather, that a defendant knowingly maintained a place *for the specific purpose of distributing or using a controlled substance*." *Id.* at 189 (emphases in original); *accord United States v. Johnson*, 737 F.3d 444, 448 (6th Cir. 2013) (requiring the government to show that "[d]rug storage thus constituted a 'significant or important reason' for which [the defendant] maintained his home"); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) (same); *United States v. Lancaster*, 968 F.2d 1250 (D.C. Cir. 1992) (same).

Rather than apply that straightforward statutory text, DOJ contends that Section 856(a)(2)—but not Section 856(a)(1)—focuses on the "drug user's purpose" in using Safehouse rather than the purpose of Safehouse's medical facility. Safehouse's purpose is not determined by

the many reasons an individual Safehouse participant may enter the premises, as the DOJ claims. That interpretation is incorrect and contrary to the statutory text. First, Section 856(a) is devoid of any reference to the purpose of any third party (*i.e.*, Safehouse participants). The DOJ's interpretation, if adopted, would lead to a substantial expansion of criminal liability for property owners, who under the DOJ's view of the statute, could be prosecuted for simply *knowing* that illegal drugs are consumed by anyone they permit to enter or remain on their property. *See* DOJ Mot. 9; *id.* at 13 (asserting that it "must show merely that Safehouse knowingly would allow people onto its property who have the purpose to use illegal drugs"). Felony statutes are not to be lightly interpreted so expansively. The breadth of the DOJ's position goes well beyond any reasonable interpretation of Section 856's scope. For example, under the DOJ's reasoning, a property owner could face severe criminal liability for allowing her child to stay at home under her care knowing that the child was addicted to and using drugs. A homeless shelter could be criminally liable for knowingly providing housing for people who currently are addicted to and using controlled substances on the premises. That is plainly not what Congress intended or enacted here.

The DOJ's reading of Section 856 also would be entirely inconsistent with federally funded programs and guidance by the U.S. Department of Housing and Urban Development ("HUD"). HUD's "Housing First" program expressly endorses and funds providers who offer housing to current substance abusers. HUD guidance states that such providers should not deem onsite drug use to be a lease violation that requires eviction.[26] Plainly, HUD does not believe its federally funded providers violate Section 856, or any other provision of the CSA, by providing shelter and housing to current drug users, even knowing that they are using on site. The same rationale applies

[26] *See* HUD Exchange, *Housing First in Permanent Supportive Housing* (July 2014), available at: https://www.hudexchange.info/resource/3892/housing-first-in-permanent-supportive-housing-brief/.

here. The "purpose" of a Housing First program is to provide a stable home; similarly, the "purpose" of Safehouse is to provide lifesaving medical care to current drug users.

The DOJ also provides no justification for its contention that the phrase "place for the purpose" should be given an entirely different and far more expansive meaning in Section 856(a)(2) than in Section 856(a)(1). Both Section 856(a)(1) and (a)(2) use the phrase *"the place for the purpose*."[27] It is a basic tenet of statutory interpretation that a word or phrase in a statute is presumed to bear the same meaning throughout the statutory text. *See* Antonin Scalia & Bryan A. Garner, Reading Law 170 (2012); *see, e.g., Sullivan v. Stroop*, 496 U.S. 478, 484-85 (1990) (It is the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986)); *see also United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). There is no meaningful difference in the relevant portion of the two subsections of Section 856 that would justify the DOJ's dramatically disparate interpretations.

The DOJ is further incorrect that its interpretation of Section 856(a)(2) is required to prevent it from "overlap[ping] entirely with 856(a)(1) and hav[ing] no separate meaning." DOJ Mot. 10 (quoting *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991)). To the contrary, Section 856(a)(1) and Section 856(a)(2) prohibit different activities: Section 856(a)(1) targets those who "open," "lease," rent," "use" or "maintain," property, *i.e.*, typically the operator of the property; whereas Section 856(a)(2) targets those who "manage or control any place" and who then "rent, lease, profit from or make available for use," the property, *i.e.,* typically the landlord or manager. *Cf. Chen,* 913 F.2d at 190 ("Based on our reading of the statute, § 856(a)(2) is

[27] The only textual difference is, in Section 856(a)(1), the phrase "whether permanently or temporarily" comes between "place" and "for the purpose of"; whereas that same phrase ""whether permanently or temporarily" appears earlier in the text of Section 856(a)(2). That minor textual difference does not signify any substantive change in the statutory meaning of the phrase "place . . . for the purpose of."

designed to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use . . . for the purpose of unlawfully' engaging in such activity." (alteration in original)). Both subsections impose the same requirement, however, that the *purpose* of the *property* is unlawful manufacture, distribution, storage, or use of controlled substances.

The purpose of Safehouse and its facility is to provide lifesaving medical treatment, primary care, and wraparound services to a vulnerable population at high risk of overdose death and complications from opioid use disorder. Counterclaims ¶ 92. For that reason alone, Section 856 does not apply to Safehouse or to a property used for such a vital medical purpose.

ii. The legislative history of Section 856 confirms it narrowly targets properties used for the purpose of unlawful drug activity

The legislative history confirms that Section 856(a)(2) was intended to impose liability on landlords or property-owners who make their properties available for unlawful purposes; it was not intended to expand dramatically the statute, as suggested by the DOJ. Congress enacted Section 856(a) to "[o]utlaw[] operation of houses or buildings, so-called 'crack houses,' where 'crack,' cocaine and other drugs are manufactured and used." *See* 132 Cong. Rec. S26474. Statements from sponsoring Senators establish that Section 856 was intended to prosecute landlords and property owners for maintaining a property (referred to as "crack houses" in legislative debate) for the purpose of drug use. Sponsoring Senator Chiles stated the Act would address law enforcement's difficulties in arresting "crack house" operators: "When police raid these crack houses, the dealers and users can easily dispose of the drugs, thus avoiding arrest. This bill makes it a felony to operate such a house, to be present at the house." *See id* (Statement of Senator Chiles); *see also id.* at S19241. Sponsoring Senator Biden described Section 856 as

establishing a "new offense[] for opening or maintaining a building, or 'crack house,' where the drug is produced, sold, and used." *Id.* at S19241

In 2003, Senator Biden introduced the Illicit Drug Anti-Proliferation Act ("2003 Amendment"), after a Senate hearing was held on the topic of "the proliferation of Ecstasy and other club drugs," and the role of rave promoters in drug distribution. *See* 149 Cong. Rec. S1669, S1677. The proposed 2003 Amendment changed Section 856 in two ways. "First, it made the 'crack house statute' apply not just to ongoing drug distribution operations, but to 'single-event' activities, including an event where the promoter has as his primary purpose the sale of Ecstasy or other illegal drugs." *Id.* "[S]econd, it made the law apply to outdoor as well as indoor activity." *Id.*

Senator Biden noted that "[t]he purpose of my legislation is not to prosecute legitimate law-abiding managers of stadiums, arenas, performing arts centers, licensed beverage facilities and other venues because of incidental drug use at their events." *Id.* at S1669, S1678. Senator Biden continued: "My bill would help in the prosecution of rogue promoters who not only know that there is drug use at their event but also *hold the event for the purpose of illegal drug use or distribution. That is quite a high bar*." *Id.* (emphasis added); *see also id.* (explaining that the bill targets "*any venue whose purpose is to engage in illegal narcotics activity*" (emphasis added)). Thus, the 2003 Amendment was intended to prosecute property owners or managers who (1) "know" of illegal drug use on their property and (2) intend their property to be used "*for the purpose* of illegal drug use." *Id.* (emphasis added). But it was not intended to permit the prosecution of a legitimate entity, such as Safehouse, as Senator Biden explained that Section 856(a)(2) merely "amends, 21 U.S.C. 856, [which] has been on the book for nearly two decades

and I *am unaware of it ever being used to prosecute a legitimate business*." *Id.* at S5153 (emphasis added).

This history refutes the DOJ's position that it suffices if a property owner merely knows that drug use is occurring on his or her property. Rather, the legislative history conforms to the statutory text, which is to limit Section 856's application to property that is operated or maintained *for the purpose of* drug distribution and use.

iii. The non-binding precedent upon which the DOJ relies does not illuminate the legal standard for when a property is used "for the purpose of" prohibited activities

Rather than confront these norms of statutory construction or dispute Safehouse's actual purpose of providing medical care, the DOJ relies upon non-binding circuit case law to support its erroneous position that the only relevant purpose under Section 856(a)(2) is "that of the so-called 'participants' who would use illegal drugs at Safehouse's facility." DOJ Mot. 9. As a preliminary matter, the Third Circuit has never held that "purpose" under Section 856(a)(2) refers to the purpose of a third-party individual, rather than the purpose of the premises at issue. *See id.* The cases upon which the DOJ relies do not grapple with the purpose of a property because it was clear from the overwhelming evidence presented that the property in question was used for drug distribution or manufacture. Instead, the DOJ's cited cases focus on the *mens rea* of the defendant and evaluate whether sufficient evidence established that the defendant knew or intended that the property be used for prohibited drug activity. Certainly no case dealt with the issue presented here—*i.e.*, whether medical professionals may permit drug users to remain under their supervision at the time of drug consumption for the purpose of providing potentially urgent medical care.

In *Chen*, for example, the owner of a motel was accused of knowingly making the property available for overt and notorious drug distribution, in violation of both Sections 856(a)(1) and (a)(2). The Fifth Circuit correctly found that Section 856(a)(1) requires proof that *the defendant*

have the specific purpose to use the property for improper distribution, manufacture, storage, or use. 913 F.2d at 189-90. The *Chen* court found, however, that under Section 856(a)(2), "the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose)." *Id.* at 190. The court found it sufficient for liability under Section 856(a)(2) if "she had actual knowledge that she was renting, leasing, or making available for use the [premises] *for the purpose of* unlawfully storing, distributing, or using a controlled substance" or was willfully blind to that fact. *Id.* at 191-92 (emphasis added). The Court's resulting decision dealt only with the necessary mental state for the owner or manager of the property (knowing or intentional), but the Fifth Circuit did not need to answer the threshold question of the property's purpose because it found "overwhelming evidence at trial" demonstrated that the motel was being used for the purpose of "drug related activities." *Id.* at 191. In particular, the owner/defendant told an undercover officer that he could purchase cocaine "in almost any room," witnesses testified that everyone at the motel was "involved in selling drugs," and the owner/defendant "would encourage tenants to make drug sales so that their rent could be paid." *Id.* at 185-86. Safehouse's proposed medical intervention bears no resemblance to the drug motel in *Chen*.

United States v. Tebeau is similarly distinguishable. 713 F.3d 955 (8th Cir. 2013). In that case, the defendant used his property to host music festivals and admitted that he intended for his property to be used for drug-related activities. *See id.* at 958. The defendant further admitted that he was aware individuals were selling drugs on his premises, and it was estimated that approximately *$500,000* in illegal drugs were sold *at each event*. *See id.* at 958, 961.

Likewise, the car dealership at issue in *Tamez* was the location of repeated drug sales. *See* 941 F.2d at 772-73. The owner of the car dealership (the defendant) *was the source of the drugs*

used on the property and had a unity of purpose with the third-party actors that engaged in prohibited conduct on the property. *Id.* On appeal, the defendant argued that Section 856(a)(2) was only intended to apply to drug manufacturing operations. *Id.* at 773. Although the court refused to examine the purpose of the property in assessing whether the owner of the dealership could be charged under the statute, it did so based solely "on the logic of *Chen*," with little additional analysis. *Id.* at 774.

Finally, the cases cited by the DOJ from within the Third Circuit do not support its argument. In *United States v. Coles*, 558 F. App'x 173, 181 (3d Cir. 2014) (non-precedential), the court upheld a Section 856 conviction where the apartment, rented by the defendant, had widespread evidence of crack production, including "masks, goggles, latex gloves, cutting agents to dilute the cocaine, and drug packaging paraphernalia" and "white powder sprayed across some parts of the carpet in the living room." Likewise, in *United States v. Blake*, 2006-cr-0030, 2009 WL 1124957 (D.V.I. Apr. 24, 2009), the court found the defendant "knowingly and intentionally allowed her home to be used for the purpose . . . of manufacturing cocaine base and storing cocaine powder." Finally, in *United States v. Butler*, No. CRIM.A. 02-300-01, 2004 WL 2577631, at *3 (E.D. Pa. Oct. 6, 2004), the defendant permitted his co-conspirator to sell drugs from his apartment. Each of those cases involved places that were undoubtedly used for purposes of drug manufacturing and distribution, and the question was only whether the defendant had sufficient knowledge of that activity to be held liable.

B. Safehouse Is "Authorized By" the CSA Because It Is a Legitimate Medical Practice, which the CSA Does Not Regulate and Section 856 Does Not Prohibit

i. The CSA and Section 856 do not restrict or regulate the legitimate practice of medicine

The CSA protects medical professionals and facilities from prosecution or civil enforcement for engaging in the legitimate practice of medicine, which includes Safehouse's

proposed overdose prevention services. The Drug Enforcement Administration regulations implementing the relevant subchapter of the CSA similarly recognize that registered medical practitioners may administer, prescribe, or distribute controlled substances "*for a legitimate medical purpose* by an individual *practitioner acting in the usual course of his professional practice*." *See* 21 C.F.R. § 1306.04 (emphasis added). Section 856's plain text is consistent with that well-established limitation on the CSA's reach by providing, "[*e*]*xcept as authorized by this subchapter*," it is unlawful to knowingly open or use any place, or manage or control any place, for the purpose of manufacturing, distributing, or using any controlled substance. *See* 21 U.S.C. § 856(a) (emphasis added).

Though the CSA creates a comprehensive statutory and regulatory regime regarding the manufacture, distribution, and possession of drugs contained in the CSA's schedules, it does not regulate medical treatment or the practice of medicine. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("[T]he statute manifests no intent to regulate the practice of medicine generally."). That is because "[t]he protection of public health falls within the traditional scope of a State's police powers." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 596 (2011). While "[t]he States have broad authority to enact legislation for the public good" through their "police power," the "Federal Government, by contrast, has no such authority." *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014); *Oregon,* 546 U.S. at 270.

In *Oregon*, the Supreme Court recognized that the Attorney General possesses "limited powers," under the CSA and held that the CSA did not permit the DOJ to criminalize medical prescription of controlled substances to enable physician-assisted suicide. The Supreme Court noted two areas in which the Attorney General has authority to enforce the CSA: "control" and "registration." *See Oregon*, 546 U.S. at 259. With respect to the Attorney General's authority to

"control" drugs, the Supreme Court noted "control" is a "term of art" and refers to the Attorney General's authority "to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter." *Id.* at 260. Even if "control" had a more expansive definition, the Attorney General does not have authority to promulgate rules "based on his view of legitimate medical practice." *See id.*

With respect to the Attorney General's "registration" power, the Court held that the Attorney General does not have the authority "to decide what constitutes an underlying violation of the CSA in the first place." *Id.* at 262. The Court rejected the notion that the Attorney General was permitted to "criminalize even the actions of registered physicians," finding that such authority would be "unrestrained" and contrary to Congress's "painstaking[]" description of the Attorney General's power over registration. *See id.* The Court observed that the CSA allocates the authority to "determine the appropriate methods of professional practice in the medical treatment of . . . narcotic addiction" to the Secretary of Health and Human Services, not the Attorney General. *See id.* (citing 42 U.S.C. § 290bb-2a). Accordingly, the Supreme Court concluded "[t]he structure of the CSA . . . conveys an unwillingness to cede medical judgments to an executive official who lacks medical expertise." *Id.* at 266. In sum, the Supreme Court held that "[t]he [CSA] and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood." *Id.* at 269-70. It is thus clear from the Court's decision in *Oregon* that the Attorney General cannot use the CSA to regulate the legitimate practice of medicine, particularly outside of the limited areas of registration and control. These limited areas are not implicated by Safehouse, which will not store, prescribe, distribute, or administer controlled substances.

The limitation of the DOJ's ability to use the CSA to regulate legitimate medical practice is well-settled and regularly applied as a defense to criminal prosecution under the Act. For instance, in *United States v. Chube II*, the Seventh Circuit explained that to prosecute a medical practitioner under the CSA, a jury would have to find that the medical professional knowingly and intentionally acted "outside the course of professional practice" and without "a legitimate medical purpose." 538 F.3d 693, 697 (7th Cir. 2008); *see also United States v. Moore*, 423 U.S. 122, 124 (1975). The Ninth Circuit likewise explained that, in order to convict a practitioner for unlawfully dispensing controlled substances under 21 U.S.C. § 841(a), the jury would have to find (among other things) "that the distribution of those controlled substances was outside the usual course of professional practice and without a legitimate medical purpose," and "that the practitioner acted with intent to distribute the drugs and with intent to distribute them outside the course of professional practice." *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006); *United States v. Maynard,* 278 F. App'x 214, 218 (3d Cir. 2008) (non-precedential) (similar); *see also United States v. Birbragher*, 603 F.3d 478, 485-86 (8th Cir. 2010) (interpreting the phrase "professional practice" as meaning "generally accepted medical practice").

Finally, the DOJ is incorrect that only prescribing, dispensing, and administering controlled substances can be "authorized" by the CSA as within the scope of medical practice. *See* DOJ Mot. 13-15. To the contrary, those activities are regulated by the CSA, and therefore it makes sense that courts require affirmative authorization to fall within the CSA's protection for legitimate medical practices. *See United States v. Akinyoyenu,* 199 F. Supp. 3d 106, 113 (D.D.C. 2016). The case for authorization is even stronger, however, for medical practice that does *not* involve CSA-regulated activities, such as the overdose prevention services proposed by Safehouse.

Because Safehouse will not prescribe, administer, or distribute controlled substances, it is even further from the CSA's regulatory scope than prescriptions of controlled substances to enable physician-assisted suicide, which was at issue in *Oregon*. Rather, Safehouse proposes to provide sterile drug consumption equipment; Naloxone; a clean, medically supervised environment; urgent respiratory support; and primary medical care—none of which are even arguably proscribed or regulated by the CSA. The DOJ is incorrect that Safehouse implicates, much less violates, the CSA by providing a facility in which to effectively offer these medical services by allowing its participants to remain under medical supervision at the time of drug consumption.

ii. Safehouse's overdose prevention model will be carried out in the usual course of professional practice with a legitimate medical purpose.

Safehouse's medical staff will be engaged in the legitimate practice of medicine by operating a facility that provides immediate access to overdose reversal agents, urgent medical care, and rehabilitation options. Safehouse will operate within established standards of care in the medical field. At Safehouse, no medical professionals will administer, prescribe, or distribute narcotics; rather, medical professionals will merely staff and supervise the consumption site with the goal of treating and preventing acute overdoses using opioid reversal agents, which are not controlled substances regulated by the CSA, and provide respiratory support and urgent care.

By providing these services, Safehouse will prevent overdose deaths. Overdose prevention efforts, including supervised consumption sites, have been in existence for over thirty years and have proven to be effective through clinically sound data. Counterclaims ¶¶ 37, 76, 118, 131. In fact, studies estimate that an overdose prevention site like Safehouse could reduce overdose deaths annually by 30% in the site's immediate vicinity.[28] *Id.* ¶ 38. Opioid receptor antagonists, like

[28] *Supervised Consumption Facilities*, *supra* note 21.

Naloxone, are highly effective and, if given in time and in sufficient quantity, will reverse an otherwise fatal overdose with medical certainty. *Id.* ¶ 68.

The medical and public health measures that Safehouse proposes have been recognized and endorsed by prominent national and international medical and public-health associations including the American Medical Association, the American Public Health Association, AIDS United, the European Monitoring Center for Drugs and Drug Addiction, the Infectious Diseases Society of America, the HIV Medical Association, the International Drug Policy Consortium, and innumerable public health experts, physicians, and addiction researchers. Counterclaims ¶ 88. Philadelphia's Public Health Commissioner and its Commissioner of the Department of Behavioral Health and Intellectual disAbility Services have each announced that overdose prevention, including supervised consumption, is a critical medical and public-health intervention to mitigate Philadelphia's overdose crisis. *Id.* ¶ 89.

Safehouse's goal and model are entirely consistent with federal and state law and guidance regarding the public-health benefits of needle exchanges and CARA's legislative goal of developing a comprehensive approach to combatting the opioid crisis. Federal law and HHS guidance endorse syringe exchange programs and authorize federal funding of most elements of local- and state-sponsored syringe exchange programs. *See* Appropriations Act of 2016, § 520, 129 Stat. 2652. Congress also recognized the importance of Naloxone access when it enacted CARA. *See* CARA § 101, 130 Stat. 697. Pennsylvania similarly enacted the Drug Overdose Response Immunity Statute and declared a Disaster Emergency—which provides a standing statewide prescription for Naloxone, intended to ensure "family members, friends or other persons

who are in a position to assist a person at risk of experiencing an opioid-related overdose . . . are able to obtain Naloxone."[29] *See* 35 Pa. Stat. § 780-113.7*l*; Counterclaims ¶ 75.

It would be unreasonable to interpret federal law to allow Safehouse to lawfully establish a facility that furnishes sterile consumption equipment and which is well-stocked with Naloxone, only to criminally punish Safehouse with a 20-year felony if it allows participants to remain within the same facility and under the supervision of its medical practitioners at the critical moment of drug consumption, when overdose risk is most acute. The DOJ's interpretation of Section 856 cannot be reconciled with the medical facts recognized by Congress and federal health policy. Safehouse's modest extension of federally endorsed and funded harm reduction measures will close a short, but critical gap in care at the time of drug consumption, and therefore is not barred by federal law.

C. "[U]nlawfully . . . using" Is Not Defined by Section 856 or the CSA and Renders Its Application to Safehouse Doubtful.

Safehouse will not manufacture, store, or distribute any controlled substances. The only possible portion of Section 856(a)(2) that could apply is the prohibition against providing a place for "for the purpose of" "unlawful[] . . . use"—an undefined term that does not plainly encompass Safehouse's medically supervised consumption services model, which allows individuals to consume drugs in its facility only for the purpose of enabling access to critical medical intervention.

Although the CSA elsewhere expressly defines and prohibits the unauthorized manufacture, storage, or distribution of controlled substances (*see generally* 21 U.S.C. §§ 802 (definitions), 841(a) (prohibition of manufacture, possession and distribution)), nowhere does it define or prohibit drug consumption or use. Since it is not necessarily illegal under federal law to

[29] Standing Order, *supra* note 12.

use opioids or fentanyl (and indeed fentanyl and some other opioids may be lawfully prescribed and used), it is unclear from either Section 856 or the CSA as a whole what "unlawfully . . . using" means. At the very least, that undefined phrase does not plainly encompass Safehouse's overdose prevention site.

In the DOJ's view, this Court should read "unlawfully . . . using a controlled substance" to mean "use an unlawful controlled substance," *i.e.*, "consumption of illegal drugs." DOJ Mot. 16. Unlawfully is an adverb, which necessarily modifies the verb that follows it (*i.e.*, using). The statute does not use the adjective "unlawful[]" to modify the term "controlled substance," as the DOJ suggests.

This Court also should not accept the DOJ's rewriting of Section 856 to equate "use" with "possession" of controlled substances. *Id.* at 17. "Use" is nowhere defined in the CSA, while possession is defined in 21 U.S.C. § 801(2) and proscribed in Section 844. But Section 856 does not use the term "possession" and the DOJ provides no basis for assuming that Congress used the term "unlawfully use" as a mere substitute for that term. It is perhaps for that reason that none of the cases cited by the DOJ—and no case of which Safehouse is aware—involved Section 856(a) charges based solely on making a property available for the use, but not manufacture, storage, or distribution, of controlled substances.[30] Because "using" controlled substances—unlike illegally

[30] *See, e.g.*, *Chen*, 913 F.2d at 186 (evidence showed that defendant permitted drug transactions to occur in motel rooms, encouraged tenants to make drug sales to pay rent, stored drugs and drug proceeds for tenants, and loaned money to tenants to purchase drugs); *Tamez*, 941 F.2d at 773-74 (evidence showed that Tamez employees sold cocaine out of the Tamez car dealership, that the dealership was used as a distribution center, and that Tamez financed his car business with proceeds from the drug sales); *United States v. Harrison*, 133 F.3d 1084, 1085 (8th Cir. 1998) (evidence showed that property owner was present on ten occasions when methamphetamines were manufactured on his property using his equipment); *United States v. Ramsey*, 406 F.3d 426, 429 (7th Cir. 2005) (evidence showed that a trailer was used for the purpose of selling crack cocaine, with 35-40 purchases made out of the trailer); *United States v. Ford*, 371 F.3d 550, 552 (9th Cir. 2004) (evidence showed a negotiated and planned a drug sale out of a property with a confidential informant); *United States v. Wilson*, 503 F.3d 195, 198 (2d Cir. 2007) (evidence showed drugs were manufactured in the properties with the property owner's knowledge); *Tebeau*, 713 F.3d at 958 (evidence showed hundreds of drug sellers attended ten music festivals, sold drugs out in the open, and made hundreds of thousands of

manufacturing, distributing or storing of controlled substances—is not "unlawful[]" under the CSA, there is significant ambiguity as to whether, or in what circumstances, that provision prohibits Safehouse's supervised consumption site. Such ambiguity is heightened by the fact that Safehouse and its staff will not necessarily inquire into or know the identity of the substance used by its participants or the circumstances by which it was obtained; Safehouse therefore will not know whether a participant is "unlawfully . . . using" a controlled substance. Section 856 should not be interpreted to impose criminal liability on that basis.

D. The Rule of Lenity and Clear Statement Rule Require Any Doubt to Be Resolved in Safehouse's Favor

The Court need not look beyond the text of the CSA to conclude that Safehouse's overdose prevention model would not violate Section 856. The DOJ's interpretation of Section 856(a)(2) is incorrect as a matter of law. Even if the DOJ's strained interpretation of Section 856(a)(2) were plausible (and it is not), any ambiguity triggers several canons of statutory interpretation—the rule of lenity, the clear statement rule, and the doctrine of constitutional avoidance—each of which provides an independent basis for endorsing Safehouse's reading of federal law. *See, e.g., Jones v. United States*, 529 U.S. 848, 850 (2000).

It is well-settled that where there is "ambiguity in a criminal statute that cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme," courts must interpret that statute in "favor of lenity"—*i.e.*, in favor of the defendant. *United States v. Flemming*, 617 F.3d 252 (3d Cir. 2010); *Rewis v. United States*, 401 U.S. 808, 812 (1971). Put differently, "[u]nder a long line of [Supreme Court] decisions, *the tie must go to the defendant*." *United States v. Santos*, 553 U.S. 507, 514-15 (2008) (plurality) (Scalia, J.) (emphasis added).

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dollars from the sales at each concert); *Coles*, 558 F. App'x 176 (evidence showed that Coles was the leader of an organization that processed, packaged, and distributed cocaine and cocaine base at the property).

Similarly, the clear statement rule provides that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Univ. C. I. T. Credit Corp*., 344 U.S. 218, 221-22 (1952). "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed," but also it "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Id.*

These interpretive principles have special force in this case, where the federal government's interpretation of Section 856 raises significant federalism concerns and is indifferent to Safehouse's indisputably benevolent, lifesaving goals and the dire need for the overdose prevention services Safehouse intends to provide. As the Supreme Court has explained, where Congress enacts criminal law that touches on areas traditionally falling within the authority of the states, courts will assume—"unless Congress conveys its purpose clearly"—that Congress "will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones*, 529 U.S. at 850 (internal quotation marks omitted); *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001) (applying the principle to an agency's interpretation of a statute that "push[es] the limit of congressional authority"). There is no basis for this Court to presume that, by enacting Section 856, Congress intended to disrupt the traditional balance of federal and state authority over public health initiatives. *See, e.g.*, *U.S. Army Corps of Eng'rs*, 531 U.S. at 159.

The portions of Section 856(a) invoked by the DOJ here—"make available for use, . . . without compensation, the place for the purpose of unlawfully . . . using a controlled substance"—already stand at the outer reaches of any plausible reading of that provision. None of the cases the DOJ cites involves charges under Section 856(a) based solely on unlawful use, much less on any remotely analogous basis against a not-for-profit medical facility. A ruling in favor of Safehouse will not in any way affect the DOJ's enforcement of federal drug laws or call into question the validity of any prior prosecution. Here, the words of Section 856 must be read in the context of the CSA as a whole, its purpose, and its history, which evince no intent to criminalize Safehouse's medical and public health intervention to prevent overdose deaths, much less do so unambiguously. To the extent that any doubt remains, lenity requires it to be resolved in Safehouse's favor.

II. SECTION 856(a)(2) CANNOT APPLY TO SAFEHOUSE

A construction that applies Section 856(a)(2) to Safehouse would exceed the scope of Congress's authority to regulate commerce. The DOJ's threatened prosecution of Safehouse for operating a medically supervised consumption site would also violate RFRA because it would substantially burden Safehouse's religious mission to save lives and prevent overdose deaths, without furthering any compelling governmental interest. As a result, Section 856(a)(2) cannot lawfully prohibit Safehouse's proposed overdose prevention facility.

A. Application of Section 856 to a Medically Supervised Consumption Site Would Be Unconstitutional as an Exercise of Power Under the Commerce Clause

Application of Section 856 to prohibit Safehouse's proposed non-commercial medically supervised consumption and observation site does not fall within Congress's authority to regulate

interstate commerce and therefore is unconstitutional.[31] Federal legislation that exceeds the scope of Congress's enumerated sources of Article I authority—either on its face or as-applied—is unconstitutional. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 556 (1995). The Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States[.]" U.S. Const., Art. I., § 8, cl. 3; *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824). When Congress enacts criminal legislation, principles of federalism weigh against interpreting Congress's commerce authority in a manner that converts it into a "general police power of the sort retained by the states." *Lopez*, 514 U.S. at 567. For that reason, the Supreme Court has always "rejected readings of . . . the scope of federal power that would permit Congress to exercise a police power." *United States v. Morrison*, 529 U.S. 598, 618-19 (2000). That is because State governments, not the federal government, "possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561 n.3. And "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *Bond*, 572 U.S. at 853-54. Congress therefore may regulate only: (i) the "use of the channels of inter-state commerce"; (ii) "the instrumentalit[ies] of interstate commerce, or persons or things in inter-state commerce"; and (iii) "activit[ies] that substantially affect interstate commerce." *Lopez*, 514 U.S. at 559. Application of Section 856 to non-commercial activities at a property based solely on unlawful "use" does not fall with any of these three categories.

As an initial matter, Section 856 lacks "a jurisdictional element limiting the reach of the law to a discrete set of activities that additionally has an explicit connection with or effect on interstate commerce." *United States v. Walker*, 657 F.3d 160, 178 (3d Cir. 2011); *United States v.*

[31] Under no circumstance will Safehouse make available any illicit narcotic or opioid; manufacture, sell, or administer unlawful drugs, or permit the distribution or sale of drugs on site, nor will it charge participants for its harm reduction and overdose prevention services or permit the exchange of currency. Counterclaims ¶ 112.

Kukafka, 478 F.3d 531, 535-36 (3d Cir. 2007). Moreover, making a property available on an entirely local, non-commercial basis for drug "use" is not, as the DOJ asserts, "part of an economic class of activities that have a substantial effect on interstate commerce."[32] Therefore, it cannot "be sustained under [Supreme Court] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id*. Any "link between the regulated activity and interstate commerce" that can be imagined only by creating a speculative chain of contingencies and "pil[ing] inference upon inference." *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 612. Concerns about attenuation are especially pressing in the context of criminal statutes like Section 856.

Congress has never found that any conduct remotely similar to Safehouse's proposed model substantially affects interstate commerce. When Congress adopted the CSA in 1970 it did not find that "use" of a controlled substance had any effect on interstate commerce. Congress found that illegal importation, manufacture, distribution, and possession had an effect on interstate commerce, but that finding notably did not include improper use:

> A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, ***such as manufacture, local distribution, and possession,*** nonetheless have a substantial and direct effect upon interstate commerce because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

[32] As explained above, the DOJ's efforts to have this Court rewrite the term "use" to mean "possession" should be rejected outright.

Id. § 801(3) (emphasis added). Similarly, the findings in Sections 801(4), (5) and (6) concerning the interstate effect of local drug activities conspicuously omit "use" from the listed activities. *Id.* § 801(4)–(6).[33] Those findings indicate that Congress did not see regulation of drug use as falling within its commerce authority.

Congress separately adopted Section 856 in 1986—a decade-and-a-half after Congress's 1970 findings—and it amended the statute in 2003. Congress made no additional findings about the impact of drug use on interstate commerce at that time. In fact, by expressly targeting non-compensated uses of property, Section 856 is written to capture conduct that lacks "an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Given that regulation of drug use is traditionally a local concern, courts should "reject[] readings of . . . the scope of federal power that would permit Congress to exercise a police power." *United States v. Morrison*, 529 U.S. at 618-19.

In addition, the operation of Safehouse will not facilitate or increase the interstate market for controlled substances. Whether drug use takes place in safe and medically supervised conditions or on the street cannot plausibly affect the interstate market demand; participants will have already obtained any drugs before arriving at Safehouse. This Court, moreover, must accept as true the allegation that "[t]he operation of Safehouse's overdose prevention services will have no adverse impact on the legitimate CSA goal of suppressing the interstate market for illegal drugs.

[33] That omission was not an oversight. In the same provision, Congress addressed "improper drug use" in the context of health and welfare, finding that "illegal importation, manufacture, distribution, and possession *and improper use* of controlled substances have a substantial and detrimental effect on *the health and general welfare of the American people*." 21 U.S.C. § 801(2) (emphases added). No similar finding was made, however, as to the effect of "use" on commerce.

In fact, studies show that medically supervised consumption sites actually reduce drug use."[34] Counterclaims ¶ 113.

The DOJ fails to address the lack of nexus between Safehouse's proposed site and interstate commerce. Instead, the DOJ incorrectly argues that the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), forecloses Safehouse's Commerce Clause challenge to Section 856(a)(2). DOJ Mot. 20-21. *Raich*'s holding and reasoning do not apply here. In *Raich*, the Supreme Court held that the CSA's prohibitions on intrastate possession and manufacture of marijuana constituted a valid exercise of congressional authority. As the Court explained,

> Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions. . . . [T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Raich, 545 U.S. at 19.[35] The Court has repeatedly stressed since *Raich* that its holding depended on Congress's judgment that prohibiting intrastate possession and manufacture of marijuana would affect the national market for marijuana. *See, e.g.*, *Taylor v. United States*, 136 S. Ct. 2074, 2077–78 (2016) ("We held in [*Raich*] that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate

[34] The DOJ's response is that "'safe' injection sites . . . would give people who use opioids and the public the false impression that using these deadly drugs can be safe given the right environment and supervision." DOJ Mot. 6. The DOJ presumes that this would lead "people who use opioids and the public" to buy more of them and thus impact the commerce that the CSA seeks to suppress. *Id.* That assertion is contradicted by Safehouse's pleaded facts, which cite to clinical and public health evidence that supervised consumption sites do *not* encourage or increase illicit drug use, but rather, lead to greater rates of drug treatment. Answer 3 & n.5. In any event, that is a disputed factual proposition not properly raised in a motion for judgment on the pleadings.

[35] *See Raich*, 545 U.S. at 28-29 ("One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme . . . is not only rational, but 'visible to the naked eye.'").

production, possession, and sale of this controlled substance"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560–61 (2012) (Roberts, C.J.) (explaining that the CSA was "comprehensive legislation to regulate the interstate market" in marijuana and that the Court denied an exemption to individuals who engaged in "only intrastate possession and consumption . . . on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market."). As discussed above, Congress has never determined, and no evidence suggests, that the availability of local property, on an uncompensated basis, for drug "use" has any effect on interstate commerce.

In addition, like the non-commercial possession of weapons in *Lopez*, Section 856 is "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Raich*, 545 U.S. at 24 (quoting *Lopez*, 514 U.S. at 561). The provision at issue here regulates only *the place* in which use occurs; it is a single-subject statutory provision with a non-economic objective removed from the core of the CSA's broader regulatory regime. *See Schmidt v. United States*, No. C 06-04378 CRB, 2006 WL 3734594, at *1 (N.D. Cal. Dec. 18, 2006) (describing Section 856 as "a statute that relates not specifically to the manufacture, distribution, or dispensation of controlled substances").

Nor is it essential to DOJ's enforcement of Section 856 or other provisions of the CSA to apply Section 856(a)(2) to property made available, on an uncompensated basis, for individual drug use. To the contrary, it is unprecedented. Every successful prosecution under Section 856 of which Safehouse is aware has involved premises used for purpose of commercially manufacturing, storing, or distributing controlled substances. None involved only unlawful drug use. Certainly this is true for the cases cited by the DOJ, as explained above.

As the Third Circuit has observed, "'in view of our complex society,' there is virtually nothing that does not affect interstate commerce in some manner." *United States v. McGuire*, 178 F.3d 203, 209-10 (3d Cir. 1999) (quoting *Lopez*, 514 U.S. at 555). "Though certain conduct may appear to be the quintessence of local activity, if we 'follow the money' the trail we will always disclose *some* effect on interstate and/or foreign commerce." *Id.* ("Even such a seemingly parochial action as borrowing a cup of sugar from a neighbor can be viewed as part of the stream of commerce that extends to refineries overseas."). Because "such an inconsequential effect can[not] support the exercise of federal jurisdiction over a purely intrastate concern without obliterating the distinctions between state and federal jurisdiction," *id.* at 210, this Court should reject the DOJ's attempt to expand Congress's authority to regulate local, intrastate, non-commercial activity.

In sum, the DOJ's threatened prosecution of Safehouse would be unconstitutional. This Court can and should avoid these constitutional doubts by concluding that Section 856 does not prohibit Safehouse from operating an overdose prevention site. Alternatively, this Court should conclude that Section 856, on its face and as-applied to Safehouse, would impermissibly extend the statute beyond the limits of congressional authority set forth in Article I of the Constitution.

B. Enforcing Section 856(a)(2) Against Safehouse or Its Officers Would Violate the Religious Freedom Restoration Act

RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the "Government . . . demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§2000bb–1(a), (b). The term "person" includes nonprofit corporations, such as Safehouse. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708

(2014). "To establish a prima facie case under RFRA, [a plaintiff] must allege that the government (1) substantially burdened (2) a sincere (3) religious exercise." *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016). In cases involving corporate entities, courts examine the beliefs of the owners of the entity. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) (focusing on the corporate owners' religious practices when assessing the beliefs of a closely held corporation).

The mission statement of Safehouse announces, "The leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in us from our religious schooling, our devout families and our practices of worship. At the core of our faith is the principle that preservation of human life overrides any other consideration."[36] Driven by its board members' religious obligation to save lives, Safehouse is in the process of opening an overdose prevention site, which will include medically supervised consumption. Safehouse's counterclaims describe in detail the necessity and efficacy of these overdose prevention services—and the inadequacy of alternatives. The DOJ's attempt to block these services substantially burdens Safehouse's lifesaving religious mission and, if the DOJ is successful, would result in avoidable overdose deaths. The DOJ's decision to prevent the saving of life cannot be described, with any plausibility, as the least restrictive means of achieving a compelling governmental interest.

i. Safehouse's decision to open a supervised consumption site is driven by its board members' religious obligations to save lives

A party invoking the protection of RFRA must seek to engage in a "sincere exercise of religion." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006) ("*O Centro*"). In cases involving corporate entities, the religious beliefs are determined in accordance with normal principles of corporate governance. *See, e.g.*, *Hobby Lobby*, 573 U.S. at

[36] *See* Safehouse, About Safehouse, https://www.safehousephilly.org/about (last visited June 28, 2019).

717-19 (rejecting the argument that closely held corporations cannot hold religious beliefs because of possible disagreement between its owners as to religious issues, and explaining that such disagreements are resolved like any other corporate dispute).

Safehouse's religious beliefs are determined by its board and its mission. Safehouse's mission statement proclaims: "At the core of our faith is the principle that preservation of human life overrides any other considerations." Safehouse has further alleged that each Safehouse board member is a follower of a religious faith (Counterclaims ¶ 124); that the entire board shares the religious belief—rooted in scriptures—that they are obligated to "preserve life, provide shelter to [their] neighbors, and to do everything possible to care for the sick" (*id.* ¶¶ 126-28); and that the provision of supervised consumptions facilities would effectuate that obligation. *Id.* ¶ 128. Each Safehouse board member believes in the existence of God, and in the scripture of their respective faiths. *See id.* ¶ 124 (describing the religious practices of the board). The positive commandment to save lives animating the Safehouse mission—"the core of all board members' faith" (*id.* ¶ 126)—derives from the members' religious texts. *Id.* ¶ 127 (listing examples of Jewish and Christian scripture that impose a religious obligation to value and preserve human life).

The religious nature of these beliefs and their sincerity are issues of fact. *Real Alts., Inc. v. Sec'y of HHS*, 867 F.3d 338, 356 (3d Cir. 2017) (citing *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008)); *see also Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (explaining that "sincerity and religiosity . . . are factual inquiries"); *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) (observing that "whether . . . religious beliefs are sincerely held . . . is a question of fact"); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (noting that "assessing a claimant's sincerity of belief demands a full exposition of facts"). At this stage of the litigation, then, the Court must credit Safehouse's allegations as true and treat Safehouse's mission as an

exercise of its religious convictions. *See Zimmerman v. Corbett*, 873 F.3d 414, 417-18 (3d Cir. 2017). That should foreclose the DOJ's motion for judgment on the pleadings on this issue.

Although the DOJ acknowledges this standard of review is correct (*see* DOJ Mot. 4 fn. 3), it nevertheless insists that, when ruling on a motion for judgment on the pleadings, the Court may disregard the pleaded facts and make its own determination as to whether Safehouse asserts sincerely held religious beliefs. DOJ Mot. 30. None of the cases cited by the DOJ supports this position. *See id.* at 30-31 (citing *Sutton v. Rasheed*, 323 F.3d 236, 240 (3d Cir. 2003) (appeal from grant of summary judgment); *Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47, 50 (2d Cir. 1988) (appeal following a bench trial); *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 416 (E.D.N.Y. 2010) (ruling on a motion for a preliminary injunction following an evidentiary hearing); *Check v. N.Y.C. Dep't of Educ.*, No. 13-cv-791, 2013 WL 12113679, at *1 (E.D.N.Y. 2013) (same)). In the sole case cited that involves a Rule 12 motion, the Court refused to resolve the factual dispute between the parties. *See Cutter v. Wilkinson*, 644 U.S. 709, 725 n.13 (2005). There is no support for resolving any factual dispute about Safehouse's religious beliefs at this stage of the proceedings.

The substance of the DOJ's argument is also flawed. It first contends that Safehouse cannot engage in a religious exercise because it claims that Safehouse is informed by its "socio-political belief" and "individual, medical, and public health-based judgment." DOJ Mot. 32. The DOJ similarly attempts to re-characterize Safehouse's religious convictions as "moral beliefs" or "individual philosophical views." DOJ Mot. 32-34. But courts have never required the faithful to ignore the world around them; rather, faith-based action may certainly be informed by social, medical, and economic evidence. *Western Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 546 (D.D.C. 1994) (feeding program was "[u]nquestionably . . . in every

respect [a] religious activity and form of worship" even though "[i]t also happen[ed] to provide, at no cost to the city, a sorely needed social service"); *see also Welsh v. United States*, 398 U.S. 333, 342 (1970) (a person's beliefs may be religious even if they also contain a "substantial political dimension"); *Wiggins v. Sargent*, 753 F.2d 663, 666 (8th Cir. 1985) ("[A] belief can be both secular and religious. The categories are not mutually exclusive."); *Callahan v. Woods*, 658 F.2d 679, 684 (9th Cir. 1981) ("[A] coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one."); *Pitcher v. Laird,* 421 F.2d 1272 (5th Cir. 1970) (conscientious objectors may have political and sociological beliefs as well as qualifying religious scruples); *Bates v. Commander, First Coast Guard District,* 413 F.2d 475 (1st Cir. 1969) (religious belief not disqualified as a mere "personal moral code" because it affects political views).

The religious nature of Safehouse's actions is therefore unchanged by the entity's decision to further its religious obligations through means that are scientifically proven. Instead, as the DOJ recognizes, conduct loses religious protection only when it is "based on *purely* secular considerations." DOJ Mot. 31 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972)) (emphasis added). That is not the case here. The DOJ does not dispute the "sincerity of Defendants' asserted religious belief," (*id.*), and Safehouse has alleged that it is those beliefs that motivate its decision to open an overdose prevention site, which will include supervised consumption, to provide lifesaving medical care. Counterclaims ¶¶ 128, 142. Safehouse's decision to operate a supervised consumption site is therefore just one part of "a comprehensive system of beliefs about fundamental or ultimate matters," and therefore qualifies as a religious—rather than philosophical or moral—exercise for the purposes of RFRA. *Fallon v. Mercy Catholic Med. Ctr. of Southeastern*

Pa., 877 F.3d 487, 492 (3d Cir. 2017).[37] The Court should not second-guess Safehouse's professed religious faith and conviction, although Safehouse's board members are more than willing to testify at a hearing to establish both the nature of their beliefs and their sincerity.

The DOJ suggests that a ruling in favor of Safehouse will contribute to a breakdown of the rule of law and a rise in defendants asserting RFRA claims. DOJ Mot. 34. RFRA necessarily requires courts in certain circumstances to excuse religious believers from generally applicable laws. *See Hobby Lobby*, 573 U.S. at 694-95 (citing 42 U.S.C. § 2000bb(a)(2)). Courts already grapple with—and have previously accommodated—religious defenses to otherwise-criminal conduct. *See O Centro*, 546 U.S. at 439 (affirming a preliminary injunction permitting a religious group to consume a controlled substance). Denial of the DOJ's motion for judgment on the pleadings will therefore do nothing to change the courts' competency to safeguard religious rights while ensuring that the rule of law abides.

ii. The DOJ's efforts to ban Safehouse's overdose prevention site places a substantial burden on Safehouse's religious exercise

Section 856(a)(2), if interpreted in the manner the DOJ advocates, would substantially burden Safehouse's religious exercise. A substantial burden exists when the "an individual face[s] 'serious disciplinary action' for acting on their religious beliefs." *United States v. Stimler*, 864 F.3d 253, 268-69 (3d Cir. 2017) (quoting *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015)). "[T]he

[37] Additionally, although religious beliefs are "not limited to beliefs which are shared by all of the members of a religious sect," *Holt v. Hobbs*, 135 S. Ct. 853, 858 (2015), Safehouse's calling to look after those in need has long been recognized as an integral part of religious practice. *See Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574-75 (2d Cir. 2002) (Christian scripture directing believers "to care for the least, the lost, and the lonely of this world" provided the religious basis for the provision of sleeping space to the homeless to constitute religious exercise); *Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726, 729 (9th Cir. 2016) (provision of shelter to the homeless effectuated plaintiff's belief in "Christian compassion towards the oppressed, poor, and hungry"); *W. Presbyterian Church*, 862 F. Supp. at 544, 547 (noting that a feeding program for the indigent was "a form of worship akin to prayer," and that "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions"); *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12-3159, 2012 WL 3235317, at *17 (E.D. Pa. Aug. 9, 2012) (noting, in a case decided under the Pennsylvania Religious Freedom Protection Act, that plaintiffs "observe their faith by providing sustenance to the poor, needy, and homeless").

inquiry here isn't into the merit of the plaintiff's religious beliefs or the relative importance of the religious exercise . . . . Instead, the inquiry focuses only on the coercive impact of the government's actions." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.). The DOJ cannot use the substantial burden analysis simply to cast aside the plaintiff's religious beliefs as "half-hearted," as the DOJ seeks to do here. DOJ Mot. 2.

The threat of criminal sanctions for exercising a religious belief constitutes a substantial burden. *See Yoder*, 406 U.S. at 218 (effect of law mandating, "under threat of criminal sanction," conduct at odds with Amish beliefs was "not only severe, but inescapable"); *O Centro*, 546 U.S. at 426 (government conceded that prosecution under the Controlled Substances Act would constitute a substantial burden). Fines may also substantially burden a religious exercise. For example, in *Hobby Lobby*, the Court "ha[d] little trouble concluding" that a potential fine of $800,000 substantially burdened the plaintiff corporation's religious exercise. 573 U.S. at 719-20*; see also Yoder*, 406 U.S. at 208, 218 (explaining that a $5 fine for violating compulsory school attendance laws was a "grave interference" with defendants' religious tenets).

The DOJ's present actions squarely fit the definition of "substantial burden." In response to Safehouse's announcement that it was opening an overdose prevention facility, the U.S. Attorney's Office threatened criminal and civil sanctions for a purported Section 856(a) violation, and commenced this lawsuit. Counterclaims ¶¶ 39-41. Successful prosecution of Safehouse under Section 856(a)(2) carries fines of up to $2,000,000. *See* 21 U.S.C. § 856(b). The threat of prosecution under Section 856(a)(2)—which subjects individuals to up to twenty years' imprisonment—also places substantial pressure on Safehouse's officers to refrain from operating

a supervised consumption site or "face 'serious disciplinary action' for acting on their religious beliefs." *Stimler*, 864 F.3d at 268-69. There should be no dispute as to substantial burden.[38]

The DOJ nevertheless asserts that it "is not pressuring Safehouse to modify its behavior or cease a religious exercise" because Safehouse has not yet opened an overdose prevention facility. DOJ Mot. 25. Not so. As a factual matter, the DOJ is incorrect in its claim that Safehouse has yet to commence its religious exercise—Safehouse has already begun the process of "working with community partners to find a suitable location[] to deliver [overdose prevention] services," and continues to solicit donations in furtherance of its mission. *See* DOJ Compl., Ex. A at 6, 16, ECF No. 1-2.

A believer need not start exercising its religious beliefs—and risk government recrimination—before invoking RFRA: the inmate in *Holt v. Hobbs* challenged the prison's grooming policy in court before he started growing a beard to the length required by his religion (135 S. Ct. at 861);[39] the worshippers in *O Centro* successfully prevented a prosecution under the Controlled Substances Act, even though the *status quo* prohibited the sacramental use of ayahuasca. *O Centro Espirita Beneficiente v. Ashcroft*, 389 F.3d 973, 980 (10th Cir. 2004) (per curiam), *aff'd sub nom. O Centro*, 546 U.S. 418 (2006)), and the Sikh children in *Cheema v. Thompson* stayed at home before their RFRA claim was litigated rather than attend school and risk expulsion for wearing their articles of faith. 67 F.3d 883, 885-86 (9th Cir. 1995), *overruled on other grounds by United States v. Antoine*, 318 F.3d 919 (9th Cir. 2002). RFRA does not require Safehouse to wait until its board members are arrested and the entity fined before seeking judicial

[38] *See* Memorandum from Att'y Gen. to All Exec. Dep'ts & Agencies, *Federal Law Protections for Religious Liberty* 4 (Oct. 6, 2017), https://www.justice.gov/crt/page/file/1006786/download ("Attorney General Memo") ("In general, a government action that bans an aspect of an adherent's religious observance or practice . . . will qualify as a substantial burden on the exercise of religion").

[39] The Court ruled in plaintiff's favor under the Religious Land Use and Institutionalized Persons Act, but a RFRA claim is analyzed "pursuant to the same standard." *Holt*, 135 S. Ct. at 860.

intervention. The threat of enforcement is enough to substantially burden Safehouse by "coerc[ing] it to act contrary to [its] religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (internal quotations omitted)).[40] Safehouse did not chose the timing of this action; the DOJ brought suit. For the same reasons that the DOJ's case does not fail under Article III on ripeness grounds, Safehouse's RFRA defense is not premature.

The DOJ's contention that this burden is insubstantial because Safehouse could allegedly practice its religion in ways that would not violate the CSA is contrary to current law. In 2000, "RLUIPA amended RFRA's definition of the 'exercise of religion' . . . to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Hobby Lobby*, 573 U.S. at 696 (quoting 42 U. S. C. §2000cc-5(7)(A)). In *Holt*, moreover, the Supreme Court rejected the very argument that the DOJ now presses—that "the availability of alternative means of practicing religion is a relevant consideration" under RFRA. 135 S. Ct. at 862. Rather, as the Court held, the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . , not whether the . . . claimant is able to engage in other forms of religious exercise." *Id.* at 862.[41]

[40] The cases cited by the DOJ (*see* Mot. 25-26) have nothing to do with the interplay between the 'substantial burden' analysis and the *status quo*: In both *Adkins v. Kaspar* and *Smith v. Kyler*, the inmate plaintiffs lost because their ability to hold religious gatherings was burdened by "a dearth of qualified outside volunteers available to go to [the prison], not from some rule or regulation that directly prohibits such gatherings." *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004); *Smith v. Kyler*, 295 F. App'x 479, 483 (3d Cir. 2008) (non-precedential) (quoting *Adkins*). And, in *Washington v. Klem*, the Third Circuit agreed that an inmate was substantially burdened by a prison rule that applied equally to all inmates. 497 F.3d 272, 282 (3d Cir. 2007). Here, it is the DOJ—not a third party—that actively seeks to interfere with Safehouse's religious exercise.

[41] The Court was discussing RLUIPA but a RFRA claim is analyzed "pursuant to the same standard." *Holt*, 135 S. Ct. at 860.

Nevertheless, the DOJ urges the Court to draw a parallel between this case and *United States v. Stimler*, in which the Third Circuit rejected a RFRA defense to a violent felony charge. The court held that the burden on defendants' religious exercise was not substantial because "none of the defendants argue[d] that they [we]re unable to participate in [religious practice] without engaging in kidnapping." *Stimler*, 864 F.3d at 268.[42] Beyond the obvious dissimilarity between this case and *Stimler*, the Court in *Stimler* did not consider—and the parties did not address in their briefs—whether subsequent Supreme Court precedent in *Holt* undermined the vitality of the "alternative means of practice" analysis that the Third Circuit previously employed.

In any event, even assuming that analysis applied, the DOJ's argument only has force if the Court is willing to ignore the facts alleged in Safehouse's counterclaims, which describe why harm-reduction methods that do not include supervised consumption have so far failed to curb the thousands of overdose deaths in Philadelphia.[43] Requiring Safehouse to forgo its supervised consumption facility would lead to avoidable overdose deaths; it would force Safehouse to violate

[42] The defendants in *Stimler* were convicted of kidnapping for the tactics they employed in encouraging recalcitrant male members of their own ultra-Orthodox religious community to allow their wives a divorce.

[43] The DOJ's interpretation of RFRA, and dismissiveness toward Safehouse's religious beliefs, cannot be reconciled with the position it has taken in its own briefs recently filed in this very Court or the U.S. Attorney General's recent interpretive guidance on the subject. Only ***three days after its motion was filed***, the DOJ filed a brief in this Court arguing that, under RFRA, a courts' "narrow function in this context is to determine whether the line drawn [by a religious objector] reflects an honest conviction," as opposed to "in effect tell[ing] the plaintiffs that their beliefs are flawed." DOJ Br. in Op. to Summ. J. at 16-17, *Commonwealth v. Trump*, No. 17-cv-4540 (E.D. Pa. June 14, 2019), ECF No. 211. In that same case, the DOJ argued that the Court should "decline to question the Individual Plaintiffs' religious beliefs under the guise of adjudicating substantial burden. [It should] respect their convictions and conclude that the Contraceptive Mandate —which forces them, under threat of monetary penalty, to sign up for and participate in a system that violates their devoutly held beliefs about human life—is a substantial burden on their exercise of religion." DOJ Br. in Opp. to Prelim. Injunction at 26, *Commonwealth v. Trump*, No. 17-cv-4540 (E.D. Pa. Nov. 16, 2017), ECF No. 15. Likewise, the Attorney General instructed all federal agencies and departments that "[r]eligious adherents will often be required to draw lines in the application of their religious beliefs, and government is not competent to assess the reasonableness of such lines drawn, nor would it be appropriate for government to do so." Attorney General Memo at 4, ¶ 14. The outcome-oriented and selective approach the DOJ has taken toward its interpretation of RFRA shows the DOJ simply does not like Safehouse's religious beliefs, not that those beliefs are not entitled to protection.

its religious obligation to save lives; and it would substantially burden Safehouse's religious exercise.

The DOJ's final rejoinder is that "Safehouse's RFRA argument fails as a practical matter" because Safehouse cannot legalize the possession of controlled substances by Safehouse's constituents. DOJ Mot. 34. This assessment does not alter Safehouse's religious obligation to help those in need or prevent the operation of a supervised consumption facility. Syringe exchange programs, for example, provide clean needles to individuals who use heroin or fentanyl. Counterclaims ¶ 5. Even though "the underlying activity [they] seek[] to invite remains illegal," *id.* at 34, the DOJ's encourages and funds many of these facilities.[44] The fact that those to whom Safehouse seeks to provide services might have broken the law has no bearing on the religious nature of Safehouse's exercise, the burden placed on that exercise by the DOJ, or whether Safehouse is entitled to protection under RFRA.

CONCLUSION

Accepting the facts in the pleadings as true, as required at this stage under Fed. R. Civ. P. 12(c), 21 U.S.C. § 856 would not prohibit Safehouse from operating and establishing an overdose prevention facility that provides medically supervised consumption services. Accordingly, Defendants Safehouse and Jose Benitez respectfully request that this Court deny the DOJ's motion for judgment on the pleadings.

[44] *See* CDC, *Program Guidance for Implementing Certain Components of Syringe Services Programs* (2016), https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-syringe-exchange-services.pdf (last visit June 28, 2019).

Dated: June 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2019, I caused Defendants Safehouse and Jose Benitez's brief in opposition to the motion for judgment on the pleadings 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 to be filed with the Clerk of Court of the United States District Court for the Eastern District of Pennsylvania using the ECF system, it is available for viewing and downloading from the ECF system, and a true and correct copy was served via ECF to all counsel of record registered with the ECF system.

BY: /s/ *Ilana H. Eisenstein*

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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	:	

REPLY IN SUPPORT OF THE UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS

Safehouse proposes a radical experiment: to invite thousands of people onto its property who indisputably have the purpose of injecting illegal drugs. This proposed experiment is against

the law. It does not matter that Safehouse has a "professed unselfish motivation" for breaking the law. *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (Stevens, J.). That is not a justification for taking the law into its own hands. Rather, it is "a form of arrogance which organized society cannot tolerate." *Id*. What matters is that Safehouse is not above the law, nor are its views about drug policy "superior to democratic decision making." *Id*.

Safehouse's proposed interpretation of the CSA would gut the analysis of the five circuit courts that have unanimously reached the same conclusion – *i.e.*, that a person cannot knowingly and intentionally make a place available for illegal drug activity, but escape liability on the basis of a purported lack of illegal purpose. The United States simply requests that the Court affirm the obvious proposition embodied within § 856(a)(2) that it is illegal to invite thousands of people onto one's property knowing and intending that they will conduct illegal drug activity.

Although Safehouse and its *amici*[1] raise policy arguments for Consumption Rooms, Congress is the appropriate venue for such arguments. Even more to the point, Safehouse does not have the power to trump the views of Congress. If Safehouse and its proponents wish to open Consumption Rooms, they must advocate for a legislative change to the CSA. In that legislative forum, both their views and the concerns of those constituents most affected[2] can be properly evaluated and debated. As of now, however, proposed Consumption Rooms are squarely illegal. The Court should uphold the law – which would respect and defer to the democratic process – by granting the government's motion.

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[1] A significant portion of the *amicus* briefs filed in this matter raise public health policy arguments about the safety and efficacy of Consumption Rooms and their effect on any neighborhoods in which they would be located. That material is beyond the pleadings and thus beyond the scope of the Rule 12(c) motion. Accordingly, the government does not address those issues here.

[2] ECF No. 97, Amicus Brief of Bridesburg Civic Assoc., Fraternal Order of Police, Lodge 5, Harrowgate Civic Assoc., Juniata Park Civic Assoc., Kensington Independent Civic Assoc., Port Richmond on Patrol and Civic, South Port Richmond Civic Assoc. ("Amici do not have the luxury of ignoring the consequences that illegal drug consumption sites would unleash on their communities.").

I. Safehouse's Planned Consumption Rooms are Unambiguously Illegal Under Section 856(a)(2).

A. Section 856(a)(2) Refers to the Purpose of Those Using the Illegal Drugs, Not Safehouse's Purpose.

Safehouse does not contest that it would "knowingly and intentionally" permit thousands of people to use illegal drugs at its facility. Indeed, Safehouse plans to facilitate drug use by providing a place to use the illegal drugs. Safehouse contends, however, that it would not violate 21 U.S.C. § 856(a)(2) because it would do so "for the purpose of" providing medical care. But the phrase "for the purpose of" in § 856(a)(2) unambiguously refers to the purpose of the "participants" Safehouse would invite to its facility – not the purpose of Safehouse itself. *See*, *e.g.*, *United States v. Wilson*, 503 F.3d 195, at 197-98 (2d Cir. 2007) ("The phrase 'for the purpose,' as used in [§ 856(a)(2)], references the purpose and design *not* of the person with the premises, but rather of those who are permitted to engage in drug-related activities there[.]") (emphasis in original). "This conclusion is mandated by the text and structure of § 856(a)(1) and (a)(2), and is consistent with the case law and jury instructions" in every circuit that has addressed it. *United States v. Tebeau*, 713 F.3d 955, 961 (8th Cir. 2013).

Here, there is no dispute that Safehouse would "knowingly and intentionally . . . make [its facility] available" to "participants" who have the "purpose" of using controlled substances. 21 U.S.C. § 856(a)(2). Nothing more is required for liability under subsection (a)(2). Safehouse's purpose is irrelevant.

Contending that § 856 "turns on the purpose of the place itself," Safehouse argues that § 856 should be read such that its own purpose is the relevant "purpose" under both section (a)(1) and (a)(2). (ECF No. 48 at 19, 24.) Such a reading is contrary to the holding of every circuit court to have considered the issue. *Tebeau* analyzed the distinction between the two

subsections, framing the question presented as "whether § 856(a)(2) criminalizes a defendant's knowing and intentional making available of [a property] even if he himself does not have the purpose to manufacture, store, distribute, or use a controlled substance there." 713 F.3d at 959. The court agreed with the Fifth Circuit that "for the purpose of," in § 856(a)(1), "applies to the person who opens or maintains the place for the illegal activity," whereas, under § 856(a)(2), "the person who manages or controls the [property] and then rents to others [ ] need not have the express purpose in doing so that drug related activity take place, *as long as others have the purpose*." *Id*. at 960 (quoting *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990) (internal marks omitted and emphasis added)).

The Eighth Circuit is not alone. The Ninth Circuit held that "§ 856(a)(1) applies 'to purposeful activity,' and that interpreting § 856(a)(2) to require an illegal purpose would cause the subsections to overlap 'entirely[.]'" *Id*. (quoting *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991)). *See also United States v. Burnside*, 855 F.2d 863 (9th Cir. 1988) (Table) (available in Westlaw at 1988 WL 90077) (§ 856(a)(2) "requires . . . control of a building and knowingly allowing someone else to use it"). The Second and Seventh Circuits have reached similar conclusions. *Wilson*, 503 F.3d at 197-98 (2d Cir. 2007); *United States v. Ramsey*, 406 F.3d 426 (7th Cir. 2005).

Section 856(a)(2) encompasses Safehouse's proposed conduct. Unlike § 856(a)(1), which refers to the person who "knowingly open[s], lease[s], rent[s], use[s], or maintain[s]" the place at issue, (a)(2) refers to the person to whom the owner or manager "knowingly and intentionally rent[s], lease[s] . . . or make[s] [a place] available for use." 21 U.S.C. § 856(a)(2). Subsection (a)(2) squarely applies to the person – like Safehouse – "who has knowingly allowed others to

engage in those activities by making the place 'available for use . . . for the purpose of unlawfully' engaging in such activity." *Chen*, 913 F.2d at 190.

Safehouse's hypotheticals about children who may use drugs in their parents' home and occupants who may use them in homeless shelters are inapt. (ECF No. 48 at 22.) These circumstances do not fall within the scope of § 856(a)(2) because neither the homeowner nor the shelter operator "knowingly and intentionally" makes the home or shelter available for illegal drug use by a child or tenants just because those people struggle with addiction and there is a risk of use. Put differently, while illegal drug use undercuts the purpose of the homeowner or shelter operator facilities, drug use is *always* a necessary prerequisite of Safehouse's plan. HUD's guidance regarding drug use on HUD properties is inapposite for the same reason. In any event, HUD guidance cannot trump the clear words of § 856(a)(2) because "loose language" in agency guidance cannot create ambiguity in a statute. *See United States v. Lopez*, ___ F.3d ___, 2019 WL 3001002, at *3 (6th Cir. July 10, 2019).

Safehouse's remaining arguments regarding § 856(a)(2) are meritless. Safehouse is wrong to suggest that Sections 856(a)(1) and (a)(2) "prohibit different activities" by distinguishing operators, landlords, and managers, ECF No. 48 at 23, and Safehouse cites nothing in *Chen* or in the statute to support such a reading. Similarly, the reference to evidence of drug sales in *Chen* and *Tebeau* does not suggest that such evidence is required to violate § 856(a)(2). (ECF No. 48 at 27.) The plain language of § 856(a)(2) proscribes drug use on a property to the same extent that it proscribes drug manufacturing and distribution. Both kinds of conduct are illegal. And, nothing in the statute requires the defendant to be the source of the drugs for criminal culpability. (*Id*. at 27-28.) This is why the Ninth Circuit in *Tamez* affirmed the defendant's conviction despite finding "no evidence that the business or its buildings were

established or maintained for the purpose of drug activities," holding that "section 856(a)(2) requires only that proscribed activity was present, that Tamez knew of the activity and allowed that activity to continue." *Tamez*, 941 F.2d at 774.

B. Even if Safehouse's "Purposes" Were Relevant, Safehouse Would Still Violate § 856.

Even if Safehouse's purposes were relevant under § 856(a)(2) – and they are not because the people Safehouse invites onto its property will indisputably have the purpose of using illegal drugs – Safehouse's contention that allowing illegal drug use is *not* one of its purposes is disingenuous. Unlike subsection (a)(2), the property owner's "purpose" is directly at issue in subsection (a)(1). Courts interpreting "purpose" in § 856(a)(1) have held that a defendant may have more than one purpose in maintaining the property and illegal drug activity need not be the sole purpose to violate § 856(a)(1). *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995) ("Liability under the statute does not require the drug related use to be the sole or even the primary purpose of maintaining the property."); *United States v. Church*, 970 F.2d 401, 406 (7th Cir. 1992) (rejecting the proposition that the government cannot sustain a conviction under § 856 if drug distribution is "but one of several uses of a residence").[3] Though Safehouse contends its sole motive in maintaining the Consumption Room is medical treatment, the illegal use of drugs on Safehouse property by Safehouse invitees is a necessary prerequisite to the treatment it proposes. Indeed, Safehouse's offering a place to engage in supervised illegal drug use is its distinguishing feature that sets it apart from existing public health and drug treatment organizations.

[3] Other Circuits that have considered this issue have required that the illegal purpose be "a significant purpose" or "one of the primary or principal uses" of the premises. *See United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010); *United States v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995).

In suggesting that its purpose is other than what it repeatedly states in its pleadings and on its website, Safehouse asks this Court to engage in make-believe. Safehouse argues this Court should ignore Safehouse's stated purpose of providing a Consumption Room, and instead should *only* consider Safehouse's ultimate ends, and not the illegal means by which it would achieve those ends. Safehouse itself acknowledges that § 856(a)(2) applies to operators of "crack houses" and "rave promoters." (ECF No. 48 at 24, 25.)[4] But, under Safehouse's theory, crack house operators and rave promoters could avoid culpability by arguing that their only "objective, goal, or end" was to make money and that providing a place for illegal drug use was only the *means* by which they achieved that motive. Similarly, Safehouse cannot justify rampant illegal drug use on its property by relying on its "ultimate objective" of saving lives. It makes no difference that Safehouse's motive may be beneficent. "One in his heart may believe, in the Robin Hood tradition, that it is proper to steal from the rich and give to the poor, but we still prosecute the thief for his stealing." *In re Weitzman*, 426 F.2d 439, 452 (8th Cir. 1970).

The Third Circuit has always rejected Safehouse's ends-justify-the-means defense, emphasizing that an "end motive" cannot negate the intent or purpose to perform illegal acts. *United States v. Romano*, 849 F.2d 812, 816 n.7 (3d Cir. 1988). In *Romano*, the defendant broke into a naval air station, damaging military aircraft, and was convicted for "entering a military installation for an unlawful purpose." *Id*. at 812-13. The Third Circuit rejected that her "end motive of protecting innocent lives could [] adequately negate or explain her specific intent to achieve this end through breaking into a military installation and disabling military aircraft." *Id*. at 816 n.7. The only relevant intent was her "intent in entering government land and damaging

[4] Safehouse's concession that the statute reaches "rave promoters" contradicts its later attempt to argue that the statute reaches the manufacture, storage, and distribution of controlled substances, but not "possession." (ECF No. 48 at 35 n.30.)

government property" – the intent 18 U.S.C. § 1382 explicitly prohibits – "rather than her intent to save lives." *Id*. *See also United States v. Epstein,* 91 F. Supp. 3d 573, 593 (D.N.J. 2015) ("[M]otive cannot be used to negate specific intent[.]"), *aff'd sub nom.*, *United States v. Stimler*, 864 F.3d 253 (3d Cir. 2017), *partially vacated on other grounds by United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2019).

Similarly, in *United States v. Kabat*, 797 F.2d 580, 582 (8th Cir. 1986), the defendants broke into a military installation and damaged equipment. They were convicted of "willfully injur[ing], [or] destroy[ing] . . . any national-defense material, national-defense premises, or national-defense utilities" with "intent to injure, interfere with, or obstruct the national defense of the United States." *Id*. at 583-84. They argued that they lacked "criminal intent" because they were "acting as required by their faith and the Bible by serving as 'peacemakers[.]'" *Id*. at 587. The Eighth Circuit rejected this argument, drawing a distinction between "criminal intent" and "motive":

> "Criminal intent" properly used refers to the mental state required by the particular statute which makes the act a crime. Once that intent has been proven, it is immaterial that a defendant may also have had some secondary, or even overriding, intent. If the intent is overriding—that is, it reflects the ultimate end sought which compelled the defendant to act—it is more properly labeled a "motive." This is true even with respect to a "specific intent" statute where the intent itself is stated in terms of an "end," for example, breaking and entering with intent to commit theft. The "end" of stealing money still could be just a means to another more valued consequence, such as giving to the poor; that ultimate goal, however, would not replace or negate the intent of stealing and would still be a "motive," while the intent to steal would still provide the "specific intent" required by the statute.

Id. at 587-88 (citations omitted). Thus, even though the *Kabat* defendants' "ultimate desire" was to "sav[e] lives," this motive could not negate their intent under the criminal statute. *Id*. at 588. *See also Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 1997 WL 405908, at *5 (D. Ariz. Mar. 27, 1997) ("If Congress intended the statute to

mean for the 'sole' purpose of committing a crime or tort, it would have included the word 'sole.'").

This principle is well established. *See United States v. Platte*, 401 F.3d 1176, 1181-82 (10th Cir. 2005) (holding that defendants' "high-minded motives" to raise awareness of the dangers of nuclear weapons by breaking into and damaging a nuclear weapons facility "did not negate their intent" to disrupt military operations, and noting that "the worthiness of one's motives cannot excuse the violation in the eyes of the law"); *United States v. Ahmad*, No. 98-1480, 1999 WL 197190, at *1 (2d Cir. Mar. 31, 1999) (holding that the defendant's "innocent motive . . . does not negate either his intent nor his knowledge"); *Cullen*, 454 F.2d at 392 (emphasizing that "if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue"). In other words, defendants' larger, lofty reasons for breaking the law could not excuse their clear desire to engage in illegal conduct. Indeed, then-Judge Stevens' opinion in *Cullen* states:

> One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. ***Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate. A simple rule, reiterated by a peaceloving scholar, amply refutes appellant's arrogant theory of defense: 'No man or group is above the law.'***

Id. at 392 (emphasis added). It would be hard to imagine a statement more relevant to the situation here. Accordingly, Safehouse's purported "end motive" to save lives does not excuse the fact that by opening a consumption site, Safehouse would engage in the very conduct – and exhibit the exact intent – that 21 U.S.C. § 856(a) prohibits.

C. The CSA Does Not Authorize the Maintenance of a Property for Illegal Drug Possession and Use.

Apparently abandoning its initial claim that the phrase "[e]xcept as authorized by this subchapter" in § 856 is ambiguous (ECF No. 3 at ¶ 100), Safehouse now contends that its "proposed overdose prevention services" constitute a "legitimate practice of medicine" authorized by Subchapter I of the CSA (ECF No. 48 at 28-29.)[5]

Safehouse's reliance on a DEA regulation, 21 C.F.R. § 1306.04, is misplaced. (*Id*. at 29.) The regulation "recognize[s] that registered medical practitioners may administer, prescribe, or distribute controlled substances '*for a legitimate medical purpose* by an individual *practitioner acting in the usual course of his professional practice*.'" (*Id*.) (emphasis in original). That sentence does not apply here. Safehouse contends no Safehouse practitioners will be registered under the CSA, nor would they need to be insofar as they purportedly "will not prescribe, administer, or distribute controlled substances." (*Id*. at 32.) Even Safehouse acknowledges that it will not be writing prescriptions, so a regulation addressing the administration, prescription, or distribution of controlled substances does not illuminate whether the CSA authorizes Safehouse's proposed Consumption Rooms.

Cases involving the prosecution of prescribers for unlawful distribution under 21 U.S.C. § 841 do not support Safehouse's interpretation, either. (ECF No. 48 at 31.) In those cases, as Safehouse observes, the juries were required to consider whether the defendants, in prescribing or distributing certain controlled drugs, "knowingly and intentionally acted 'outside the course of professional practice' and without 'a legitimate medical purpose.'" (ECF No. 48 at 31 (quoting

[5] Safehouse misleadingly and improperly enlarges the United States' position to include conduct that the United States does not oppose. If, for example, Safehouse provided only "sterile drug consumption equipment, Naloxone; . . . urgent respiratory support; and primary medical care," as well as addiction treatment referrals, ECF No. 48 at 32, that conduct would not violate the CSA. The United States does not seek to prevent those legal services, but *only* Safehouse maintaining a premises for the use of illegal drugs.

United States v. Chube II, 538 F.3d 693, 697 (7th Cir. 2008)). Because Safehouse does not propose to prescribe or otherwise distribute controlled substances (Naloxone is not a controlled substance), the question of whether it would do so "outside the course of professional practice" or without "a legitimate medical purpose" does not arise. Rather, § 856(a)(2) spells out the elements of the offense that apply to Safehouse.

Nor does *Gonzales v. Oregon* support Safehouse's arguments. When the Supreme Court discussed limitations on the U.S. Attorney General's authority under the CSA in that case, those limitations concerned only "medical prescription of controlled substances to enable physician-assisted suicide," as Safehouse acknowledges. (ECF No. 48 at 29.) This case is not about government efforts to control prescriptions; it is about Safehouse making its facility available for its "participants" to possess and use heroin and street fentanyl. Significantly, the *Oregon* Court recognized that the facts there were unlike those presented in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), where "Congress' express determination that marijuana had no accepted medical use foreclosed any argument about statutory coverage of drugs available by a doctor's prescription." *Oregon*, 546 U.S. at 269. Congress' same "express determination" applies to the conduct here – use of heroin is always illegal, as is use of fentanyl other than with a valid prescription. Thus, Congress has determined that heroin has no accepted medical use and that fentanyl use is only authorized when prescribed by a physician. Safehouse does not contend that it plans to prescribe fentanyl (or to make any attempt to determine if fentanyl users within its facility have prescriptions). Its conduct thus falls outside the facts at issue in *Gonzales v. Oregon*.

Additionally, Safehouse's circumstances are distinct from those the Supreme Court considered in *Gonzales* because Safehouse does not rely upon state legislative action to support

its planned Consumption Rooms.[6] The support of public health bodies does not change the fact that what Safehouse proposes is illegal under the CSA. Loosened restrictions on needle exchanges under other provisions of law and the availability of Naloxone likewise do not inform this statute's text. The fact that Congress and the Pennsylvania General Assembly have *not* acted to legalize supervised injection sites – despite their existence in other countries – in addressing the opioid crisis is of greater significance than the fact that these legislative bodies have taken other actions to combat opioid addiction that stop short of such legislation.[7] Safehouse also cannot claim the support of the Secretary of Health and Human Services for its proposed activity, though it acknowledges that it is the Secretary, and *not* Safehouse, who has authority to "determine the appropriate methods of professional practice in the medical treatment of … narcotic addiction." (ECF No. 48 at 30 (citing 42 U.S.C. § 290bb-2a).) Indeed, the U.S. Surgeon General issued a correction to erroneous news articles, making clear that neither the Administration nor the Surgeon General support Consumption Rooms because of the dearth of reliable evidence showing that they reduce drug use or improve health outcomes for those with opioid use disorder.[8]

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[6] In *Gonzales*, Oregon voters approved a ballot measure exempting from civil or criminal liability state-licensed physicians who, in compliance with specific statutory safeguards, dispensed lethal doses of drugs at the request of a terminally ill patient. 546 U.S. at 249.

[7] Safehouse has evidently abandoned its affirmative defense that its proposed conduct is "justified by medical necessity." (ECF No. 3, Affirmative Defense No. 2). Safehouse makes no mention of that defense in its brief and avoids any discussion of the Supreme Court precedent undermining it. *See Oakland Cannabis Buyers' Coop.*, 532 U.S. at 490.

[8] *See Surgeon General urges ER docs to advocate for evidence-based opioid treatment*, Steven Ross Johnson, ModernHealthcare (May 23, 2018) (available at https://www.modernhealthcare.com/article/20180523/NEWS/180529976/ surgeon-general- urges-er-docs-to-advocate-for-evidence-based-opioid-treatment). Safehouse incorrectly states that the Surgeon General issued a correction two weeks before the government filed its motion for judgment on the pleadings. (*See* ECF No. 48 at 16, n.23.) In reality, the statement was issued in May of 2018, more than a year before the government's motion was filed, well before this lawsuit began, and months before Safehouse was incorporated. (*See id.*)

D. Safehouse Fails to Propose Any Plausible Interpretation of "unlawfully ... using a controlled substance."

The Court must ascribe meaning to the words "unlawfully . . . using a controlled substance" in § 856(a)(2) because courts "must give effect to every clause and word of a statute" and be "reluctant to treat statutory terms as surplusage." *Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004) (internal quotations omitted). This phrase is not ambiguous. It plainly forbids the use of a property for the consumption of illegal drugs. Safehouse fails to propose *any other* interpretation of the phrase or address how any other interpretation is plausible. (ECF No. 48 at 34-36.) Indeed, no other plausible interpretation exists in light of the plain language of § 856(a)(2) and the context of the CSA. (ECF No. 47 at 16-18.)

While Safehouse fails to identify any case supporting its own position, it argues that none of the authorities the government cites involved prosecutions under § 856(a) *exclusively* based on the use of illegal drugs. (ECF No. 48 at 35 n. 30.) But Safehouse fails to acknowledge that these courts included use of illegal drugs among the activities § 856(a)(2) expressly proscribes. *See Tebeau,* 713 F.3d at 961 ("[O]pen and obvious *drug use* is precisely the conduct prohibited by § 856(a)(2)'s plain language.") (emphasis added); *Tamez,* 941 F.2d at 773 ("[T]he words of the statute are not ambiguous: the statute *prohibits allowing the use of a building for* 'manufacturing, storing, distributing, or *using a controlled substance*.'") ((emphasis added) (internal quotations omitted); *Chen*, 913 F.2d at 186-187 (noting "drug use in the motel rooms" and holding that making a property available for "using a controlled substance" was among § 856(a)(2)'s proscribed activities). While Safehouse tries to read the phrase out of the statute, none of these courts found ambiguity in the meaning of "unlawfully . . . using a controlled substance" because none exists – the statute plainly proscribes the use of a property for the consumption of illegal drugs. *See also Salinas v. United States*, 522 U.S. 52, 59 (1997) ("No rule of construction . . .

requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope.").

E. The Legislative History Supports the United States' Position.

Because Section 856 is unambiguous, the Court should not consider its legislative history. Only if the Court were to find the statute ambiguous would consideration of legislative intent be appropriate. *United States v. Hodge*, 321 F.3d 429, 437 (3d Cir. 2003). Even assuming *arguendo* that the legislative history were relevant, it supports the government's view.

Safehouse mistakenly contends that the legislative history suggests a concern only for "crack houses" and properties that are "operated or maintained for the purpose of drug distribution and use." ECF No. 48 at 26, *see generally id*. at 24-26. To the contrary, the legislative history of the amendment of § 856 in 2003 demonstrates that, even prior to that amendment, courts had interpreted § 856 broadly, consistent with Congress' intent. *See* Proceedings and Debates of the 108th Cong., 1st Sess., 149 Cong. Rec. S10605-02, 2003 WL 21779824 (July 31, 2003) (comments of Senator Biden after the amendment's passage stating that "section 856 has always punished those who knowingly and intentionally provide a venue for others to engage in illicit drug activity"). The 2003 amendment made clear, to the extent that it was not already, that Congress intended § 856 to apply widely to anyone who provides a venue for illegal drug activity. H.R. Conf. Rep. 108-66, H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 2003, 2003 WL 1862082, 2003 U.S.C.C.A.N. 683 (Leg. Hist.) ("This expansion makes it clear that anyone who knowingly and intentionally uses their property, or allows another person to use their property, for the purpose of distributing or manufacturing or using illegal drugs will be held accountable.").

Indeed, as *amici* Harrowgate Civic Association, *et al*, state, ECF No. 97 at 19, Congress made a determination to make illegal "places where users congregate to purchase and use" illegal drugs. (*Id*. citing 132 Cong. Rec. 26447 (1986) (statement of Sen. Chiles)). The statute is designed to prohibit places where drug users congregate to use drugs because, among other reasons, these places negatively affect neighborhoods where drug activity takes place. (*Id.*) As Congress found in related legislation, "90 percent of heroin users rely upon criminal activity as a means of income" and "[m]uch of the drug trafficking . . . results in increased violence and criminal activity because of the competitive struggle for control of the domestic drug market." National Narcotics Act of 1984, Pub. L. No. 98-473, 98 Stat. 2168.

Since its enactment, Congress has expanded – rather than narrowed – § 856's scope each time it has revisited it, consistent with its intent to limit the establishment of places where illegal drug use occurs. In 2000, Congress increased the penalties by adding § 856(c). In 2003, as part of the above amendment, Congress changed the title of Section 856 to "Maintaining drug-involved premises," which replaced the earlier title of "Establishment of manufacturing operations." H.R. Conf. Rep. 108-66, 68, 2003 U.S.C.C.A.N. 683, 703.

Moreover, although it has amended the CSA multiple times, Congress has, of course, never sanctioned Consumption Rooms. Recently, in passing the 2016 opioid prevention bill, the Comprehensive Addiction and Recovery Act, Publ. L. 114-198, 130 Stat. 695 ("CARA"), Congress made no allowance for Consumption Rooms. This Court should decline Safehouse's invitation to usurp congressional authority and overturn congressional policy judgments.

F. The Rule of Lenity, Clear Statement Rule, and the Principle of Constitutional Avoidance Do Not Apply.

Safehouse erroneously urges the Court to apply three principles of statutory construction – the rule of lenity, the clear statement rule, and constitutional avoidance – that apply only when

a statute is reasonably susceptible to more than one interpretation. *See Salinas, 522 U.S. at 60; Reno v. Koray*, 515 U.S. 50, 64-65 (1995); *see also United States v. Marek,* 238 F.3d 310, 322-23 (5th Cir. 2001). The Court need not analyze any of these principles, however, because § 856(a)(2) is unambiguous by its plain language – which is also confirmed by the legislative history and the statutory context.[9]

II. *Raich* Forecloses Safehouse's Contention Under the Commerce Clause.

As the government demonstrated in its opening brief, ECF No. 47 at 20-22, the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), forecloses Safehouse's and *Amici*'s Commerce Clause contention. *Raich* makes clear that the CSA (of which § 856 is a part) "regulates the production, distribution, and *consumption* of commodities [*i.e.*, heroin and other drugs] for which there is an established, and lucrative interstate market," and that Congress' decision not to create an exemption for Safehouse's "entirely local" and non-commercial

[9] The rule of lenity only applies in cases of such "grievous ambiguity" that "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Reno v. Koray*, 515 U.S. 50, 64-65 (1995), *Huddleston v. United States*, 415 U.S. 814, 831 (1974), *see also* ECF No. 47 at 18 n. 9. In such cases, only "when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant." *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992). The rule of lenity does not apply because § 856 is unambiguous for all of the reasons stated above and in the government's initial brief.

The clear statement rule requires that a statute be clear in cases where it will alter the existing balance of federal and state powers. *See Salinas*, 522 U.S. at 60; *see also Marek*, 238 F.3d at 322-23. It does not apply here for two independent reasons: § 856(a)(2) is a clear and unambiguous statement of congressional intent and it also does not alter the existing balance of federal and state powers. *See* ECF No. 47 at 22.

Similarly, "[s]tatutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Salinas*, 522 U.S. at 60 (the principle does "not apply when a statue [is] unambiguous" (internal citation omitted)). The principle of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them…. It rests on the presumption that Congress did not intend the alternative which raises serious constitutional doubts[.]" *Sherman v. United States Parole Comm'n*, 502 F.3d 869, 882 (9th Cir. 2007), *quoting Salinas*, 522 U.S. at 59-60 and *Clark v. Martinez*, 543 U.S. 371, 381 (2005). As with the rule of lenity and the clear statement rule, the Court should not reach a constitutional avoidance analysis, because § 856(a)(2) is susceptible to only one plausible interpretation.

Consumption Rooms "is a rational (and commonly utilized) means of regulating commerce in [heroin and other controlled substances]." *Raich*, 545 U.S. at 26 (emphasis added).

The absence of a jurisdictional element in § 856 does not, as Safehouse and Professor Barnett argue, *see* ECF No. 48 at 39, and ECF No. 98 at 7-8, invalidate the challenged provision given the Supreme Court's determination that the CSA "is a statute that directly regulates economic, commercial activity." *Raich*, 545 U.S. at 26. Observing that *Raich* upheld the CSA under the Commerce Clause without discussion of the CSA's jurisdictional element, the Fourth Circuit has stated that "an effective jurisdictional element is certainly not required where . . . the statute directly regulates economic activity." *United States v. Forrest*, 429 F.3d 73, 77 n.1 (4th Cir. 2005). Because § 856 is "an essential part of the [CSA's] larger regulatory scheme," *Raich*, 545 U.S. at 27, which itself regulates "activities that are quintessentially economic," the absence of a jurisdictional element does not render the challenged provision invalid. *Id*. at 25-26. *See also United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1273 n.4 (10th Cir. 2005) (noting that while "other courts have questioned the sufficiency" of the jurisdictional element set forth in 18 U.S.C. § 22251(a), the federal statute criminalizing, *inter alia*, the local possession and production of child pornography, "'any failure of the jurisdictional element effectively to limit the reach of the statute is not determinative'" "[i]n light of the Supreme Court's ruling in *Raich*," and Tenth Circuit precedent holding that "the activity regulated in this case has a substantial impact on interstate commerce") (internal citation omitted).

The absence of particularized congressional findings regarding § 856, *see* ECF No. 48 at 40-41, does not render the challenged provision inoperative. In *Raich*, the Supreme Court squarely rejected this argument as a basis for invalidating the CSA as applied to individuals who grew or obtained marijuana at no cost for purported "medicinal purposes," reasoning that the

Court "has never required Congress to make particularized findings in order to legislate, . . . absent a special concern such as the protection of free speech." *Raich*, 545 U.S. at 21. To be sure, "[w]hile congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress's authority to legislate." *Id.*

In any event, Congress' findings made in connection with the CSA's earlier enactment apply equally to § 856. *See, e.g.*, *Maryland v. Wirtz,* 392 U.S. 183, 189 n. 13 (1968) (it was "quite irrelevant" that the legislative history of the amendments being challenged did not provide a factual basis for extending the original statute because "[t]he original Act stated Congress's findings and purposes" and "[s]ubsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered"), *overruled on other grounds, Nat'l League of Cities v. Usery,* 426 U.S. 833 (1976); *United States v. Holston*, 343 F.3d 83, 89 (2d Cir. 2003). This includes Congress' specific findings "regarding the effects of intrastate drug activity on interstate commerce," *Raich*, 5445 U.S. at 21 n. 32, including its observation that "controlled substances possessed commonly flow through interstate commerce immediately prior to such possession" and determination that "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." *Id.* at 12 n.20 (quoting, among other provisions, 21 U.S.C. §§ 801(3)(C), (4)).

As the *Raich* Court observed, to effectuate Congress' goals of "conquer[ing] drug abuse and . . . control[ling] the legitimate and illegitimate traffic in controlled substances[,] . . . Congress devised a closed regulatory system making it unlawful to manufacture, distribute, or

possess any controlled substance except in a manner authorized by the CSA." *Id.* at 12, 13 (citing 21 U.S.C. §§ 841(a)(1), 844(a)). Thus, § 856's "categorical prohibition against maintaining or controlling a drug-involved premises where, as here, the facility will be used by individuals who will possess or use Schedule I drugs such as heroin," *see* ECF No. 47 at 21, is not, as Safehouse argues, a "single-subject statutory provision with a non-economic objective," *see* ECF No. 48 at 43, but rather "an essential part of the [CSA's] larger regulatory scheme." *Raich*, 545 U.S. at 27.

Safehouse's and *Amici*'s insistence to the contrary, *see* ECF No. 48 at 39, ECF No. 99, Amicus Br. of King Cty. at 17-18; ECF No. 98, Amicus Br. of Prof. Barnett at 7-19, is simply wrong. "Congress acted rationally in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA" including § 856 at issue here. *Raich*, 545 U.S. at 26. As the Eleventh Circuit explained in rejecting a similar challenge to the Child Pornography Prevention Act, it is not "irrational for Congress to conclude that its inability to regulate intrastate incidence of child pornography would undermine its broader regulatory scheme designed to eliminate the market in its entirety, or that 'the enforcement difficulties that attend distinguishing between [purely intrastate and interstate child pornography],' would frustrate Congress's interest in completely eliminating the interstate market." *Maxwell*, 446 F.3d at 1218 (quoting *Raich*, 545 U.S. at 22). So too here, "there is nothing irrational about Congress's conclusion, supported by its findings, that [the consumption of heroin and other illegal drugs] begets [increased demand for and consumption of illegal drugs], regardless of" whether the illegal drug use occurs at a facility under which individuals are medically-supervised.[10] *Id.* In sum, that § 856 "ensnares some purely intrastate

[10] The Court need not "accept as true," *see* ECF No. 48 at 41 n.33, Safehouse's "allegation" that "'the operation of Safehouse's overdose prevention services will have no adverse impact on the legitimate CSA goal of suppressing the interstate market for illegal drugs." *See, e.g.*, *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (explaining that in evaluating a cause of action, the tenet that a court must accept as true all of the allegations in a

activity is of no moment" given that "Congress was well within its [Commerce Clause] authority" when it enacted "comprehensive legislation to regulate interstate commerce in a fungible commodity." *Raich*, 545 U.S. at 22.

Finally, *Amici*'s remaining federalism arguments cannot salvage Safehouse's claim. *See* ECF No. 99 at 17-18; ECF No. 98 at 19-22. As the government explained in its opening brief, there is no merit to the contention that § 856 violates principles of federalism, particularly where neither Safehouse nor *Amici* point to any Pennsylvania law that permits Safehouse to maintain or control premises in a manner that directly conflicts with the prohibitions in § 856. *See* ECF No. 47 at 22 (quoting *Raich*, 545 U.S. at 29). And, even if there were a Commonwealth law that directly conflicted with § 856, the Supremacy Clause makes clear that the "federal law shall prevail." *Id.*

Accordingly, for the reasons set forth in the government's opening brief and those herein, § 856 is an essential part of the CSA's larger regulatory scheme, which the *Raich* Court held to be a permissible exercise of Congress' authority to regulate interstate commerce. The Court should reject Safehouse's unsupported claim to the contrary.[11]

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complaint is inapplicable to legal conclusions). By enacting the CSA of which § 856 is a part, Congress "rationally" decided "to include this narrower 'class of activities' [*i.e.*, the maintenance or control of a facility at which individuals are permitted to possess and use illegal drugs under Safehouse's medical supervision,] within the larger regulatory scheme." *Raich*, 545 U.S. at 26.

[11] In its opposition brief, Safehouse asserts for the first time that § 856 is facially invalid. *Compare* ECF No. 3, Safehouse Answer & Counterclaim ¶ 106 ("The DOJ's interpretation of Section 856, as applied to Safehouse, exceeds the bounds of Congress's constitutional authority to regulate interstate commerce") *with* ECF No. 48 at 44 ("this Court should conclude that Section 856, *on its face* and as-applied to Safehouse" violates the Commerce Clause) (emphasis added). But asserting a facial challenge for the first time in response to the government's motion to dismiss will not salvage this claim. That is because Safehouse and Professor Barnett (who also argues that § 856 is facially invalid, *see* ECF No. 98 at 19-20), cannot overcome the "difficult challenge" of demonstrating that there is no valid application of § 856. *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (same). Indeed, Safehouse's opposition brief belies this newly-raised argument. *See* ECF No. 48 at 24-26 (arguing that § 856(a)(2) "was intended to impose liability on landlords or property owners who make their properties available for" unlawful drug activity). In any event, Safehouse cannot demonstrate that there is no valid application of § 856 in the face of *Raich*, where, as here, the challenged provision is an "essential part" of the CSA's larger regulatory a scheme, and

III. Safehouse's RFRA Claims Fail as a Matter of Law.

Safehouse repeatedly contends that it plans to do more than just provide a place for drug users to inject illegal drugs. It insists that it will provide additional beneficial services, including health assessments, wound and primary health care, sterile consumption equipment and Naloxone, counseling, addiction-treatment referrals, access to social services such as housing, public benefits, and legal services, and more. In defending the alleged efficacy of its planned approach, Safehouse repeatedly stresses the benefits of these many additional services (and the United States agrees that such services – other than supervised injection – are commendable and should go forward). Yet, in raising a claim under the Religious Freedom Restoration Act ("RFRA"), Safehouse conveniently backtracks and argues that *none* of these other services would effectuate the religious beliefs of its board members to care for the sick and shelter their neighbors, and that *only* operation of a drug-consumption site would. This makes no sense.

Unsurprisingly, Third Circuit precedent contradicts Safehouse's argument. In *Stimler*, the court held the availability of alternative means of pursuing a specific exercise of religion *is* a relevant consideration under RFRA's substantial burden prong. *See United States v. Stimler*, 864 F.3d 253, 267-68 (3d Cir. 2017), *vacated on other grounds by United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018). Contrary to the Defendants' suggestion that the *Stimler* court "did not consider … subsequent Supreme Court precedent in *Holt*," (*see* ECF No. 48 at 53), the *Holt* case was decided two years before *Stimler*, *see Holt v. Hobbs*, 135 S. Ct. 853 (2015), and the panel was evidently aware of it because *Holt* is cited therein, s*ee Stimler*, 864 F.3d at 268, n. 61, as recognized in Defendants' brief, *see* ECF No. 48 at 49. Notwithstanding the Third Circuit's awareness of *Holt*, the court still held that, "[w]hile the government's decision to prosecute the

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Congress could have rationally determined that Safehouse's proposed plan to operate a Consumption Room does not "compel[] an exemption from the CSA." *Cf. Raich*, 545 U.S. at 25-27; *Maxwell*, 446 F.3d at 1215 n.5.

defendants undoubtedly constituted a burden on their sincerely held religious beliefs, *the District Court properly analyzed whether the burden was 'substantial' by looking to acceptable alternative means of religious practice that remained available to the defendants*." 864 F.3d at 268 (emphasis added) (and citing *Washington v. Klem*, 497 F.3d 272, 282-83 (3d Cir. 2007), in support of the alternative means analysis).

The Court in this case should (and, in fact, must) do the same. This analysis is especially appropriate here because the religious belief espoused by Safehouse – the preservation of human life – is extremely broad, and can indisputably be satisfied through methods other than maintaining a place for illegal drug injection, including through the additional methods that Safehouse states it will employ.

Holt is also readily distinguishable. There, the district court held a prison did not substantially burden a prisoner's religious exercise in refusing to let him grow a religiously required beard because the prison facilitated other ways in which the prisoner could observe his Islamic faith, including providing a prayer rug and allowing the prisoner to follow a religious diet and observe religious holidays. *See Holt*, 135 S. Ct. at 862. The Supreme Court rejected this analysis, stating that "whether [a claimant] is able to engage in other forms of religious exercise" is not a consideration under the substantial burden test. *See id.* The alternative means analysis employed by the *Stimler* court does not conflict with *Holt* because it involves a narrower question. Rather than consider whether defendants could engage in other, separate forms of exercise required by their religion, the *Stimler* court considered whether the *specific religious exercise* in which the defendants sought to engage—in that case, helping women obtain divorces

from recalcitrant husbands—could be satisfied through other means.[12] *See Stimler*, 864 F.3d at 268.

The government does not contend here that Safehouse's religious exercise is not substantially burdened because its board members may still engage in other acts of faith, such as attending church or synagogue, keeping Kosher, reading holy texts, or praying. *Holt* would foreclose this argument. Instead, the government contends – and Safehouse cannot dispute – that there are other means by which its board members can effectuate their religious obligation to preserve life, provide shelter, and care for the sick, including the myriad additional ways they have proposed on their website and in their pleadings. Thus, *Stimler* controls the outcome here.

This Court can also rule as a matter of law[13] that Safehouse has not established a *prima facie* RFRA claim because it cannot meet the substantial burden prong. Safehouse has failed to show that enforcement of § 856(a)(2) to prevent it from altering the *status quo* and embarking upon a religious exercise it claims will effectuate its beliefs – operating a Consumption Room – constitutes a substantial burden within the framework established by the Supreme Court's pre-RFRA jurisprudence. *See Washington v. Klem*, 497 F.3d 272, 279-80 (3d Cir. 2007) (adopting a disjunctive test for substantial burden (under RLUIPA) that combines the holdings of *Sherbert v.*

[12] Like *Stimler*, other courts have held the availability of alternative means of exercising a specific religious belief defeats a claim of substantial burden. *See Henderson v. Kennedy*, 253 F.3d 12, 15 (D.C. Cir. 2001); *Mahoney v. Doe*, 642 F.3d 1112, 1120-21 (D.C. Cir. 2011); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Planned Parenthood Ass'n v. Walton*, 949 F. Supp. 290, 296 (E.D. Pa. 1996); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813-14 (8th Cir. 2008); *United States v. Amer*, 110 F.3d 873, 879 n.1 (2d Cir. 1997).

[13] This Court need not accept without question Defendants' position that its religious exercise will be *substantially* burdened if it is not permitted to include Consumption Rooms with the other beneficial services it plans to offer. *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015) (stating that deference to the reasonableness of a claimant's religious beliefs "does not bar [an] objective evaluation of the nature of the claimed burden and the substantiality of that burden on the [claimant's] religious exercise"), *vacated and remanded sub nom. by Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Additionally, this Court can scrutinize Defendants' assertion without an evidentiary hearing because "whether a burden is 'substantial' under RFRA is a question of law, not a question of fact." *Real Alternatives, Inc. v. Sec'y of HHS*, 867 F.3d 338, 356 (3d Cir. 2017) (internal alterations and citation omitted).

Verner, 374 U.S. 398 (1963) and *Thomas v. Review Bd. of Ind. Employ. Sec. Div.*, 450 U.S. 707 (1981));[14] *see also Real Alternatives, Inc. v. Sec'y of HHS*, 867 F.3d 338, 371 (3d Cir. 2017) (discussing the requirements for a *prima facie* RFRA claim); 42 U.S.C. § 2000bb(b). More specifically, Safehouse has not shown that it is being forced to choose between following a religious precept and forfeiting a government benefit, coerced to affirmatively act contrary to its beliefs,[15] or pressured to modify behavior in which it admittedly is not yet engaged. *See Klem*, 497 F.3d at 280; *Real Alternatives*, 867 F.3d at 357.

While *sui generis* religious exercise is capable of protection under RFRA, whether religious activity is ongoing or merely contemplated is relevant to the substantial burden analysis. Safehouse contends that the fact that Safehouse is not now and has never operated a Consumption Room as part of the religious exercise of its board members is irrelevant to this Court's substantial burden analysis. But it is relevant.[16] RFRA was amended in 2000 to provide that a specific religious exercise need not be compelled by or central to a religion to be protected. 42 U.S.C. §§ 2000bb-1(4), 2000cc-5(7)(A). However, while Congress broadened the scope of what constitutes "an exercise of religion," this amended definition "does not change what level or kind of interference constitutes a 'substantial burden' upon such religious exercise." *Navajo*

[14] As Safehouse acknowledges, courts apply the same substantial burden test under RLUIPA and RFRA. *See Holt*, 135 S. Ct. at 860.

[15] Safehouse's contention – offered without explanation – that the government is "coercing it to act contrary to its religious beliefs" should be rejected because Safehouse does not illuminate the ways in which it is allegedly being forced to act. (*See* ECF No. 48 at 52.) Instead, application of § 856(a)(2) does not require Safehouse to take any affirmative actions, and does not prevent Safehouse from taking any number of actions to save lives.

[16] Contrary to Defendants' assertion, in each of the cases they cite, the claimants were already engaged in the religious exercise that they claimed was burdened. (*See* ECF No. 48 at 51.) In *Holt*, the plaintiff grew his beard as required by his Muslim faith, but was disciplined by the prison until he shaved, thereby precipitating his RFRA action. *See* Complaint, *Holt v. Hobbs*, ECF No. 2 at ¶ 9, Civ. No. 11-164 (E.D. Ark. June 28, 2011). In *O Centro*, a church that made consumption of hoasca central to its religious ceremonies was founded in 1961 and its members in the United States had been ingesting hoasca after importing it from Brazil for six years before they pursued injunctive RFRA relief. *See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002). Similarly, the Sikh children in *Cheema v. Thompson* were already engaged in the religious exercise of wearing articles of faith before they sought to wear such articles to school. *See* 67 F.3d 883 at 884-85.

Nation v. United States, 535 F.3d 1058, 1077 (9th Cir. 2008). Thus, while a claimant need not engage in specific religious activity before seeking RFRA relief, the absence of a prior history of such activity informs the substantial burden analysis. Safehouse therefore must show that application of § 856(a)(2) – which would permit several planned lifesaving measures that the law already allows – is a *substantial* burden on its board members' exercise of religion. *See Navajo Nation*, 535 F.3d at 1076-77 (cautioning against conflating the second and third prongs of the *prima facie* RFRA showing).

At best, Safehouse contends here that enforcement of § 856(a)(2) interferes with its board members' spiritual fulfillment by not permitting them to take *one* discrete action which Defendants claim effectuates Safehouse's religious beliefs. That is not nearly enough for a valid RFRA claim. In the absence of ongoing activity, and where other alternatives to save lives are available, this limit on Safehouse's proposed future activity is insubstantial. *See, e.g., Real Alternatives*, 867 F.3d at 357 (quoting *Lyng v. NW Indian Cem. Prot. Ass'n*, 485 U.S. 439, 449 (1988)) (observing that a substantial burden does not exist, "even if 'the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.'"). Accordingly, Safehouse fails to meet its *prima facie* burden and the Court should reject Safehouse's RFRA claim as a matter of law.[17]

[17] Finally, as one *amicus* noted, the government did not address in its initial brief its compelling interest in enforcing § 856(a)(2). While the government would welcome the opportunity to describe and explain its compelling interest, it need not do so where Safehouse cannot establish a *prima facie* case sufficient to invoke RFRA. *See Adams v. Comm'r*, 170 F.3d 173, 176 (3d Cir. 1999) (stating the burden to show a compelling interest only shifts to the government after a plaintiff demonstrates a substantial burden on her exercise of religious beliefs).

CONCLUSION

For the foregoing reasons and for the reasons stated in its initial Memorandum, the United States requests that its motion for judgment on the pleadings be granted, and that this Court enter a judgment in its favor and against Defendant/Counterclaim Plaintiffs Safehouse and Jose A. Benitez.

Dated: July 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date this Joint Appendix was filed via the Court's Electronic Case Filing (ECF) system and served electronically on counsel for all parties.

/s/ Gregory B. David
GREGORY B. DAVID
Assistant United States Attorney

Dated: May 15, 2020

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
JOSE 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 FEBRUARY 25, 2020 ORDER GRANTING FINAL DECLARATORY JUDGMENT, IN CIVIL ACTION NO. 19–519, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (HON. GERALD A. McHUGH)

JOINT APPENDIX
VOLUME III OF III
Appx345–704

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	Case No. 2:19-cv-00519-GAM
Plaintiff,	
v.	U.S. Courthouse 601 Market Street Philadelphia, PA 19106
SAFEHOUSE, et al.,	
Defendant.	
	August 19, 2019 9:34 a.m.

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE HONORABLE GERALD A. McHUGH
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: All right. This is the United States of America v. Safehouse, et al., civil matter 19-519. And would counsel please identify themselves for the record?

MR. MCSWAIN: Good morning, Your Honor. Bill McSwain for the government. I have with me Assistant United States Attorneys Bryan Hughes, Greg David, John Crutchlow and Erin Lindgren.

THE COURT: Good morning, counsel.

MR. MCSWAIN: Good morning.

MS. EISENSTEIN: Good morning, Your Honor. Ilana Eisenstein on behalf of Safehouse and Mr. Jose Benitez. I have with me co-counsel Rhonda Goldfein, Ben Fabens-Lassen and Mr. Benitez is at counsel table. And we have a team of attorneys from the Safehouse team here in the courtroom as well.

THE COURT: All right and good morning to you as well.

Let me begin by observing that I have allowed members of the media to bring in laptops. And I've also allowed them to keep possession of their cellphones even though they would otherwise be confiscated. But do not -- repeat -- do not attempt to record any proceedings because if you were to do so your phone will be confiscated and they're not -- they're locked up in the same way as a member of the public.

At the end of the day, I will post the audio transcript of today's proceedings online, all right? So it

will be available for everyone coming end of the day.

This is an evidentiary hearing today and the purpose of the hearing is to describe in detail exactly what it is that Safehouse proposes to do if it were permitted to open the program that it seeks to operate. Now, it's not a debate today on the merits of safe injection sites. This is not a public policy/public health debate. It is simply an evidentiary hearing to define exactly what it is that Safehouse proposes to do because my role here is to apply a statute to what they propose to do. And I think it matters greatly what the details are because clarity is important in trying to apply a statute to any particular type of activity.

I've made some preliminary rulings as to the scope of the evidence today. And so with that, counsel, proceed.

MS. EISENSTEIN: Thank you, Your Honor. Your Honor, Safehouse would like to call its first witness, which is Dr. Jean Marie Perrone.

THE COURT: By all means. And counsel, I've recommended that we read into the record the credentials of people who have some expertise. Should we reach some agreement on that, in that regard?

MS. EISENSTEIN: I believe so, Your Honor. I have a short introduction and I was going to introduce this -- Dr. Perrone's CV into the record without necessarily going through its full details.

THE COURT: That's fine, thank you.

MS. EISENSTEIN: And, Your Honor, I gave to your clerk a copy of the exhibits. If you would --

THE COURT: All right.

MS. EISENSTEIN: Okay. You have your own copy. Thank you.

THE DEPUTY: Please raise your right hand.

JEAN MARIE PERRONE, WITNESS FOR DEFENDANT, SWORN

THE DEPUTY: Please be seated. Please state your full name, spell your last name for the record.

THE WITNESS: Jeanmarie Perrone, P-E-R-R-O-N-E.

THE DEPUTY: Thank you.

THE COURT: Good morning, Doctor.

THE WITNESS: Good morning.

MS. EISENSTEIN: And, Your Honor, Dr. Perrone is being called here to testify based on her 30 years of training and experience as an emergency medicine physician, medical toxicologist and addiction medicine physician. Dr. Perrone's direct experience and training specifically includes identifying and responding to overdoses in the emergency department, as well as in other nonclinical settings.

Dr. Perrone is testifying, I should note based on her own experience and training and not on behalf of the hospital of University of Pennsylvania, where she is presently employed as a faculty member.

If I may?

THE COURT: You may.

MS. EISENSTEIN: Thank you, Your Honor. And if I may, just as a preliminary matter, I'd like to introduce for the record Exhibit 5, which is Dr. Perrone's curriculum vitae. As I said, we won't go through that in detail but --

THE COURT: I appreciate that, counsel, and I'll note for the record that in advance of the hearing today I had reviewed in detail the background of each of the witnesses whom Safehouse is going to call.

MS. EISENSTEIN: Okay. And I may just hit the highlights here with Dr. Perrone --

THE COURT: You may.

MS. EISENSTEIN: -- with the Court's indulgence. Thank you.

DIRECT EXAMINATION

BY MS. EISENSTEIN:

Q Dr. Perrone, thank you for coming here this morning. Dr. Perrone, I want to start with your medical expertise and the areas in which you are certified as a physician and start with your work as an emergency medicine physician. You are board-certified as an emergency medicine physician, correct?

A Yes.

Q And you're presently employed at the Hospital of the University of Pennsylvania. Is that right?

A Yes.
Q Can you describe the various positions you hold within the emergency department and other departments at the Hospital of the University of Pennsylvania?
A I am an emergency medicine attending which means that I work in the emergency department. I'm working this evening. I work about 24 hours a week clinically and the rest of my time is spent teaching medical students and residents at the bedside and in the classroom and then also engaging in helping patients who come to the emergency department get into care through some programs that we've developed outside of the emergency department.
Q And is your title you're a professor of emergency medicine? Is that correct?
A Yes.
Q Okay. And do you also have a position with respect to medical toxicology with the Hospital at the University of Pennsylvania?
A Yes, so I'm the director of the division of Medical Toxicology which essentially means poisonings and overdoses and I developed that after a two-year fellowship in medical toxicology at NYU Bellevue (ph).
Q And what about with respect to addiction medicine?
A So addiction medicine I took the addiction medicine boards based on my medical toxicology work and also some of the time

that I spent at Prevention Point and the programs that we've developed connecting patients to care from the emergency department.

Q And that addiction medicine specialty, is that something that you more recently obtained than your emergency medicine and toxicology certifications?

A Yes. That is more recent and on the basis of the evolving needs of our community.

Q I'd like to turn specifically to your work responding to the opioid crisis, which has been a significant facet of your work, hasn't it?

A Yes.

Q Can you just talk a little bit about the evolution of the work that you've done in responding to the opioid crisis in the context of your research and your clinical experience?

A Yes. So I think, over the past, you know, one or two or three or five years, everyone in this room is well-aware of what happened with the opioid crisis, but going back ten years, you know, we were really on the edge of realizing that this was becoming a problem. And so what we focused on initially and especially in my work was teaching physicians not to prescribe opioids so readily. And we call that de-prescribing now and there's been many policy and awareness that has changed people's perceptions of whether or not they need opioids, as well as clinician's thresholds for prescribing opioids.

So as that moved forward and we were prescribing less, you know, we realized that there were lots of people who were having problems because they were already dependent on opioids. And so we were seeing this new wave of problems which was a rising overdose rate and a rising death rate. And we realized that patients who were in this cycle of use and opioid withdrawal and using every few hours can't get into treatment. And so more recently in the past three years myself and some colleagues have worked to create a program where patients who come to the emergency department because they can't get an appointment or they can't follow up on an appointment to get into care actually can be directly connected into care from the emergency department, started on medications that prevent them from using illicit opioids and actually increases their chance at survival

And so my efforts to get board-certified in addiction medicine was basically to amplify that evolving role in treating patients with opioid use disorder.

Q So you had said that you had seen the increased rates of overdose, just starting there, when you say we do you mean that in the course of your clinical experience and also research and can you just explain that a little bit?

A So by we I certainly mean personally. You know, there's been many times when I had to face a parent or a loved one to tell them that their, you know, loved one, you know, hadn't

survived an overdose, who came in too late to the emergency department. And, you know, you can only do that so many times before you think something has to change. We're seeing increasing young people, increasing, you know, people whose, you know, parents had been through this and were just devastated by the ongoing lack of ability to get treatment.

And so, you know, our thoughts over time as myself and, you know, a couple of colleagues was that we needed to build this program so that we could get patients into treatment. And it was sort of multidisciplinary across a couple different aspects of the hospital trying to build this kind of program.

Q And can you describe the program with immediate initiation into rehabilitation services from the ER? Can you describe that program in just a little bit more detail?

A Yes. So when a patient -- we sort of see three different kinds of patients with opioid use disorder: Patients who come into the emergency department because they are having a complication of using drugs such as infections of their skin or fevers. We also see patients who come in immediately post-overdose who have been resuscitated in the field and who came in after that. And then we see patients who are just exhausted from their homelessness and other issues and who are actually seeking treatment. So any one of those three categories of patients have all been increasing in volume in the past four or

five years.

And so what we do is we use peer counselors, patients who have been in recovery who now work as certified recovery specialists in our emergency department and we connect those patients to the certified recovery specialist while also offering them a medication.

There's two medications that we use for opioid use disorder. One is methadone which you're probably familiar with is a oral medicine that can be given to replace -- to actually decrease the level of use of other drugs, or buprenorphine, which is a partial agonist and also works to decrease the use of other drugs and prevent overdose and death.

So we actually give them their first dose of buprenorphine or sometimes called SUBOXONE in the emergency department and then there -- our peer counselors connect them to care the next day or the same day.

Q And is that a change from what was the existing practice and has that been adopted fully within your own department or other departments, that change of immediately offering or providing a dose of buprenorphine or Methadone in the emergency department?

A So that has evolved in the past couple of years. It's really became more of a -- of the path in the past year. And it is in all three of our downtown hospitals and attempting to be implemented at some of the other outside hospitals.

Q And is that something you worked on in terms of advocacy at the state and national level to increase that practice of immediate initiation of buprenorphine or Methadone at -- in the ER setting?
A Yes. It's been a very important strategy for emergency departments, but it still is the tip of the iceberg. Most places have not been able to do that yet.
Q Can you speak about the work that you've done to have that practice implemented not just at your own hospital but what it's taken to advance that practice statewide or nationally?
A So statewide there's -- there was an initiative from the state to get more emergency departments to do it and so a lot of emergency departments have written out pathways where they would get a patient down, something like this, but very few have actually been able to implement them and get patients connected to care for various reasons. So there's a lot of education that has to happen around that.

I'm going to Harrisburg tomorrow morning to give a talk about how to do that statewide. So there's -- it's really an active process but still needs a lot of work to amplify it and adopt it in other places.

Q And just here in the city is it right that you served on the Philadelphia Mayor's Opioid Task Force as well?
A Yes.
Q And can you just describe your participation on that task

force?
A My participation was on the subgroup of education and so that was totally (ph) dovetailed with the time that I was spending a lot time talking to doctors about not prescribing as much and probably around the time that we committed towards focusing on the rising problem with opioid dependence and addiction.
Q And you've also served with the CDC and the FDA in advisory committee capacities. Is that right?
A Yes.
Q And was that also with respect to decreasing opioid prescriptions?
A Decreasing opioid prescribing, assessing safety of opioid medications and decreasing -- changing some of the drugs -- policy around certain drugs.
Q Let me turn to your experience in the emergency department detecting and responding to overdoses. Is that something that's part of your routine day-to-day work as an emergency department physician?
A Yes.
Q And can you just talk, you know, historically and in years of experience but then with a particular focus on more recent time period what the frequency and opportunities you had to respond to overdoses in the emergency department?
A It is quite common for us to see patients who have

overdosed and it might be extra common for me to see them because of my background in (inaudible) and overdoses. So about two or three times a week we may see a patient with an overdose who comes in after receiving Naloxone or Narcan who is brought to the emergency department for further care. Or we may see patients who, you know, have overdosed in the -- outside of the hospital and haven't received Naloxone yet. So we see patients in various stages of resuscitation.

We see some patients who didn't get Naloxone and now are in cardiac arrest because they were found too late, and those are the patients, again, that I'm then talking to families and, you know, devastated by a loss, a preventable loss of a young person.

Q In your experience over the course of the emergency department were -- are overdoses always about overdoses on illicitly prescribed drugs or are there times when prescribed drugs also cause overdoses that lead a patient to you in the emergency department.

A Yes. We definitely see patients who have overdosed on oral opioids, including, you know, sometimes children who have overdosed accidentally on oral opioids that are in the home. We also see, you know, that's shifted a little bit so as of a few years ago it was more common to see patients overdose from oral opioids and now more recently from heroin and Fentanyl.

Q And just talking about Fentanyl from your own experience,

just what has been the change from the patients who come to the ER in terms of coming in with a Fentanyl-related overdose as opposed to other forms of opioids?

A So it's quite common for patients to come in after a Fentanyl overdose, especially in the past, again, couple of years where most of the heroin has been replaced with Fentanyl. It appears to be much harder for them to gauge what an appropriate dose might be and so overdoses have become more common. I think it's also, you know, even more irregularity in what a dose might look like or how to use it, you know, without running into that kind of potential lethal consequence.

Q I'm going to just take a step back. What is -- what is Fentanyl? Can you just describe, putting your toxicology hat on, what Fentanyl is and how it fits within the family of opioids?

A Sure. So all opioids occupy the mu receptor, which is a part of our receptors that work for all of the different drugs in the body. Mu receptor is located in a part of the brain that's associated with happiness, euphoria, pain relief, emotion and also respiratory effects, so whether or not you can, you know, adequately breathe. The difference between an oral opioid given IV like a hospital drug like we might give hydromorphone or DILAUDID IV in the hospital is not really very different from heroin, which is also a drug that's administered usually intravenously or Fentanyl, which is also, you know, can

be administered intravenously. All of those drugs vary only slightly based on how quickly they get into the brain, how quick -- how long they last, but they all basically are opioids and occupy the same area of the brain and have the same effects.

Q And so you said they vary based on how quickly they enter the brain. You talked about DILAUDID, heroin, Fentanyl. Of those is Fentanyl among the faster-acting opioid substances?

A Yes. So Fentanyl would be the fastest, the one that gets into the brain most quickly and most potent on a milligram per milligram basis.

Q And so you talked about how the opioid attaches to the mu receptor. Can you talk a little bit more about how an opioid affects the brain and the body when it's consumer?

A Yes. So whether it's consumed orally or injected intravenously or insufflated nasally, the net effect is for opioids to cross into the blood brain barrier and attach to this mu receptor primarily. And that mediates some of those desirable pain relief mechanisms, as well as some other unwanted side effects like constipation and all of that is mediated through the brain.

The lethal consequence, essentially, is that patients will -- in that area of the mu receptor it decreases the ability for the body to notice that you're not breathing as well so it decreases sensitivity to rising levels of carbon

dioxide and it decreases sensitivity to lower levels of oxygen. So you basically don't realize that you are so sedated that you're not breathing. And so that respiratory depressant effect of all opioids is dose-dependent and common.

Q You use the term respiratory depression. Can you just explain what you mean by respiratory depression and define it for us?

A Okay. So respiratory depression means a normal respiratory rate for an adult is 16 to 20 breaths per minute. And respiratory depression would be anything less than that all the way down to apnea, which is no respiratory effect. So not breathing would be zero or apnea, you know, eight to twelve might be mild respiratory depression, something between eight and zero would be the effects of a severe opioid overdose.

Q And just in terms of timing of respiratory depression when it comes to ingestion of a fast-acting opioid like Fentanyl, can you talk about the timing of when that respiratory depression will begin to set in and peak?

A So with Fentanyl we know from both experiments in humans, clinical observations in humans and then the results of the experience we have in Fentanyl overdoses that that onset of action is about 30 seconds to one minute. Respiratory depression can occur, you know, respiratory depression would be analogous to drowning. So respiratory rate would stop very quickly in about a minute and then, you know, in four minutes

there would be brain death and cardiac arrest.
Q And so is -- in that timeline is that always a fixed timeline or does it depend on dose or other factors?
A So it depends on dose and other factors. We do know from some studies of patients who have died looking at medical examiner evidence that initially in the Fentanyl outbreaks in New England that about 25 percent of the patients died with a needle in their arm. So meaning that their respiratory depression effects happened immediately after injection.
Q And so you talked about the timeline of what after respiratory depression sets in or apnea sets in how long there is until somebody will die from that respiratory depression. Can you talk about the continuum of potential injuries that can happen during the minutes that elapse after respiratory depression sets in?
A Yes. I think the word continuum is a good place to start. Again, depending on dose, that patient may immediately stop breathing and then as you lose oxygen from not breathing the next effect on the body would be for your heart rate to slow down and, you know, that might be within a minute, a minute and a half, two minutes. You might see color change in the patient, and then as the heart rate slows more significantly and the injury to all tissues occurs in the three or four minutes, eventually at four or five minutes the slow heart rate may proceed to no heart rate or full cardiac arrest.

Q And during that progression or continuum it -- is death the only negative consequence that can occur? Or is there sort of preliminary injuries that could occur even at -- as time goes by if you were to get to somebody in the, you know, minutes but not at the point where they have -- they've passed away and they're unable to be resuscitated.

A Yes. So we certainly see people who are found at four or five minutes who may have enough lifesaving interventions that bring them back but suffer significant brain injury, significant brain injury to mean that they need to be on a ventilator and won't have, you know, any significant response for several -- you know, forever. Or some people who suffer will have mild brain injury as a result of loss of oxygen in that period.

Q Are there any physical injuries that can result from being without oxygen for, or diminished oxygen, for a period of time?

A There are markers that we can see in blood work, but besides the sequence of stopping breathing and then your heart stopping there's injury to all of the organs, heart, brain, muscle but no other real visible physical signs of other trauma.

Q Is it fair to say that once breathing is severely repressed or stops that time is of the essence in the response?

A Yes.

Q And you had talked about the fact that you see patients in

the emergency department who've been -- come to you or brought to you who have overdoses. Is that right?
A Yes.
Q What about -- and you said it was about two or three a week right now that you're seeing?
A Yes.
Q Could you maybe give an estimate just over the course of your career how many overdoses have you responded to, approximately, in the emergency department setting?
A Maybe close to 1,000.
Q And what about outside the emergency department? Have you ever had experiences having to respond to overdoses in a nonclinical setting?
A I have.
Q Can you describe what those experiences were and how you responded?
A I can tell you about one that happened outside of Prevention Point when I was volunteering in the medical clinic there a couple of years ago. Because of the frequency of overdoses in the neighborhood people knew to come to Prevention Point if somebody were struggling. And I think -- I'm not exactly sure what happened before I got there, but they had developed a kit and a rescue bag that they would go out on the street and help people. So somebody had gone out to help someone and then there was kind of a call for more need for

help.

So by the time I got there there were a few people who had already started doing some lifesaving measures. And it was a patient who was not breathing, was (inaudible) blue, was visibly obviously an overdose. And they had started to give some Narcan to but he really wasn't coming around. And so we applied some oxygen and rescue breaths and more Narcan. And, you know, what was memorable to me was that he had a bracelet on his wrist for meaning that he had just gotten out of a rehab facility. So it can be very, you know, patients lose their tolerance when they go into a rehab facility and so they're really in jeopardy for overdose after being discharged from the facility. And so that was one patient.

Another patient that I took care of was actually on Market-Frankford El just a couple of months ago. A patient was -- a person was, I think, found down by other people on the subway and they called 911. They had one of the people who was, you know, trying to help go up and down the subway platform asking for if anyone had Narcan.

So I was several cars back and I did have Narcan with me and so I followed this young man up to the middle of a subway car. On the floor of the subway car some bystanders were doing CPR and were trying to stimulate this patient. He had no pulse. He was grey, blue, what we call cyanotic and was essentially dead. And all these bystanders were around him,

you know, trying to do what they could to rescue him.

And so I got on the floor of the subway and pulled out my Narcan and gave him a dose and nothing really happened. It was really the first time I'd ever used intranasal Narcan, which is, you know, the -- what we've spread to the community. And so after administering it nothing really happened. We have two doses in the box. I gave him a second dose and, again, nothing really happened.

And they were still doing CPR and I was thinking about doing mouth-to-mouth and then I though, you know, if I'm using this intranasally maybe there's still a lot of Narcan in his nose. So I started rubbing his nose and then he took one little, tiny breath and, you know, it was, like, wow. This is, like, amazing. And over the course of, you know, the next three or four minutes he actually took a few breaths. His color went from gray-blue to, you know, grayish back to, like, almost okay. And he gradually over the next five more minutes woke up enough to sit up.

And at that time 911 arrived so that was probably 15 minutes after his overdose. Most certainly if he hadn't had CPR and ultimately Narcan he would have died. He was essentially dead and brought back. So it was really a even more eye-opening experience for, you know, the idea that people around the city are in bathrooms and in subway cars and not accessible to lifesaving measures. I mean, either having

Narcan, saving somebody or not having Narcan and not saving somebody, you know, is the difference between life and death in so many of these people.

And it was really, to me, just the most moving experience as a clinician and as a person in the city to watch, you know, 25 people on the subway, you know, get down on the ground and help this person. There's really, you know, I think a need and a sense that we are all, you know, suffering together.

Q So in the course of telling us about that experience you talked about some of the techniques that you used outside the clinical setting and in the clinical setting to respond to an overdose and how you identify an overdose. And I want to start with just how when you're in the clinical setting how do you identify and detect that an overdose has occurred?

A In the clinical setting we have a lot of monitoring so if somebody -- and this does happen, sometimes people get sleepy from opioids that we give them, and so if they're sleepy and you can't tell if their oxygen is okay we have oxygen monitors, a sensor that we put on people's fingers called a pulse oximeter. And that measures the oxygen concentration in the blood. And so that's one way that we monitor patients and that's -- tells us if somebody's respiratory effort is inadequate.

We also look at their respiratory effort, which

should be, as I said, 16 to 20 times a minute, and overall color as well.

Q And what are the types of responses in terms of trying to intervene in an opioid overdose? You had discussed Narcan, but can you talk through the protocol that you go through or the range of options in responding to an identified overdose?

A Yes. So a lot of times we may not jump to Naloxone first. We may give oxygen, so applying a facemask or stimulating the patient, repositioning them. A lot of times all of those interventions will prevent the overdose from leading to significant respiratory depression.

If we need to in the hospital we use very low doses of Naloxone intravenously generally and that would be to just reverse enough to get the patient to be making a better respiratory effort.

Q Can you just -- can you talk for a moment about Naloxone, again, putting your toxicology hat back on, and just describe how it works in a body to reverse an overdose?

A Yes. So that mu receptor that's being occupied by whatever opioid agonist, either DILAUDID in the hospital or heroin or Fentanyl, that mu receptor is being occupied. And what Naloxone does it's what we call competitive antagonist so it actually blocks the effect. It displaces the opioid from the receptor and binds there and prevents other opioids from being able to bind. So it immediately reverses the effects of

the opioid.
Q You said that you don't always jump to Naloxone or Narcan. Narcan is the brand name for naloxone? Is that right?
A Yes.
Q Okay. You don't always jump to Naloxone first in the emergency department. Why not?
A Sometimes it's adequate to do other things like just supplemental oxygen, but also because if we're giving a patient opioids in the hospital and they inadvertently overdose we're generally giving them opioids because they need it. They have cancer or they have a painful fracture, so we don't want to remove all of their analgesic effect or pain relief effect.

For patients who are opioid-dependent we don't want to cause withdrawal and so by displacing all of the opioids from their opioid receptor you can precipitate withdrawal or cause withdrawal symptoms.
Q And so what is the problem if you put somebody into immediate withdrawal when they arrive in the emergency department?
A So for clinical overdoses that we see our biggest concern is that if a patient has overdosed on both an opioid and another drug, like a benzodiazepine or a Valium or an Ativan, when you remove the opioid with Naloxone they still may have a lot of sedation from the benzodiazepine. So in other words, they might not wake up and so if they're still pretty sleepy

from the other drug and we cause withdrawal one of the most concerning symptoms of causing withdrawal is vomiting. So if someone starts to have vomiting and they're still sleepy from another drug then they won't be able to protect their swallowing and breathing reflex and they may aspirate vomit.

Q Are there any other problems if, even in the absence of another substance, of precipitating immediate withdrawal and waking a patient up that way?

A So it's, you know, unpleasant to have withdrawal and withdrawal is what drives a lot of substance use and reuse. So, you know, it's really inhumane to cause withdrawal intentionally.

Q And you described how powerful Fentanyl is and that it can be -- that the dosing can be very difficult. Can Naloxone, nonetheless, reverse even a significant overdose with a powerful drug like Fentanyl?

A It can. We know from patients who come into this country as body packers who are smuggling heroin or other potent opioids, we know that, you know, in my experience in New York and my experience here, those body packers may have, you know, millions of milligrams of heroin or Fentanyl in their body. And if one of those packets rupture they have, you know, massive exposure, far more than what anyone could ever do. But in those cases Naloxone reverses all of the effects and those patients survive.

Q So regardless of the dose of opioid or the potency of the opioid, naloxone will still work?
A Yes.
Q You talked about the importance of time response. Can you talk about how quickly naloxone will work in a patient after it's administered? And you can touch on the different modes of administration.
A Yes. So my experience with naloxone, you know, 95 percent of it is being given intravenously in the hospital. And intravenously naloxone works very rapidly within 30 seconds to one minute. And so if a patient really was breathing not at all or breathing, you know, four to six times a minute, will go up to 10 or 12 within 30 seconds to a minute. So it works very quickly.

We can also give naloxone by some other routes. We can give it intramuscularly, which is helpful if a patient doesn't have IV access yet. And intramuscularly the onset of action is probably closer to two to five minutes, but during that time we could support their respiratory effort with oxygen.

And then intranasally it works a little bit more slowly, be more like, again, three to five minutes. And in my experience I think, you know, the dose is higher but less of it gets absorbed, so a lot of patients need either supplemental oxygen or a second dose.

Q And when you provide supplemental oxygen in the emergency department, what is the mechanism of providing that supplemental oxygen?
A So we have two strategies. One would be putting a facemask on somebody and putting a lot of oxygen into their nose and mouth. The other one would be to assist their ventilations with a bag-valve mask, which just basically forces air, essentially the same as mouth-to-mouth, forcing air into somebody if they're not breathing at all.
Q And so the respiratory support during the time that naloxone is getting taken up into the body, is that sufficient to support a patient and avoid the adverse injuries or death that you described earlier?
A Yes.
Q And how certain are you about that?
A I'm very certain.
Q I wanted to talk about, you know, some of the key factors that you had described in being successful at reversing overdoses. You've had success in reversing overdoses, right?
A Yes.
Q Okay. And just talk for a minute about, you know, we talked about time, but proximity to the patient and what factors that has for you as an emergency department physician.
A Yes. So it's very important that we have patients closely monitored, both visibly and perhaps with, you know, other kinds

of monitors like this pulse oximeter sometimes necessary. But we mostly keep our eyes on patients who have either overdosed and not gotten naloxone and we want to keep watching them or patients who are getting high doses of opioids, like, in the hospital they may be on a, what we call a PCA, a patient-controlled analgesia, so high-dose opioids infused through an IV. Those patients are also very closely monitored for any over sedation or respiratory depression.

Q All right. So when you're talking about administered in the hospital there are times when someone is given in the course of their treatment while in the emergency department or inpatient treatment, right --

A Yes.

Q -- given various forms of opioids?

A Yes.

Q And is it possible even in the hospital for someone to overdose on those opioids?

A It is.

Q And so -- and that's at the time -- that's what you're describing in terms of observation of those patients in a hospital?

A Yes.

Q Do you also -- you similarly observe patients who come in who have overdosed that they've experienced based on activity they -- outside of the hospital setting?

A Yes.
Q And you would take the same observation type approach to them?
A Yes.
Q Okay. You talked about your own experience responding to overdoses in the emergency department and in nonclinical settings, like, on the street or the subway. Can you talk about how setting -- how that setting is important to the resources available to respond to an overdose?
A Yes. I mean, certainly the subway was a tremendous challenge in terms of, you know, there was no mask or oxygen or ability to ventilate the patient. There were no drugs. Since he was in cardiac arrest we might have, you know, been able to do some more effects if he was in a hospital. I think that, you know, there's a tremendous, you know, kind of feeling, like, we can do better than being on the subway on the floor, you know, resuscitating a 25-year-old from a fatal overdose. And, you know, I think the city's done a lot to get Narcan into the hands of a lot of people, but it seems like we can to better than that.
Q You had mentioned that you had volunteered at Prevention Point. Is that right?
A Yes.
Q Can you talk about the -- just give an overview of the work that you did as a volunteer at Prevention Point?

A Yes. Prevention Point is having medical clinic for a long time. I started volunteering there seven or eight years ago. And I would come in, work with students and residents who were also volunteering there and we would see patients, many different patients. They've really expanded their scope so that they really take care of anyone who comes in with any kind of medical problem. But I would say, you know, a significant subset had -- were patients with substance use disorders who were seeking treatment for skin-related problems or other complications of substance use.

Q In the course of that volunteer work did you come to get to know the patient population that is served at Prevention Point?

A Yes.

Q And what -- just maybe you had mentioned this already, but the days, you said it was seven or eight years where you -- did that lead up to the present day that you were volunteering at Prevention Point?

A Yes, not so much real recently, but yes.

Q And in the course of your work at Prevention Point did you also come to know Mr. Benitez, who is the executive directly of Prevention Point?

A Yes.

Q Okay. And have you become involved in reviewing the medical protocol for Safehouse as it's been drafted?

A Yes.
Q Can you talk about your role in reviewing the medical protocols for Safehouse?
A Yes. I reviewed the document and I think along with the team came up with -- really just agreed that the strategies seemed appropriate for the setting that it's going to be used in.
Q I'd like to -- may I approach the witness, Your Honor?
THE COURT: You may.
MS. EISENSTEIN: Thank you.
BY MS. EISENSTEIN:
Q Just to turn your attention to Exhibit 3, is this a copy of the draft medical protocol that you described reviewing. You can take a minute to look it over if you want.
A Okay.
Q Is this a copy of the medical protocol that you described reviewing, Dr. Perrone?
A Oh, yes.
MS. EISENSTEIN: Your Honor, if I may move for the admission of Exhibit 3, which is the Safehouse medical protocol.
THE COURT: Government, any objections?
MR. DAVID: No objection, Your Honor.
THE COURT: Admitted.
(Whereupon Safehouse's Exhibit 3 was identified and

moved into evidence.)

MS. EISENSTEIN: Mr. Talenta (ph), if you don't mind putting that up on the screen just starting with Page 1? And can you just, Mr. Talenta, please, just focus in on D there? Great.

BY MS. EISENSTEIN:

Q So on one section of this protocol specifically relates to the treatment of overdoses and other sudden adverse medical events. Is that right?

A Yes.

Q And if you don't mind turning to that section, which is, I believe Page 4 of that document there?

MS. EISENSTEIN: Do you mind, Mr. Talenta, just putting up Page -- I believe it's four?

THE WITNESS: It might start on three.

MS. EISENSTEIN: Okay.

THE WITNESS: General (inaudible).

MS. EISENSTEIN: Great, thank you.

BY MS. EISENSTEIN:

Q So the -- in this medical protocol there is directions to the medical provider on duty, correct?

A Yes.

Q And one of the directions in here is describing the signs and symptoms of an overdose. Is that right?

A Yes.

Q And can you just discuss what is here in terms of detecting or observing an overdose and how that comports with your own clinical experience?
A Yes. I think the description of what a patient might look like as they have less respiratory effort or decreased respiratory drive is pretty well described here in terms of change in color, change in level of consciousness, sweating.
Q And going on to Page --
A Going on to --
Q -- 4?
A Changes in breathing quality, shallow, choking, gurgling.
Q And then at the bottom of Page 4 the protocol describes the role of naloxone and I want to just move on to -- is that right, the role of naloxone in treatment?
A Yes.
Q And it describes naloxone as "a safe treatment that can be used in situations where an opioid overdose is suspected." Is that right?
A Yes.
Q We didn't touch upon this when you were talking about your emergency department experience, but can you talk about whether the appropriateness of using naloxone if you're unsure if the person is experiencing an opioid overdose or some other medical complication?
A Yes. So the dangers of giving naloxone to somebody who

has not overdosed are close to zero. So in those other scenarios of stroke or seizure or cardiac arrest it's fairly commonly given anyway in the emergency medical system per hospital protocols for changes in mental status. And so it is quite safe in all scenarios.

Q So if the person who is attending as a medical practitioner to an individual who might be suspected of overdose isn't sure if it's opioids or something, some other substance, for example, it -- is it standard of care to nevertheless apply naloxone after other techniques are tried or ruled out?

A Yes.

Q I'd like to turn to the bottom of Page 5 of the Safehouse medical protocol where it says treatment. So this starts with what you had previously described as assessment of respiratory effort and profusion.

A Yes.

Q And can you just walk us through this protocol and how it comports with your own experience. It goes from five into Page 6 of this exhibit.

A Yes. So given the myriad of warning signs that somebody would be observing for taking them to the next level of further evaluation, one would start with assessing the respiratory effort, counting respirations, looking at color. And then once a patient is deemed to have a very low respirator rate,

respiratory assistance could be given with a bag-valve mask (ph) and oxygen. A pulse oximeter would further detect either a low oxygen concentration or adequate oxygen concentration once the oxygen was applied. And the naloxone can be given either intramuscularly or intranasally if the respiratory rate or oxygen saturation is not adequate.

Q And then on part C it describes what to do with patients with a complete naloxone response. What does -- what does that mean to you?

A So for a patient who went through this intervention and needed naloxone the question is, you know, how long is that naloxone going to last and how long does the patient need to be observed. And so four hours is an appropriate amount of time to continue to monitor the patient and to observe him for a recurrence of inadequate respirations.

Q And why is continued monitoring important even after the naloxone and other measures have successfully revived a patient?

A It's important because naloxone has a peak effect at about 60 minutes, 30 to 60 minutes and most of the opioids we've previously were -- had access to, certainly oral opioids last four to six hours. Fentanyl -- or heroin might have lasted two to four, two to six hours and Fentanyl lasts shorter. But all of them last a little bit longer than naloxone. So watching for the reoccurrence of the opioid intoxication at the same

time that the naloxone's wearing off is important.
Q And then there's a section for patients with incomplete naloxone response to call the emergency department. Is that right?
A Yes, 911.
Q In your experience, when somebody has responded to naloxone and is being observed do they need to have 911 come to respond to the scene if they have a medical practitioner on hand with respiratory equipment and further naloxone?
A They do not. They're, you know, the city often sends an EMS vehicle and a large number of patients refuse to come to the hospital. And they're always looking at what happens to those people and they generally do okay in those -- in that brief period after refusing treatment.
Q We're going to talk about what happens immediately after somebody is treated in the (inaudible) in your experience starting with the emergency department as you had described earlier and getting people immediately into treatment from the ED. Can you just talk about -- a little bit more about your expertise in initiating people immediately into treatment in the ED?
A Yes. So, you know, a patient who has had an overdose who comes to the emergency department, a recent study has shown that 10 percent of those patients are dead at two years. So that far exceeds or stroke or heart attack mortality rate at

this point. So it's really a call to action and we are trying to, you know, (inaudible) resources that are comparable to what we currently do for stroke or heart attack patients, which is, you know, call somebody in, you know, act like this is a, you know, treatable moment and a big opportunity.

So we now have certified recovery specialists on call who will come to the bedside and talk to the patient about getting into treatment. So even if they're in what we call pre-contemplation we can use these peers to help them, you know, convince themselves that, you know, this would be an opportunity to at least try a few days of treatment just so that they see that, you know, maybe it's, you know, an opportunity.

And so we often start that first dose of buprenorphine in the emergency department after they've spoken to a peer. And then we follow those patients for weeks -- days, weeks, months after that to keep them engaged in treatment. And we've had a lot of success. Not everyone -- not everyone opts for it, not everyone continues in treatment, but some of the people who take it for a few days and then have a reoccurrence of use our peers will go out and get them back. And so with that we've had tremendous success.

Q And so is -- can you talk about how the immediacy of that offer of treatment and actually providing the treatment is to the -- all to that willingness of someone to accept it?

A I think that the role of the peers and role of being in the emergency department to kind of, you know, be given another opportunity directly and to be given medication that stabilizes the cycle of use and withdrawal is critical to making a change. And I think many patients who are -- who have been using opioids for a long time there is no -- that part of the brain that mediates euphoria and pain relief is gone. They're really just using to prevent withdrawal. So there's no more really getting high. They're really just suffering from a cycle of withdrawal, fear of withdrawal and using again to prevent withdrawal. And so if we could interrupt that cycle by starting them on a medication that blocks the withdrawal then they actually can develop, you know, time to think about recovery and that it's possible. When you're in the cycle of continuously using you really can't get to the next step. So I think having direct resources, using peers, making an offer is really it's empowering to a patient to realize that they have a safe place to try and get care and to be able to be connected to these opportunities. It doesn't otherwise happen.

Q And the term -- you're familiar with the term warm (ph) handoff?

A Yes.

Q Does that term encompass this process of immediate initiation into treatment and other services?

A Yes, that's a warm handoff.

Q I just wanted to just refer back for a moment to the medical protocol for Safehouse, Exhibit 5.

MS. EISENSTEIN: If, Mr. Talenta (ph), you don't mind pulling up Page 10? That's in the middle there. It's number two.

BY MS. EISENSTEIN:

Q And within this, the Safehouse medical protocol, I'll wait for you. Sorry. Within the Safehouse medical protocol have you seen that Safehouse includes a warm handoff for -- to a participant to -- for treatment and appropriate treatments are part of that?

A Yes.

Q And have you consulted with Safehouse on how to effectively engage participants in a warm handoff-type program, akin to what you've done in the emergency room?

A Yes.

Q And maybe, you know, just to, you know, describe in terms of that bridge to recovery how that has worked in terms of your own experience and patients, you described it a little bit, but can you just elaborate a little bit more on the contrast between having that opportunity for immediate treatment options and the normal discharge route at the emergency department?

A Yes. So warm handoff really, I think, describes the use of a way of having a patient meet the person who's going to continue in care with them while they're in one setting and

that person's going to go to the next setting with them. And I think that sort of aligns with people who sometimes meet their treatment provider before they're discharged from the hospital or some sort of direct human connection, so if a patient has some expectation that they'll see a familiar face when they show up in treatment.

We've been able to accomplish that with our peers who are working in the recovery community as people who have recovered and they will walk the patient or follow them patient or accompany the patient to their next steps in treatment, something which, you know, would also be accomplished at Safehouse. Finding, you know, people that these patients can trust is particularly challenging in a health care environment where they've had more adverse experiences than positive ones.

Q And even today at your own hospital and (inaudible) -- and hospitals with the advocacy that you've engaged in to create these programs, is it always the case or even often the case that patients are able to avail themselves of a warm handoff within the emergency department?

A I think there's several factors that prevent us from being able to get to everybody. And so, you know, I mean, we're probably reaching about a third of our eligible patients right now.

Q And can you just describe when somebody comes in with an opioid overdose, is treated, why it is that not necessarily

everyone in either your own department or other departments are familiar with -- get right into MAT or warm handoff to treatments?

A Right. So the patient may not be interested in recovery at that time. If they get a chance to meet one of our recovery specialists they still can be engaged in harm reduction and other strategies. But the patient -- basically there's patient readiness factors, warm handoff availability factors and then clinician time and knowledge factors. And so all three of those things have to appropriately (ph) align and overlap to get our patients into treatment. And any one of them outlying prevents that from happening.

Q And so when you see someone in the emergency department do you typically see the same person, you know, on a sort of everyday basis? Or is it more of a hopefully one-time thing?

A Yeah, less repeat, especially for opioid overdoses. Much more just, you know, a new person that we -- maybe even never been in our health system before.

Q Okay. And so does that make a difference in terms of the willingness of -- and you talked about participant willingness, the participant willingness to engage in either conversations or actually accept offers of treatment and services?

A I think, you know, every patient is different. Perhaps their road to previous treatment has been similar. I think, you know, we see an amazing transition between my approach as

what I consider an advocate to a patient and the success of my peer recovery specialists who, you know, are just much more successful at convincing a patient to try the treatment. And our peers, you know, are just not going to be available 24 hours a day and we need better access to this whole concept, you know, outside of health care.

Q And as -- given your clinical experience and what you have -- your participation in developing the medical side of the protocol can you just talk about what you see as the potential opportunities of Safehouse's supervised consumption model?

A I think the opportunities are myriad. I think the first opportunity would be to create a place where not just patients can go but families and people who are struggling for resources and, you know, clinicians who want more, you know, kind of insights. And the patients themselves need a safe place to get care or to be connected to care that's different than, you know, a -- even an addiction center that's open, you know, seven (inaudible). We used to have an addiction center at Presbyterian that took walk-ins but they closed that because it was too hectic. You know, it's but where are we going to create a patients can, you know, have a treatable moment and actually be available to be connected to care. That still does not exist. So I think access to, you know, harm reduction, meaning, you know, clean needles, a supervised place where they can use that isn't the Amtrak bathroom, that isn't, you know,

Starbucks' bathroom, that isn't the subway, you know, is what we need to provide to, you know, elevate our respect and dignity for, you know, the plight of Philadelphia citizens in, you know, this worst health care crisis of our time.

Q And just speaking even just very specifically about the supervision of consumption, can you talk about what that means in terms of the opportunity to detect and respond to overdoses based on your own clinical experience?

A I believe that this will create a safe space where there should be no -- there will not be any fatal overdoses. There are, you know, we can reduce the harm of using drugs by supervising the, you know, experience and preventing people from sharing needles or having a intoxication that results in respiratory depression.

MS. EISENSTEIN: Could I just have one moment, Your Honor?

THE COURT: You may.

MS. EISENSTEIN: Nothing further, Your Honor. Thank you, Dr. Perrone.

THE COURT: Government, do you wish to cross-examine?

MR. HUGHES: Yes, Your Honor, thank you.

CROSS-EXAMINATION

BY MR. HUGHES:

Q Good morning, Dr. Perrone.

A Good morning.

Q Among the drugs that Safehouse would supervise the use of are heroin and Fentanyl, right?
A Yes.
Q And the Fentanyl that Safehouse would expect participants to use most often is sold off the street?
A Yes.
Q It's not typically prescribed by a doctor, right?
A Typically no.
Q Okay. And a doctor can't write a prescription for heroin. Is that right?
A Not in the United States.
Q And that's because heroin is a Schedule I drug?
A Yes.
Q And that means that, at least according to Congress, there's currently no accepted medical use for heroin in the United States, right?
A Yes.
Q Does it also mean that there's a lack of accepted safety for heroin use?
A What do you mean by safety?
Q Well, I'm asking if you're aware that that's one of the findings of Schedule I drugs, that there's a lack of accepted safety for medical use even under medical supervision?
A I'm not sure about the medical supervision. I think it's the lack of indication for use.

Q Okay. And Fentanyl is a Schedule II drug, right?
A Yes.
Q And that means that although Fentanyl does have an accepted medical use, it also has a high potential for abuse.
A Yes.
Q And abuse can lead to severe physical and psychological dependence?
A I'm sorry, say that again?
Q Is it a finding of a Schedule II drug, Fentanyl is a Schedule II drug, that abuse of that drug can lead to severe physical and psychological dependence?
A Yes.
Q And you agree that heroin and Fentanyl bought off the streets are illegal to possess, right?
MS. EISENSTEIN: Objection, Your Honor. I think he's asking the witness for legal conclusions in most of his questions so far as opposed to her clinical experience.
THE COURT: I think the witness has enough sophistication to answer the question.
THE WITNESS: Can you repeat the question?
BY MR. HUGHES:
Q Yes. You agree, don't you, Doctor, that heroin and Fentanyl bought off the street is illegal to possess, right?
A I believe it is illegal, yes.
Q Okay. Now, Safehouse's harm reduction model,

misunderstanding is that that stands in contrast to a traditional abstinence-based model for treating addiction. Is that correct?

A I think the traditional abstinence model for opioid dependence and addiction it has no evidence basis.

Q Okay. But is it true that harm -- the harm reduction model is an alternative to the abstinence-based model?

A I think abstinence as a model works okay for alcohol. It doesn't really have a good evidence basis for opioids.

Q Okay. Would you agree that the harm reduction model looks to engage addicts at all points in the addiction cycle, not just when they're ready to go into treatment?

A Looks to engage them, yes.

Q Okay. And so if an addict were to come to Safehouse and say I'm ready for treatment, Safehouse would help them get that, right?

A I believe so, yes.

Q And if an addict comes to Safehouse and says I'm not ready for treatment, I just want to keep using drugs today, Safehouse would also help them do that.

A Safehouse would provide a place for to use drugs that will prevent them from dying, that will allow them to get into treatment at some point in the future.

Q Right. And they would also provide them with supplies to use those drugs, right?

A The syringes.
Q Supply them with the safe space?
A Yes.
Q And my understanding is that part of that idea, part of the idea behind harm reduction is that by building a relationship and building a trust with the addict, Safehouse might eventually be in a better position to guide them towards treatment. Would you agree?
A I would agree.
Q And so would you agree, Doctor, that for someone who's not ready for treatment that facilitating their use of drugs is an important part of Safehouse's model?
A I think these are patients with opioid use disorder who are going to use drugs. Meeting them where they are, which is the harm reduction model, is a way of engaging them rather than facilitating their use of drugs. It's a way of providing a safe place to prevent their death from using drugs.
Q Okay. Now, I think you said that you reviewed Safehouse's medical protocols. Were you involved in creating them?
A I was involved in evaluating them and editing them.
Q And am I right that those protocols are based largely on Insite, the supervised injection site in Vancouver?
A I know that they have factored into our evaluation.
Q So are you familiar with Insite, Doctor?
A Just a little bit.

Q do you have -- have you looked closely at Insite's model?
A I mean, I understand it's similar to harm reduction strategies.
Q But you're not aware of how that model might differ from what Safehouse has proposed here?
A I'm not sure.
Q You know that Insite was a result of years of research and planning.
A I think all of our supervised consumption has had a research basis behind it.
Q And do you know that that was done in cooperation with the local provincial and federal governments in Canada?
A Okay.
Q Are you aware of that or not?
(Laughter)
A It makes sense. I don't know if I specifically am aware of that.
Q And you understand -- is it your understanding, Doctor, that the possession of heroin and street Fentanyl is illegal in Canada just like it is in the United States?
A I -- that sounds right, however, I know that they are using heroin in Canada for patients. But I don't know if that's in Vancouver.
Q Okay. So are you aware that Insite was required to get a federal exemption from drug laws in order to operate?

A No.
Q Are you aware that Insite's treatment model required approval from the Canadian government?
A No.
Q Are you aware that Insite is subject to strict government oversight and regulation?
A I don't know.
Q And you're not aware, are you, that Insite actually has government employees on the staff, right?
A Am I aware? I don't know if they're government or non-government. No.
Q Doctor, do you have any colleagues at the University of Pennsylvania who do research with Schedule I drugs under a federal exemption?
A I would assume there are, but I don't know.
Q So you know that there is an exemption available in the United States that's similar to the one that Insite got to operate.
A I'm not aware.
Q Are you aware as to whether Safehouse ever applied for a research exemption?
A I'm not aware.
Q You're not aware that Safehouse ever got any approval of its protocols from the federal government, did they?
A I'm not aware.

Q And they haven't been approved by the Pennsylvania Department of Health either?
A I'm not aware.
Q Now, as part of this litigation, Safehouse has cited the support of the American Medical Association for a pilot program for supervised injection sites in the United States. Are you aware of that?
A I knew that the AMA had endorsed safe consumption facilities.
Q But are you -- to your knowledge are you aware of the AMA saying anything about how to make that come about, how to make that happen?
A I'm not sure of any details.
Q Okay. And do you know that the AMA's vote was based largely on a study that was done in 2017 by the Massachusetts Medical Society?
A I don't know.
Q You're not familiar with that study?
A I really don't know.
MS. EISENSTEIN: Your Honor, can we see you at sidebar, please, Your Honor?
THE COURT: All right.
(Sidebar begins at 10:50 a.m.)
(Sidebar ends at 10:53 a.m.)
THE COURT: Ladies and gentlemen, we have a jury

trial we usually take a midmorning break at about 11 o'clock. We have no jury here, but we'll still take a midmorning break and we'll reconvene in about 10 minutes.

THE DEPUTY: All rise.

(Off the record at 10:53 a.m.)

(On the record at 11:10 a.m.)

BY MR. HUGHES:

Q Now, Dr. Perrone, before the break, we were -- you were testifying regarding the American Medical Association's recommendation for a pilot program for supervised injection sites in the United States. Do you remember that?

A No.

Q Okay. Are you aware that the AMA has supported a pilot program for injection sites in the United States?

A I'm aware that the AMA endorsed safe consumption sites.

Q Okay. And to your knowledge did the AMA make any recommendation about how to bring that idea into reality?

A I'm not aware.

Q And are you aware that the AMA's vote in this regard was based largely on 2017 study of the Massachusetts Medical Society?

A No.

Q So you're not aware that the Massachusetts Medical Society recommended that no site open without first getting federal or state approval?

A I'm not aware.
Q To your knowledge did Safehouse approach anyone at the Pennsylvania Department of Health or anyone from the Commonwealth of Pennsylvania regarding convening a task force for safe injections sites?
A I'm not aware.
Q Did it lobby the Pennsylvania legislature for a change in the law that would allow injection sites to operate?
A I'm not aware.
Q And are you aware generally that the United States' Surgeon General has approved harm reduction measures like needle exchanges and making Naloxone more readily available?
A Yes.
Q Are you aware of the Surgeon General's position with regard to injection sites?
A No.
Q So you're not aware that the Surgeon General does not support injection sites?
A I'm not aware.
Q Are you familiar with the Substance Abuse and Mental Health Services Administration, SAMHSA (ph)?
A I know that organization.
Q And would you agree that that's the agency that leads public health efforts related to substance abuse in the United States?

A It is one of the organizations that contributes to substance abuse treatment strategies.
Q And you're not aware that the head of SAMHSA has publicly opposed injection sites?
A I'm not aware.
Q Okay. Doctor, I want to turn your attention now to the medical protocols that you testified about earlier. Safehouse staff would not handle drugs or physically help participants inject those drugs. Is that right?
A That's my understanding.
Q But they would provide a syringe -- a syringe exchange kit, correct?
A Syringe exchange, yes.
Q And Fentanyl test strips?
A I'm not aware.
Q Are you familiar with what Fentanyl test strips are?
A Yes.
Q And do Fentanyl test strips tell the user how much Fentanyl is present?
A No.
Q And do they indicate what kind of Fentanyl it is?
A No. I'm not that familiar with Fentanyl test strips, so it's possible that there are some that do more quantity than quality.
Q And you're not aware that Safehouse would provide Fentanyl

test strips to its participants?
A No, I'm not aware.
Q Okay. Would you agree, Doctor, that the kinds of drugs that are bought off the street in places like Kensington, you really don't know what's in those drugs, right?
A I think that's true.
Q And when someone injects a drug you really don't have any good indication as to how they'll respond.
A I think that's true.
Q Would you agree that if someone had just shot up a stimulant like cocaine or crystal meth could become aggressive?
A I think that can happen.
Q And can that also happen with someone who's just been administered Naloxone?
A It doesn't really happen when people get Naloxone.
Q And I didn't see anything in this -- in the medical protocols about physical security at Safehouse. Are you aware of any steps for how the security of patients and staff will be ensured?
A I think that -- I can't say exactly. You could point me to where it's in here, but I think there's several areas that address patient safety.
Q Okay. Well, I would represent you -- represent to you that I didn't find it in the medical protocols. Is it your understanding that they are in there?

A I'm not sure.
Q Okay. Now, do you know if a security risk were presented at Safehouse is there some protocol about staff would do, what the response would be?
A You said it wasn't in the protocol?
Q But are you aware of a plan for how Safehouse would deal with a security threat?
A No, I'm not aware.
Q Now, Safehouse medical staff would be certified in first aid and CPR, right?
A Yes.
Q And they would be trained in recognizing the (inaudible) overdose and administering naloxone?
A Yes.
Q And I understand that you have a lot of experience in those areas, correct?
A Yes.
Q But do you have experience, Doctor, supervising someone while they're injecting heroin?
A No.
Q What about street Fentanyl?
A No.
Q Cocaine?
A No.
Q Crystal meth?

A No.
Q Do you have training in recognizing the signs of someone who's just injected any of those drugs who is not overdosing?
A Yes.
Q But there's no academic training for supervised consumption in the United States, is there?
A Not that I'm aware of.
Q And you haven't trained staff members at your hospital in how to supervise drug use, have you?
A So we obviously supervise prescription drug use all the time.
Q But not shooting up heroin, right?
A Right, although there isn't a lot of difference between administering intravenous hydromorphone or administering intravenous heroin.
Q And what about cocaine?
A We don't have any therapeutic use of cocaine.
Q But Safehouse would accept people who wanted to shoot up cocaine, wouldn't it?
A I think they would provide a safe place to consume drugs.
Q And you haven't trained any staff members at HUP on how to supervise drug use, have you?
A Again, we certainly train a lot of people in how to supervise prescribed drug use.
Q Can a patient bring illegal drugs into your hospital?

A Legally no.
Q But it happens?
A It does happen.
Q Is there a protocol at HUP for what to do when someone's found to possess illegal drugs?
A Yes.
Q And what does that entail?
A Well, we often discover it after they've used the drugs and are unresponsive and we go through the protocols for resuscitating them, including giving Naloxone. Then after that we have somebody sit with them to observe them to make sure that it doesn't happen or puts them in jeopardy again.
Q Do you destroy any drugs, any street drugs like heroin or street Fentanyl that you might find on someone?
A The drugs are handled by security.
Q Security at your hospital, right?
A Right.
Q Now, Doctor, you'd agree generally that the practice of medicine, at least as it pertains to controlled substances, is subject to substantial regulation. Isn't it?
A Yes.
Q And more specifically, the practice of medicine as it applies to addiction treatment is subject to state and federal regulation, right?
A Yes, primarily federal I guess.

Q And Safehouse would offer medication-assisted treatment onsite, wouldn't it?
A Yes.
Q Practitioners would prescribe buprenorphine?
A If there was a practitioner who could prescribe buprenorphine there, yes.
Q Are you aware that in the protocols it indicates that there will be practitioners who will prescribe buprenorphine?
A I think it says if there is a provider who is X waivered, which is the requirement for prescribing buprenorphine.
Q Right. And buprenorphine is a Schedule III drug, isn't it?
A Yes.
Q And would you agree, Doctor, that to the extent Safehouse is going to do medication-assisted treatment that the people who come there wanting to stop using drugs and wanting to get treatment would come to the same place where other people are actively injecting those drugs?
A Yes.
Q They'd walk through the same front doors with them, run into the same people outside, right?
A Yes.
Q Are you familiar with the term opioid treatment program or OTP?
A Yes.

Q And an OTP has to be registered and approved by the federal government. Is that right?
A Yes.
Q And to get approval, an OTP would require an onsite survey.
A So if an opioid treatment program means a place that administers Methadone, then yes, that's true.
Q Okay. And that survey would involve making observations about things like storage and security of controlled substances onsite.
A Yes.
Q And inventory procedures?
A Yes.
Q And adequate staffing and recordkeeping?
A Yes.
Q And does an OTP need to have a diversion control program?
A So I know an opioid treatment program as a federal clinic that administers Methadone to patients who are attending the clinic every day and get their methadone as observed therapy. So if an opioid treatment program is a Methadone, a federally-regulated Methadone clinic then that's what I'm speaking about, though I don't know all the details of the requirements since I don't really work at that kind of place.
Q But you have expertise in addiction medicine, right?
A Yes.

Q And in your experience with addictive medicine, is it important to have a diversion program because the diversion of drugs for unintended uses poses a threat to the safety of treatment -- to the success of treatment?
A I think diversion of prescribed drugs has been a problem for all of us.
Q Now, are you familiar with the term narcotic treatment program or NTP?
A I don't know how that would differ from OTP.
Q Well, under Pennsylvania law are you aware that it's called an NTP, a narcotics treatment program, rather than an OTP sometimes?
A I don't know.
Q So would -- is it your understanding that there are a lot of regulations that apply to an OTP under federal law?
A So an opioid treatment program, one that prescribes Methadone, is a federally-regulated program that administers Methadone to patients with opioid dependence. And that was the result of regulations from the AMA and the federal government to stop prescribing opioids to patients with opioid dependence. And then that was revisited and allowed to occur in regulated settings where they're administering Methadone.
Q And so Safehouse would not be an OPT, right?
A Right.
Q And so Safehouse would not be subject to those

registration requirements, regulations and inspections, would it?

A Presumably it -- you know, they're all regulated differently, but it would not be a Methadone treatment program.

Q Okay. You're familiar with the Drug Addiction Treatment Act of 2000, DATA 2000, right?

A Yes.

Q And would you agree that before DATA 2000 opioid treatment medication could only be dispensed at an OTP, not prescribed, right?

A So Methadone could be dispensed at an opioid treatment program. And buprenorphine, which is what DATA 2000 describes the use, I think was not approved before that regulation.

Q Before 2000, right?

A Right.

Q Buprenorphine came about in 2002 or thereabouts?

A Right.

Q But DATA 2000, correct me if I'm wrong, it changed that opioid treatment medication could only be dispensed at an OTP by allowing qualified physicians to prescribe those drugs in the course of their ordinary practice, right?

A So DATA 200 allows clinicians who have taken an eight-hour course to prescribe buprenorphine for patients with opioid dependence from an office-based setting.

Q And they have to get a waiver to do that, don't they?

A DATA 2000 is the waiver.
Q Okay. And so in Safehouse's medical protocols when it talks about a waivered practitioner you'd agree that that's a DATA-waived practitioner, right?
A Right, somebody who has taken the eight-hour course and gotten their X waiver to prescribe buprenorphine, right.
Q And you've taken that course, haven't you?
A I have.
Q And all the practitioners at Safehouse that would describe buprenorphine would be DATA waived, right?
A Yes.
Q But buprenorphine would not be stored and dispensed at Safehouse, would it?
A I'm assuming not but I don't know.
Q Would you agree that if Safehouse were to store or dispense buprenorphine it would need an OTP registration to do that?
A I think if you're an office-based setting and you prescribe buprenorphine you can store buprenorphine in your office. I think that's one of the distinctions between an opioid treatment program that dispenses Methadone and office-based practice that prescribes buprenorphine.
Q So it's your understanding that Safehouse could store a Schedule III drug onsite and not be subject to OTP regulations. Is that right?

A If they were defining themselves as an office-based then I think they could store it just like another place. I don't know if that was the plan or if they were going to do it all by prescribing and filling at a pharmacy. Either one would -- is a strategy that people use.
Q So you disagree then that by writing prescriptions for buprenorphine other than storing and dispensing onsite, and I would represent to you that that's what the protocols say, and that's all I have to go by, that Safehouse would avoid the regulatory requirements that would apply to an OTP?
A Again, I think the word OTP refers to a Methadone clinic which is a different category than places that are prescribing buprenorphine, whether they're writing a prescription or dispensing buprenorphine directly.
Q Doctor, are you aware that DATA 2000 directed SAMHSA to develop a treatment improvement protocol with best practices for treated opioid-dependent patients?
A I've participated in writing some of those protocols (inaudible).
Q And did you consider those protocols in evaluating Safehouse's medical protocols?
A Not particularly related to buprenorphine.
Q Would you agree that one of the things this protocols recommends is doing a complete assessment of the patient?
A Yes.

Q And that includes things like a medical history, physical examination, mental status exam, lab testing, stuff like that, right?
A I don't think lab testing is mandated in that.
Q Okay.
A You know, we have an analogous program in the emergency department where we are providing those first doses of buprenorphine or that first prescription in the setting of creating an immediate opportunity for the patient to get to treatment where a fuller treatment evaluation can occur at a later date, usually in the next day to week. And that is based on evidence from a study at Yale that allowed treatment to be initiated in the emergency department and then basically created double the rate of engagement of people in recovery at 30 days. And there's been a call to action to increase the use of buprenorphine in all clinical settings across the country.
Q So Safehouse is --
A There's evidence for it. There's evidence for the drug and there's evidence for that pathway to gain more people into treatment.
Q Okay. But Safehouse's medical protocols, would you agree that they don't indicate that an assessment would be done before prescribing buprenorphine?
A I think that they will have done an evaluation of the patient insofar as their previous substance abuse history and

their general physical examination at that point.
Q So that's going to happen. It's just not in the protocol?
A I think the protocol is comparable to what we would use in the emergency department.
Q Okay. Would you agree that it's important to know who the person is that you're treating?
A As in identification? Identification is also a prerequisite for treatment in the emergency department but we bypass that in emergency situations where patients can't produce IDs.
Q Right, and --
A And that happens all the time.
Q But if Safehouse were prescribing buprenorphine rather than supervising consumption for that aspect of its program would it be important to have identification? I mean, you have to know what name to write on a prescription, right?
A Identification of a patient is a barrier for all of our patients and it's a social determinant of health that's just like all the other things that our patients don't have access to.
Q And what if someone who came to Safehouse was a minor? You'd want to know that too, wouldn't you?
A I think a minor suffering from substance use has a number one problem, which is substance use.
Q And so Safehouse would treat minors then, right?

A I'm not sure what the policy is going to be on minors that are known to be minors, but I think they're going to treat patients with substance use disorder as a priority.
Q Would Safehouse require identification to prove someone's not a minor?
A I'm not sure how they would handle that.
Q Okay. What about if someone's pregnant? Does that affect the kind of medication-assisted treatment that you'd prescribe for them?
A Yes, it does.
Q So you'd want to know that, too, wouldn't you?
A Yes.
Q And Safehouse's protocol doesn't directly address informed consent, does it?
A I did not see informed consent, but we also, for our protocols, we have verbal consent. We ask a patient if they're interested in treatment.
Q Okay. And are you aware that informed consent was a really big issue for Insite in Vancouver?
A No, I'm not aware.
Q And would you agree that it might put then an issue for informed consent as to whether someone can give that if they're under the influence of drugs like heroin and Fentanyl?
A We are challenged by informed consent issues all the time in the emergency department. If somebody comes in after a

motor vehicle crash and they have a femur fracture and we've given them opioids and then we need to take them to the operating room to explore their abdomen we face this issue all the time. And we have premises that the patient is still able to consent and that there are allowances for that scenario.

Q So in the context of Safehouse is it your belief, Doctor, that someone who's under the influence of heroin can give valid informed consent?

A For the patients that I have described who are there in a cycle of opioid use and withdrawal, there's very little intoxication that's really occurring. And patients who are currently using are not the ones who are about to get their first dose of buprenorphine. So patients who are using opioids have to be in a certain period of withdrawal from their last dose before they're going to be eligible to get a first dose of buprenorphine and at that point they have a fair amount of clarity about what they want.

Q If someone's in severe withdrawals would that affect their ability to give informed consent?

A I mean, you could say that severe withdrawal is also the same as severe pain and we'd like to get people to a point of just right, but it's a challenge. So I think that patients with severe withdrawal when being given an opportunity for treatment they're eligible to consider all of the options.

Q Okay. Now, Safehouse's medical protocols seem to indicate

that someone who wants treatment and is not exhibiting signs of withdrawal would be given a prescription and allowed to leave with that prescription. Is that your understanding?

A And perhaps with a peer who can help them.

Q Okay. But someone in moderate to severe withdrawals would not. There's a different protocol for that. Would you agree?

A So moderate to severe withdrawal perhaps they could get a prescription and start the dose immediately or go and get the prescription filled and get their first dose.

Q So according to the protocol Safehouse would have a staff member fill the prescription, bring it back and administer the first dose onsite. Does that sound right to you?

A I think the patient would go to a pharmacy. This is what we do. Our patients can sometimes leave with a peer and go for home induction if they have a home, get a prescription filled and take it in a few hours after they start to develop withdrawal symptoms.

Q Doctor, would any of what Safehouse proposes be subject to any kind of federal or state accreditation or approval?

A I'm not aware.

Q And you agree that none of the regulations that apply to an opioid treatment program would apply to Safehouse, right?

A Opioid treatment program as defined by a Methadone clinic I don't think would apply to Safehouse per se.

Q But are you aware of any regulations that apply to

treatment programs other than an opioid treatment program, a Methadone clinic?
A I'm not aware of the regulations.
Q And Safehouse would invite people to bring illegal drugs onsite, wouldn't they?
A They would offer supervised consumption to mitigate risk of fatal overdose.
Q And Safehouse would allow people to inject those drugs when they don't really know what's in those drugs, right?
A I think it's the same challenge that the patients have in subways and bathrooms around the city.
Q And Safehouse wouldn't necessarily have any accurate medical history and sometimes even no demographic information about people that are coming there, right?
A I think that's true.
Q But it would prescribe medication and it would do that the same place where people are injecting heroin and fentanyl, right?
A Yes.
Q Would you agree, Doctor, that that's unprecedented in the United States?
A I believe supervised consumption has not occurred in the United States.
Q But would you also agree that all of that is contemplated by Safehouse's medical protocols?

A I think their medical protocols are describing the goal of supervised consumption.
Q And it's your testimony, Doctor, that none of that would be subject to approval or regulation by the government?
A I'm not aware.
MR. HUGHES: I have no further questions.
THE COURT: Any redirect?
MS. EISENSTEIN: Yes, Your Honor.
REDIRECT EXAMINATION
BY MS. EISENSTEIN:
Q Dr. Perrone, you were involved in advising on the medical protocols from a clinical perspective for Safehouse. Is that right?
A Yes.
Q Are you here to testify about the full scope of the operations and staffing at Safehouse?
A No.
Q And, you know, have you been given full visibility from where you sit today into all of the operational decisions that Safe house might make outside of the clinical components of overdose detection and response to an overdose?
A Outside of those things?
Q Yeah. Have you been involved in the operational planning for Safehouse beyond the clinical advice that you've --
A No.

Q -- been describing? You -- when you were speaking to my friend on the other side, you talked about the evidence with respect to abstinence-only programs and can you please elaborate on what you said about the evidence with respect to abstinence programs?

A Yes. So abstinence means that patients stop using the substance that they were dependent on and that a simplest analogy is alcohol or patients with alcohol use disorder often go to a a one-week or three-week or one-month rehab where they get away from access to alcohol and develop strategies to prevent their use of alcohol when they come back to their normal living circumstances.

That model has been attempted to be employed with opioids where they've put patients into treatment facilities for days to weeks at a time and what happens is they lose their tolerance. They go through a severe withdrawal period. And at the end of that period where they've been abstinent for one, two or three weeks their risk of subsequent overdose is tremendously high. And we've had many deaths in that scenario.

So using the alcohol abstinence model to extrapolate to treatment use for opioid use has been fraught with increased fatalities. So the standard of care for treatment of opioid use disorder is treatment with either Methadone or buprenorphine or Naltrexone, which is another drug that we haven't talked about.

Q And you spoke earlier during your direct examination about your own experience in the emergency department initiating patients into buprenorphine, correct?
A Yes.
Q And what -- can you just speak about the differences, if there are any, between the requirements and initiating someone in the first instance to buprenorphine, giving them those first few doses, and being a clinical provider of buprenorphine in an outpatient setting?
A Yes. So buprenorphine is, again, back to that mu receptor, the opioid agonist, it also binds to the opioid receptor but it is a partial agonist so it doesn't have the full effects that a regular opioid would have. And actually it has a plateau effect on respiratory depression so it's much safer, but it also displaces other opioids so it prevents people from using heroin or Fentanyl or other opioids. So it is our safety net for these patients and it also prevents fatal overdose.

So we administer buprenorphine. As a clinician in the hospital I don't need that X waiver that he was speaking about. Any clinician can start a patient on their first few doses of buprenorphine in the emergency department, but I need to take that eight-hour course in order to write a prescription for buprenorphine. And that's been one of the limitations in getting primary care doctors across the city to be able to

prescribe buprenorphine because there's even more regulations around that.

Q And is it fair to say that there are a number of different options for referrals for longer term MAT treatment besides that initial initiation -- after that initial initiation period?

A Yeah, so after we stabilize a patient with a few doses of buprenorphine or if we write a prescription for a home induction of buprenorphine the handoff is to a primary care provider who has taken the X waiver course and who will continue to prescribe buprenorphine in a primary care setting or some of the other clinics around the city.

Q Now, you've spoken about some of your opinions today about the benefits of having a medical practitioner in close proximity to someone who is consuming, right?

A Yes.

Q And these opinions, were they based on the opinions or determinations of various national or local medical agencies or your own clinical experience?

A My own clinical experience, which has been sort of influenced by all of those other sources.

Q And we talked about Naloxone. One thing we didn't touch on is can someone self-administer Naloxone?

A So someone who needs Naloxone in the setting of an overdose cannot self-administer Naloxone. So patients who are

sleeping, not breathing, unable to respond, those are the patents who'd need Naloxone and they cannot administer it to themselves.

Q So another person must be present with the Naloxone in order to have it administered. Is that right?

A Yes.

Q Now, you had been asked about whether you ever supervised someone injecting heroin in the emergency department. Is that right?

A Yes.

Q Do you ever -- do you have clinical experience or have experience administering other opioids in the emergency department?

A Yes.

Q And you had mentioned that heroin is essentially or similar to or the same as some of those other opioids that you administer in the emergency department. Is that right?

A Yes.

Q Can you just elaborate on what you meant by that?

A So hydromorphone or DILAUDID is a opioid that we administer for pain in the emergency department. It is rapidly acting. It gets into the brain quickly. It might not be quite as euphoria-producing as heroin, but it's pretty close and it can be very rapidly -- cause the same effects of respiratory depression in a dose-dependent manner.

Q Is the -- is in any way your evaluation of whether a patient is experiencing an overdose, does it matter whether someone took heroin, Fentanyl, prescribed Percocet or any other opioid in terms of how you evaluate whether someone's experiencing an overdose?
A It doesn't matter.
Q Does it matter when you're deciding how to support their respiration what type of opioid they may have consumed?
A No, it doesn't matter.
Q Does it matter whether you administer Naloxone with the type of opioid they consumed?
A No.
Q Does it matter if it's street Fentanyl versus Fentanyl that you administered as part of a hospital treatment, how you respond to an overdose?
A No.
Q You had asked -- been asked about cocaine and other drugs and whether you had experience in supervising that activity in the ED. Is that right?
A Right, and I have not.
Q But have you treated people who have come to you in the immediate aftermath of consuming any of those substances?
A Yes.
Q Can you -- do you see and are there times at which someone is in the very immediate aftermath of consuming those

substances?
A Yes.
Q And does it matter to your medical care of that person whether you would have watched them consume the substance or whether they show up at your door in the emergency room immediately after consuming?
A I think the effects of using last a long time and so they look pretty similar to immediately after or a short time after.
Q And so in the emergency department you went through the factors of detecting whether someone is experiencing an overdose. Are those the same factors that the Safehouse protocol suggests that the medical practitioners would look at within the Safehouse walls?
A Yes.
Q You facilitate breathing and respiratory support in the emergency department, right?
A Right.
Q And that's what Safehouse would do, correct?
A Yes.
Q You provide Naloxone access and administration in the emergency department, right?
A Yes.
Q And that's what Safehouse would do, right?
A Yes.
Q When possible you observe or stay in close proximity to

patients who have received opioids in order to monitor their breathing and make sure that they are breathing at a sufficient rate, right?

A Yes.

Q And that's what the Safehouse medical team would do as well.

A Yes.

Q And the equipment that they would have is similar to what the emergency department has. Is that right?

A Yes.

Q You talked to us about how time is of the essence in responding to an opioid overdose. Do you recall that?

A Yes.

Q And so what is the -- there's a critical difference between Safehouse and the emergency department in terms of the time that elapses potentially between when an overdose occurs and when the physician can respond. Is that right?

A Yes.

Q And can you speak to how critical from your perspective is that difference in time may be in terms of the outcome for the patient?

A Yes. I think it's very important. When you think about those people who are dying with syringes in their arm it really speaks to the idea that, you know, people have when they misjudge or get a bad batch of Fentanyl or heroin that they're

at risk for fatal overdose immediately after injection. And that's perhaps a large number of the people that we are losing in the city. So providing a place for them to use more -- with less harm and in a supervised setting will mitigate that risk of death.

MS. EISENSTEIN: Noting further, Your Honor.

THE COURT: Any further re-cross, government?

MR. HUGHES: No redirect, Your Honor.

THE COURT: All right.

MR. HUGHES: Recross.

THE COURT: I knew what you meant.

MR. HUGHES: Thank you.

THE COURT: You may step down, Doctor. Thanks.

(Witness excused.)

MS. EISENSTEIN: Should we call our next witness, Your Honor?

THE COURT: We should. We're good until 12:30 or thereabouts.

MS. EISENSTEIN: Your Honor, the government (sic) calls Mr. Jose Benitez to the stand.

THE DEPUTY: Please stand and please raise your righthand.

JOSE BENITEZ, DEFENDANT, SWORN

THE DEPUTY: Please be seated. Please state our full name and spell your last name for the record.

THE WITNESS: Jose Benitez, B-E-N-I-T-E-Z.
THE DEPUTY: Thank you.
THE COURT: Good morning, sir.
THE WITNESS: Good morning.
MS. EISENSTEIN: Could I have a moment, Your Honor?

DIRECT EXAMINATION

BY MS. EISENSTEIN:

Q Good morning, Mr. Benitez.
A Good morning.
Q Mr. Benitez, you're here as the Safehouse president and treasurer. Is that right?
A That's correct.
Q And you've also been the executive director of an organization called Prevention Point. Is that right?
A Yes.
Q And how long have you been the executive director of Prevention Point?
A Going on 11 years at Prevention Point Philadelphia.
Q And with respect to Safehouse, you were one of the founders, were you not, of the Safehouse organization?
A Yes.
Q And that was founded in 2018. Is that right?
A Yes.
Q And just Prevention Point is -- you've been there for 11 years. You've been working in Kensington for over 20 years.

Isn't that right?
A Correct.
Q And will you talk about your -- give an overview of your professional and personal experience responding to the opioid crisis?
A Sure. So my entire social work career has been spent working with people who use drugs and my job at Prevention Point started about 11 years ago. We run the city's sanctioned syringe exchange program. And we have since become a public health organization so we've expanded in terms of the types of services that we serve for people. But my entire social work career was basically working with people who use drugs.
Q And you described your social work career. You have training -- your training and education was in the field of social work?
A It is. I received a Master's degree from Temple University and had been working in social work my entire career.
Q And before that is it right that you attended seminary?
A Yes.
Q Can you talk about why it was you came to spend your career working with those affected by drug use and opioids in particular?
A For me it is -- it was a matter of faith to try and to help people who were -- who were afflicted by drug use. And so

I felt a call to do that in terms of providing some service to them.

Q And so when you first started out in that work what kind of work were you doing when you first got into the field of addressing and heling those who use drugs?

A I was a case manager for an HIV service organization.

Q And then from there what was the next role that -- and progression in your career?

A So I began working in various -- I had various social work jobs so I began working at a hospital as a hospital social worker. Then ran an -- sort of became the administrator of an HIV clinic and then worked at a treatment facility for youth who were suffering through opiate use disorder and then became the executive director over at Prevention Point Philadelphia.

Q What is -- let's just talk about when Prevention Point first came into existence. That was 27 years ago. Is that right?

A Yes.

Q And when it first opened what was the service that it provided?

A So when Prevention Point first was founded it was the sanctioned city -- the city-sanctioned syringe exchange program.

Q And was that the only service it provided when it first opened its doors?

A Yes. At that point it was just the syringe services.
Q And at first where was it located?
A It was mobile so most of the services were provided out of vans.
Q And at some point did Prevention Point come to be located in Kensington area, Philadelphia?
A It was.
Q And ow long ago was that?
A I want to say about 16 years ago or so and then we moved to a recent new -- our location now. We were there for about four years.
Q And over the years has the -- have the services expanded from just syringe exchange to providing a range of other services at Prevention Point?
A Yeah. So Prevention Point has become a public health organization that provide a -- provides syringe services programs but in addition to that medical services. We have a medically-assisted treatment program that's operating right now. There is a shelter that houses 80 homeless people and there are other services, mail services for the homeless and we also have a food program so people can come in and eat breakfast, lunch and dinner.
Q And is it fair to say that you've become a robust provider of social services for the community that you serve?
A We have.

Q And also provide various medical and public health services. Is that correct?
A Correct.
Q I'd like you to tell us a little bit about the patient body that you presently serve.
A So we serve over 15,000 Philadelphians at this particular point. That's an unduplicated number. That translates into over 100,000 interactions with people a year. That encompasses all of our services. And people can come in and out of the various services depending on what their needs are. So some folks just come for syringe exchange services. Some folks come for our medically-assisted treatment, and some folks come in to eat basically.
Q And of the people that Prevention Point serves, if you can estimate what fraction of them are people who are using drugs or who are even suffering from a substance use disorder?
A I would say most, over 90 percent.
Q And what about other demographics of the people that you serve in terms of their experience with homelessness and other similar demographic factors?
A Sure. So I would say that we have over 60 percent experience of people that come in that experience homelessness. We are an organization that sees a lot of trauma so people who have gone through various forms of trauma. We have people who are in the midst of opiate use disorder and there are people --

it's a fairly mixed race -- racially so, you know, we have -- and we have I would say three-quarters of the population are male and a quarter female.

Q How many people are on staff at Prevention Point today?

A One hundred and twenty.

Q And do you also have volunteers who work at Prevention Point?

A We do, over 200 volunteers and our volunteers are folks who come in from the community but also up to physicians, nurses who are volunteering their time to take care of people.

Q So over the course of a year you have over 300 people who are helping to provide these services to the population you serve. Is that right?

A Yes, correct.

Q Can you talk a little bit about the training and the jobs that your staff members, the various roles that they serve in your organization?

A So we have folks who -- what we proudly at Prevention Point call street degrees, people who may not have formal training in universities. They come in. They help us, so provide services to people who are homeless. We have nurses, doctors and physician assistants all on staff, Master's-prepared social workers and Bachelor's level social workers, certified peer specialists. All of that is the range of staff that we have providing services at Prevention Point.

Q Can you talk about the expansion in the staff over the last number of years at Prevention Point?
A So about four years ago we were providing services, I would say, to about 25 -- a little over 2,500 people. We are now at 15,000. We have grown in terms of services and staff due to the opioid use crisis that we're seeing in Philadelphians at this point.
Q And so that increase in the number that you're seeing do you know whether that's attributable to people flocking to Prevention Point from other areas or attributable to the people in your area increasingly needing your services or both?
A So different studies have shown that basically we're seeing the bulk of the people that we see are Philadelphians. There are a small percentage of folks that come in from various parts of -- you know, outside of Philadelphia for services. But the bulk of them are Philadelphians.
Q And I should have taken a step back. You had said that there were 15,000 unique individuals and you've tracked the number of visits and you keep data on that. Is that right?
A Correct.
Q And can you just explain how it is that you are able to gather those data with respect to Prevention Point use
A Sure. So for the syringe exchange program, for example, you come in we will gather some various points of information from you and develop a unique identifier basically. So we give

you a number and that's how you do business with us in terms of the exchange.

For other services then it becomes name-based. So for example, if you need medically-assisted treatment then you go through an assessment and it would be name-based basically like you normally would at a regular medical clinic.

Q And so for the name-based services is there a medical record?

A There are, yeah, depending --

Q And --

A -- on the service, right? So in some cases yes. In other cases, like, if you need -- if you need a mailbox, for example, for us to use our address it would be name-based but there wouldn't be necessarily a database associated with that or a chat.

Q And so you have clinicians who work with you on staff. Is that right?

A That's right.

Q And do you also have either as part of your volunteers or, well, let me take a step back. Do you also have organizations that you partner with who provide staff members, physicians and others who aren't on Prevention Point staff?

A Yes. So because of the volume and because of the expertise that we sometimes need we partner with other community-based organizations. We also partner with the city

to provide various services. So an example of that is an organization like Philadelphia FIGHT who provides -- and they come and they provide physicians and then staff to run our HIV clinic. And the same is true with Project Home which comes in and provides primary care services for the homeless.

Q And when you talk about the 120 on staff and the 200 volunteers, are those affiliated partners counted in those numbers?

A No. No, those are Prevention Point staff, strictly Prevention Point staff or volunteers, yes.

Q So in addition to the people who work for you these partner organizations would be accounted on top of that?

A That's correct.

Q And are some of those organizations located physically on the same site as Prevention Point is?

A No, but when they come in for service, to provide a service, yes. They are physically located in our clinics or in our vans so depending on the service that they're providing they do come in. The purpose is to sort of provide as much service as we can to people where they're already coming in for services.

Q And so onsite do you have providers who can initiate and prescribe medically-assisted treatments?

A Yes, we do.

Q And are those providers staff of Prevention Point or are

they part of the affiliated services?
A They're staff of Prevention Point.
Q Okay. And so you also have affiliated services who can provide --
A Yes. Yes, we do.
Q -- medically-assisted therapy?
A Mm-hm.
Q Just one second. I want to talk -- focus your attention on the syringe exchange service in particular, okay?
A Sure.
Q Can you just start with explaining the basics of how the syringe exchange at Prevention Point point presently works?
A So a person will come in, request to exchange with us. We will do a brief assessment with them. In that assessment we will obtain certain personal information from them. An example could be your initials, your mother's maiden name, the last four digits of your Social Security number, and then we can come up with what we call the unique identifier. That number is then issued to the person that's coming in seeking services and we're also going to ask some brief questions about -- we're going to get some demographics. We're going to ask a little bit about former drug use, what people are currently using, what ZIP code they reside in. So all of those kinds of information will be put into a database and then the person gets issued a card that says that they're registered -- they're

registered with our syringe exchange program.
Q And when somebody first comes in what else happens besides getting the unique identifier?
A So they can come in. Usually people, if it's the first time that they're coming in we're also sort of spending some time with people explaining the program. And they may be given syringes, what we call a starter kit which is, you know, anywhere from 10 to 20 syringes. And we are also offering a slew of services so that folks understand that there's also treatment services available for people, that there are Hepatitis C and HIV screening for them and we go through all of the services that people may need.
Q And so just walk us through the door of the syringe exchange and just so that people can understand --
A Sure.
Q -- sort of, like, the physical layout, how it works and just who this person is who's maybe engage in the person who walks in and just what happens then.
A Sure. So the first thing that people -- on an exchange day, the first person that they would encounter is someone at the door who is collecting -- on of our staff people who is collecting used syringes. That automatically goes into a red bin. And we will sort of figure out what's the number of syringes that they're coming in with. There's staff who will write a ticket with that number on the back of the ticket and

then direct the person to go into the syringe services area, which might have three or four different lines. And depending on what you need is if you're a new registrant then there's a line for that and we're going to do a brief orientation of the program and provide the summary of all of the services that we offer.

If you're a regular there will be a line for that and we will then sort of, like, exchange with you. Depending on what you have on the ticket we'll give you a one for one exchange.

Q And so for new registrants you had talked about the offer of services. Can you provide more detail as to how that offer is made and what opportunities at the time someone walks into the syringe exchange for the first time what opportunities they're given?

A Yeah, because we're orienting them to the program so we're going to explain how the exchange works. That it -- that they, when they bring in their used syringes, you know, how to describe them, how to be safe after use, depositing them usually in a red bin that we'll give them. But if that's not available they can use other kinds of containers. And so that whole process is reviewed with someone.

We -- then we'll offer all of the programs, the menu of programs that we have at Prevention Point. So someone will know about medically-assisted treatment, someone will know

about all other options of treatment. The city of Philadelphia we have folks from Community Behavioral Health or BHSI, which is a form of insurance for people who are not insured. All of that gets explained so that if somebody wants to go into treatment outside of Prevention Point they can do that and there is all of the clinics get explained as well. So we give people a menu of what's available. The HIV clinic is here today, the Hepatitis C clinic. There's a legal service, so legal clinic is here. So all of those services get explained to an individual.

And the piece that's important -- that I like to sort of distinguish is that the only program that is run anonymously is the syringe exchange program. Once you ask for another service we do ask people for their names and there are assessments that people go through.

Q So you described 15,000 people using your services. Is that 2018 numbers?

A Correct.

Q And so -- and then over the course of a year it's over 100,000 individual visits by those people?

A Yes.

Q So not everyone is coming every day. Is that right?

A That's right.

Q So can you talk about just the range of people's use, whether they're using a few times or a population that's using

the service on a more regular basis?
A So I would say that, you know, we also -- we've been, you know, describing it as the office space, but there are vans that also go out still and they do mobile sites. We have 11 of those. And depending on where we are in the city we usually have fairly regular people that come into exchange. That's true with our -- with our office space exchange and people come in as often as they need to to exchange syringes or use services.

So in some cases we're seeing somebody every day because they're coming in for one service or another. In some cases we see people one time only because they came in and then they may have, you know, gone, you know, to another syringe services program or left the city. And in some cases, as I said, we see people fairly regularly depending on the service that they need.
Q Do you see your syringe exchange service as purely a transactional service? Or are there other relationships that the staff develop with the participants in your programs?
A No. So the whole basis in all of the programs that I'm describing are based on a harm reduction model, which really is developing relationships with people. So 15,000 people sounds like a lot of people, but we have staff that know pretty much everyone that comes in and we usually try to establish a relationship because that's sort of the first step in being

able to assist people to obtain other services.
Q And what happens when, like, if the new person comes in, you know nothing about them, is there a different effort that's made with respect to that new person who arrives at your door than somebody who you've already gotten to know?
A Yeah, I think that's why we sort of segregate the lines, right, so that we have more staff available to work with people who are newly coming into the building, introducing themselves to the participant and I'm trying to quickly build relationships with people so that, you know, someone can identify with, hey, I can always ask Jose for another service if I need that. Usually that's how peer -- our certified peer specialists that are sort of making those kinds of real connections with the people.
Q How many exchange -- you said 15,000 people, how does that correspond to the number of syringes themselves that were exchanged last year?
A We exchanged 3.9 million syringes in Philadelphia last year.
Q How has that number changed over the last several years as the opioid crisis has intensified?
A Yeah, it's -- it's steadily risen and it really took a sharp uptake when we first started to see Fentanyl come -- got introduced into the drug scene in Philadelphia. So typically people were coming in initially and they were injecting twice a

day. Now people are injecting anywhere from eight to ten times a day so, you know, consequently we've been giving out a lot more syringes.

Q And what about the number of people who are using your service? How has that changed in the last number of years?

A It's increased exponentially. I mean, we've, you know, as I said, we saw -- you know, we were about four, five years ago at 2,500. We're now at 15,000. I mean, I think it's just really exploded in terms of the numbers.

Q Have you seen a change in the demographics of the people using your exchange over the last several years?

A You know, slight racial lines. There's slight changes, not anything that I would sort of, I think, mention, that's mentionable. I mean, you know, I think the piece of it is that we're seeing a lot more use, individuals using -- injecting a lot more than they did in the past.

Q And you said that Fentanyl was part of the equation. Can you just elaborate on -- from your knowledge of people's use of how Fentanyl is driving these changes?

A So people describe Fentanyl as having a shorter half-life than heroin does and so it requires for people to consume more times in a day than they would have when they were using heroin.

Q When you conceived of the purpose of Safehouse as the executive -- or Safehouse, sorry -- of Prevention Point as the

executive director, do you see the purpose of Prevention Point as facilitating intravenous drug use?

A No. We -- what we do is initially the syringe services programs were set up to interrupt the HIV, the number of HIV cases. So back in 1991 the number of HIV cases that -- the newly diagnosed HIV cases came from people who were sharing syringes. It was about half of, you know, little -- about to be exact about 47.9 percent of those folks were sharing needles and becoming HIV-infected.

When you introduced the syringe services program and, you know, we were able to do that because of an executive order that then Mayor Ed Rendell issued, we -- if you introduce the syringe exchange program and you look at it last year, that 47 percent dropped to five percent new infection rates.

Q And so that intervention in, at that time AIDS and HIV was one of the initial impetuses for syringe exchange. Is that right?

A Correct, but also there's always the opportunity for someone to access treatment. And the more that we grew in our existence the more we realized that we should have those services readily available to someone who asks for them.

Q When you provide someone with a certain -- you described it as a syringe exchange kit, can you talk about what besides syringes you provide to individuals who use your syringe exchange service?

A Sure. So people would use -- people will get provided with what they need essentially to use safely, which is a syringe, a tie, alcohol pads, a cooker, so it's a little sort of metal piece where people can mix the drug, and saline to mix the drug with.
Q And so why provide those other items besides just syringes?
A Because it will -- it cuts down on both the ability for people to spread HIV or Hepatitis C, so those are the primary focuses of providing the whole piece. And in terms of the ties, you effectively will reduce people, you know, it gives people the opportunity to not stick themselves multiple times in an attempt to sort of find a vein.
Q And so when you say ties you mean something that goes --
A Yeah, wraps around.
Q -- around the arm?
A So, like, when you go to the doctor to sort of get blood, give a blood sample, they'll tie the rubber sort of tie around you.
Q And what about you said that there's saline or clean water that's provided as part of the kid?
A Correct.
Q What's the purpose of doing that?
A Because it would prevent people from literally taking -- dipping into a pot of water, essentially, to mix drugs.

Q Because I'm -- when -- just so for those in the audience who don't know how injection, how someone may proceed with an injection of a substance, why -- what role does water or liquid play in that process?
A There are some times people mix a powdery substance in it and it --
Q And have you seen the effect of what happens if someone uses unclean water or a liquid to mix a substance and then inject into their veins?
A Yes. Usually people, you know, people get sicker, a lot sicker faster, so yes.
Q So providing all those pieces that someone -- you're providing all of these pieces that someone may use to inject without the risk of infection. Is that right?
A Correct.
Q And transmitting infection, is that --
A And transmitting infection, yeah.
Q Can you tell us about how it is then after somebody receives the syringes and all of the other equipment that's in your syringe exchange kit from your service? What happens next?
A So if the person does not avail themselves of other services that we may have for that day, they essentially will leave the facility and, you know, they're leaving the facility in certain cases to go and use.

Q And how do you know that?
A Just, you know, certainly -- certainly word of mouth, but, you know, that's sort of the folks coming in and are exchanging that that sort of is what typically happens next is people will go to use.
Q And so do you let people stay to consume drugs presently at Prevention Point?
A No.
Q Can you talk about your policy about use of controlled substances at Prevention Point today?
A Yeah. We have a policy of no use at Prevention Point. So people will need to go do that someplace else.
Q And so they get their bag, their syringe exchange bag, and then you show them to the door and what's outside the door?
A Well, usually then people will go into, you know, will use out in the community essentially. So that's sort of what's happening right now.
Q Do you enforce the policy that prohibits consumption onsite at Prevention Point?
A Yes, we do. We're very careful with how people using inside. We have bathroom monitors so that we're sort of making sure that we're vigilant about how long someone's in the bathroom, that they get the door knocked on regularly so that we could sort of check with people verbally if everything's okay. That's not so say that there isn't use in the building

because that does happen on occasion and we -- that's why we have bathroom monitors there.

Q Do you post signs about rules that --

A Yes. There is rules -- there are signs all over the building and especially in the restrooms.

Q And what do the signs say?

A They basically say please, you know, do not use here.

Q And what about the staff? Do they ever enforce that rule?

A Yes, mm-hm.

Q Can you talk about the enforcement efforts by staff to prevent people presently from using controlled substances or any substances at Prevention Point?

A So in our bathroom, for example, the bathroom monitor will hold people's belongings while they are going into the bathroom. So bags are not allowed into the restrooms. And we -- even though we do that, we do knock on the door consistently to have some verbal exchange with someone.

Q And but when we're talking about the non-consumption, we're talking about in the general area, not the MAT program or other clinical programs, right?

A Correct.

Q Okay. And those programs, just maybe you can describe the way that Prevention Point itself is laid out presently in terms of clinical services, exchange services and just other social services just so folks have a sense of the layout of where the

people using your services might be.
A Yeah, so the syringe exchange services are usually located when they're office-based in our basement/cafeteria area so people -- actually it's a separate area. People are going downstairs and they're exchanging.
Medically-assisted treatment and all the rest of the medical clinics are in a clinic area. It looks just like it would if you went to your doctor's office basically so there are about ten rooms where we see patients for the varied medical services. There's a space for people to sort of come in what -- that we call the drop-in center so that if it's really, really cold outside or hot, people can get out of the elements for a little while. And that sort of provides us with the opportunity to engage people.
Q Talk a little bit more about the level of engagement among your staff with the people who are physically present at Prevention Point.
A So I think that people know each other over time. There are typically -- and it could -- it ranges depending on what the participant requests and what they need, but, you know, people do -- we have people that come in for services and have been receiving services as long as we've been open for the 27 years. So we have folks that still come in for a service and we have people that come in for very little services. That, you know, they may just ask us for the syringe services program

and that might be typically the way people start.

What we usually see is people sort of asking for other kinds of services from us, but staff relationships are really important. Staff go out of the way to sort of develop a relationship with participants.

Q You've been engaged in the efforts towards opioid -- I'm sorry, I wanted to say overdose reversal, is that right?

A Correct.

Q Do you distribute what's known as on overdose reversal kit?

A Yes. We've given out -- an overdose prevention kit is basically -- has the brand name of Narcan. It's naloxone, essentially, it's the internasal that Dr. Perrone described earlier, along with a mask in case you have to assist someone with breathing, some gloves and directions on how to use -- how to detect an overdose and then how to use the naloxone.

MS. EISENSTEIN: May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. EISENSTEIN:

Q (Inaudible).

A (Inaudible).

Q If you don't mind (inaudible). I'm showing you what will be marked as Exhibit 8 and that's at Tab 8, Your Honor, in the binder and we'll get -- make sure that those get a sticker on

them after the fact. Do you recognize that picture?
A Yes. This is the kit that we give out to participants and community at large.
MS. EISENSTEIN: Your Honor, we move to move into evidence Exhibit 8.
THE COURT: Hearing no objection it's admitted.
(Whereupon Safehouse's Exhibit 8 was marked for identification and moved into evidence.)
MS. EISENSTEIN: Thank you.
THE COURT: And you can pick your break time.
MS. EISENSTEIN: We'll be ready to break in -- just after this line of questioning.
THE COURT: That's fine.
BY MS. EISENSTEIN:
Q You don't have it, but I want to put it up up here if you don't mind?
(Pause)
Q So I've put up on the screen the picture that you have in front of you as well. Can you just explain what the elements are of this overdose rescue kit that you distribute at Prevention Point?
A Mm-hm. So basically we have Narcan, which is the sort of packaged internasal form of naloxone basically.
Q And that's where I'm indicating right here?
A That's what you're indicating there, yeah. We have a pair

of gloves so that if a person, you know, just so that the person can put those on for protection, a facemask, the directions that are being, you know, in terms of how to use the naloxone. But typically this all comes with training so we're spending time training each individual that gets this and then there's a carry case, basically, with it.

Q Approximately how many overdose reversal and naloxone such as this have -- did you give out last year?

A So we did a little over 6,000 last year with support that we received from the City of Philadelphia's Health Department and the Behavioral Health Department.

Q Okay.

MS. EISENSTEIN: Your Honor, now is good time for a break if --

THE COURT: All right.

MS. EISENSTEIN: -- you wish to keep --

THE COURT: We'll take a one-hour lunch recess and try to reconvene as close to 1:30 as possible.

THE WITNESS: Thank you.

THE DEPUTY: All rise.

(Off the record at 12:29 p.m.)

(On the record at 1:32 p.m.)

MS. EISENSTEIN: May I proceed, Your Honor?

THE COURT: You may.

BY MS. EISENSTEIN:

Q Mr. Benitez, I want to start off after the break, we were talking about your distribution of overdose reversal kits. Do you recall that?
A Yes.
Q Do you also have experience at Prevention Point responding to overdoses onsite or in the vicinity of Prevention Point?
A Yes on both counts, onsite and around the surrounding area in the -- that surrounds the building.
Q And so over last year, for example, have Prevention Point staff and volunteers been involved in responses to overdoses where they reversed an overdose in progress?
A Yeah, last year our staff and volunteers reversed over 500 people.
Q And those 500 people, were they all within the immediate building of Prevention Point or did that also include those who were in the neighboring vicinity of Prevention Point?
A So sometimes it's the neighboring -- it's the -- basically the neighborhood. There are times because people know that we have access to naloxone that people will run into the building and notify us of someone's who's overdosing. Sometimes it could be up to four or five blocks away. So we have teams of staff that are sort of assigned so when that emergency happens that that team will go out to respond to the overdose.
Q And tell me more about the teams that are assigned to respond to overdoses.

A Yeah. So the teams are -- sort of work in shifts and they are Prevention Point staff. We sort of decide the three people that are typically responding for that day. There's another backup team in case we have multiple overdoses that we have to respond to. The team will get notified and then that -- the primary team will run out. It could be any combination of staff. Sometimes we have a person who's a medical provider on it. Sometimes we have staff who are social workers. Sometimes we have line staff that may work as peer -- as peer counselors to folks. So it's a mixture of staff.

And people essentially will get a warning that someone or an indication that someone is overdosing. Staff grabs an emergency bag that has what we talked about in terms of an overdose kit, but it had a little bit more. It'll have a facemask that we're able to then provide breathing through. It will have a pulse ox. It will have some other sort of equipment that we may be able to use to resuscitate someone at the time.

Q So you described it being a crew. How many people are typically assigned to be on a crew that's ready to respond to an overdose if called?

A Yeah, it's usually three and that's usually because they're running outside upon a situation, kind of as a first responder would. So a person could be out on the sidewalk or in some cases in someone's home that's close to us. It could

be in an alleyway or at the el (ph) stop. And so the staff sort of tries to do this in groups of three. Sometimes that's not always possible, but when they do we have a person that will attend to the person that's in distress. We have a person that will sort of help secure the surrounding area, look for what might be a danger, which is, you know, a used syringe or other sort of refuse that's on the street that might get in the way, that's dangerous. And then the third person's going to call 911 to notify them of the overdose so we could have EMS dispatched and sort of help with crowd control.

Q So you said that your staff could travel blocks away from Prevention Point. Is that right?

A That's correct.

Q And it sounded like people are typically physically coming into Prevention Point to notify of a potential overdose rather than telephoning you or communicating with you in some other way. Is that right?

A Yeah. It's typically someone will run in from the neighborhood and say there's an overdose happening two, three blocks down. They'll give us the location.

Q Why aren't people calling you? Wouldn't it be faster?

A It really sort of depends. I mean, sometimes people don't have cellphones so, you know, and it's sort of, like, they see us as sort of an immediate way to do some contact. And most of the times when people are coming in they're also taking us to

the scene. So they know exactly where it is so they escort us there.

Q And does this happen only during the daytime or also at nighttime?

A No, it happens during all hours actually. So Prevention Point operates some kind of program 24 hours a day.

Q And what happens, you said that there's a crew and then a backup crew?

A Yeah. So sometimes we have a secondary crew with a, you know, with extra equipment that if there's two overdoses happening at the same time, which is sometimes happening when we have an overdose surge going on. So there could be as many as several overdoses happening at the same time so we have some folks that will go out and have a backup crew to do that.

Q And are there times at which that you have to pull staff from other activities in order to go respond to an overdose?

A Yes. All of these staff, actually the three, the initial primary team, all of the staff are doing other -- they're fulfilling other responsibilities in the building at the time usually. But we have an assigned team that's going to run out so they know that they can stop what they're doing instantly, grab the emergency kit and run out the door.

Q You said that this has happened 500 times in the last year. Is that right --

A That's correct.

Q -- or approximately 500 times?
A Yeah.
Q So that's could be multiple times a day that your staff is running out or running somewhere in the building to respond to an overdose. Is that correct?
A Yeah. It's not uncommon for us to respond to overdoses several times. I mean, I believe when we had Mr. McSwain visiting us at Prevention Point we actually had the staff have to respond to somebody who was overdosing right on our corner during the visit. So I think it's -- you know, usually it's happening -- it could happen several times a week, if not several times in a day.
Q Okay. And so that example where that happened when there was a visitor like Mr. McSwain, that's a routine occurrence not an unusual occurrence, right?
A That's correct. It's very routine for us. We do it -- we tend to do it multiple times in the week.
Q And so you said this could happen day or night, right?
A Yes.
Q What about is it always nice weather out when you have to respond to an overdose?
A I wish. No. Staff is responding winter, summer, rain, snow. I mean, there's -- yeah, it's not always hospitable.
Q What about the outdoor environment? Can you speak to some of the challenges that your staff faces in an outdoor

environment responding to an overdose?
A Yeah. I think that, you know, there's always -- there's always a crowd so, you know, handling the crowd on, you know, you're sort of running up on a situation so we never know who's in the crowd and what, you know, what exactly occurred. So it gives us -- we have to take a few minutes to assess -- well, not a few minutes -- a few seconds actually to assess whether or not, like, there's something -- where the syringe is because we want to be careful not to have staff get accidentally stuck. But we want to make sure that, you know, there is somebody looking around to making sure that the crowd gives the person enough space. And then we want staff to be there to interact with EMT when they get there so that we can turn the case over to them once they arrive.
Q And so in terms of the indoor locations are there times at which you respond to overdoses within Prevention Point?
A Yeah, there's on occasion something will -- someone will overdose. Like in many places our bathrooms are public so, you know, it happens on occasion.
Q And you had mentioned earlier in your testimony that the -- you have bathroom monitoring in place --
A We do.
Q -- at Prevention Point. Can you talk a little bit more about how the bathroom monitoring connects with your overdose response --

A Sure.
Q -- overdose response?
A So it's a matter of we monitor bathrooms. It's a matter of, you know, the rules are spelled out for participants. We are knocking on doors very frequently. We require that someone using the bathroom give us a verbal response so that, you know, we know that everything's okay. And if we don't hear a verbal response after a couple of times on knocking then we, you know, the participants know that we will come in to make sure that -- to ensure their safety.
Q Okay. And you had talked about that bathroom monitoring in the context of the policy that Prevention Point currently has against consuming controlled substances, right?
A That's correct.
Q But it sounds like it's also, well, maybe especially a program that helps in -- provide overdose response. Is that right?
A That's correct. Because if someone does overdose in the bathroom we can knock on the door, we would be more apt to get to the person. It's a matter of, you know, as we heard Dr. Perrone testify, it's a matter of minutes before someone has damage that we're unable to reverse. So it's vigilance that we have to exercise when we're monitoring bathrooms.
Q And do you have a set interval of time when staff are supposed to be checking in on a person inside a bathroom, for

example?
A Yeah. They do it every minute to two minutes depending on the monitor, but yeah, people are knocking on the door frequently.
Q You talked about the team composition including a range of peoples who seem to be medically trained or, you know, medical professionals and some who are not medical professionals. So they all have a certain degree of training even if they're not a physician or a physician extender or a nurse?
A Yes. So every person at Prevention Point, all 120 staff, go through overdose prevention training and it's part of the requirement as before you are sort of assigned to a particular area. So it's part of the orientation training.
Q Okay. But not -- but you're not always able to staff your crews with medical professionals per se.
A No.
Q Is that right?
A That's correct.
Q Talk about the equipment when you respond to an overdose in one of these nonclinical settings. What equipment -- you talked about what equipment you have but is there times when you don't have all the equipment that you might have in a clinical setting?
A We probably would not carry a defibrillator with us. There wouldn't be -- I mean, I think what we would carry is to

put it in a -- we would have first aid essentially, a, you know, first aid sort of equipment with us. So there'll be sort of a facemask. There would be, you know, the Narcan and there would be a pulse ox probably.

Q And when you engage in this overdose prevention response, is that an activity that you have to register with the state for?

A No.

Q Okay. And what about the naloxone that you distribute? Do you have any kind of state authorization to use and administer the naloxone that your overdose prevention crews use when they respond to an overdose in the vicinity of Prevention Point or in Prevention Point?

A Yes. The state has a standing order that was issued by the State Surgeon General of a physician general at the time so we operate using that standard order.

Q Do you need any kind of federal authorization to administer naloxone?

A No.

Q Can you talk -- you talked about some of the challenges of responding to emergency calls like this. Can you speak to any other challenges that your staff and crews face when they go out to address an overdose?

A I think our main challenge is getting to someone on time, right? So if you are talking about someone who has overdosed

several blocks away you have the time that the person who's coming to get us to inform us ran the blocks down and then the time that the staff has to run to the scene. So we're talking about minutes. And as we heard Dr. Perrone say minutes are everything in overdose reversals, so, you know, the more -- the sooner we can get to a person the more likely they are to live.

Q Is it ever hard to find the person that the staff is looking for?

A Sometimes. I mean, I think that, you know, there's -- yeah. Sometimes there's some confusion about where the person might have been if there isn't an escort.

Q And you talked about, you know, time being so important. Are there times when your staff has responded to an overdose and they've gotten there too late?

A Yes.

Q Can you talk a little bit more about that?

A I mean, I think that that's sort of the most difficult for staff is getting to someone when it's late. I think, you know, they're going to try to go ahead and resuscitate the person anyway, but there have been times when we got there late, administered Narcan, did rescue breathing and weren't able to resuscitate. I think that's sort of the hardest thing that we have to deal with on staff on a regular basis.

Q And are you aware of how many times someone has died of an overdose in the vicinity of Prevention Point itself?

A You know, the -- if you look at the citywide statistics there were over 1,100 deaths last year in the city. About a little over 200 of those were in our local -- in our ZIP code where Prevention Point is located.

Q And you had previously talked about the population you serve at Prevention Point that your staff knows the people that you serve for the most part. Is that right?

A Yes. Pretty much we learn your name pretty quickly when you come in there and staff develops relationships. That's the whole purpose of our existence is to develop a relationship with someone.

Q And so at Prevention Point are you able to specifically track by whatever numbers people use or just even by their name whether or not they subsequently were someone who was lost to an overdose death?

A It's harder for us to do it with data. What typically happens is someone in the community will come in and tell us that, you know, so-and-so passed away or had an overdose and died. So typically we find that out from other either social service providers or community members that come in and let us know.

Q And have there been times when the people that -- the emergency crews have gone out to respond to where people that are known to the staff and to Prevention Point?

A Yes.

Q Can you talk a little bit more about that?
A Well, I think, you know, that because we are in the community and we're seeing people who sometimes come in daily for services, so we get to know folks pretty well, a lot of the times folks are estranged from their families so we're the only family that they have. And I think that, you know, when we're losing someone that that really does impact the staff. And it's something that we have to deal with on a regular basis at Prevention Point.
Q do you provide support for your staff --
A We do.
Q -- for those, you know, to deal with those experiences?
A Yeah, we do. We've been -- we do a lot of vicarious trauma training. We have individual -- we have a pretty good health plan that allows people to sort of seek individual therapy, but we also have some groups that happen and, you know, we do a lot of memorials at Prevention Point to sort of recognize what we're dealing with.
Q To signify the people that have been lost?
A Yes.
Q Are there times when you work with families of the people that you've served?
A Yes. So there are times when, you know, families can't afford to bury someone where we will contribute to -- we've contributed to a lot of funerals.

Q I'm going to talk about this formation of Safehouse. Can you talk about how Safehouse grew out of these efforts that you have been discussing with respect to Prevention Point?
A Well, in doing, you know, provision of services for the last 29 years or so, it clearly became clear to us that -- and to me -- that overdose prevention sites were something that were operating around the world and that they were very successful and that we needed to do something like that approach in Philadelphia.

So I was on the Mayor's Task Force. I was the co-chair of the Overdose Prevention Committee. The development of overdose prevention sites was something that we recommended on the committee. It was more than just -- there were -- there were several recommendations. This is one of many recommendations that were made by the Mayor's Task Force. I was also a member of the Mayor's Task Force. And clearly we thought that we would need to, you know -- I thought it would -- we should organize and try and figure out how to do overdose prevention since we were losing so many Philadelphians.

That happened and, you know, we -- it was essentially something that we initially thought would be a natural piece to fit into Prevention Point, but we were worried about repercussions from the federal government. And so rather than to risk the services to 15,000 people I decided that it would be advantageous for us to sort of create a new 501(c)(3).

Q And that was the formation of Safehouse?
A That was the formation of Safehouse. I went over to the AIDS Law Project (ph) to get counsel and did that. And then sought out the former governor of Pennsylvania, Ed Rendell, and myself, Ronda Goldfein and Ed Rendell were the three founding members for Safehouse.
Q And that was in August of 2018. Is that right?
A That's correct. It was sort of several months after the city had announced that they would support the development of an overdose prevention site but would not fund it but they would support it.
Q And you mentioned the Mayor's Task Force. Is that the mayor of Philadelphia's task force to combat the opioid epidemic in Philadelphia?
A That's correct. Yes.
Q And the recommendations that were advanced you were a part of -- you were a part of the group that advanced the recommendations to the mayor. Is that right?
A That's correct.
Q Can you just describe a little bit more what your role was within that task force?
A So I chaired the Overdose Prevention Committee. It was one of several groups, subgroups that were formed, but I also served on the task force so I was a voting member of the Mayor's Task Force as well. And that -- it was that group that

voted in, I think it was 19 recommendations. This was one.
Q And so when you formed Safehouse in August 2018 what was the purpose for which you formed it?
A We formed it to provide medical supervision to those who were consuming drugs. We also formed it to ensure that people had access to treatment and other social services.
MS. EISENSTEIN: Your Honor, if I may approach?
THE COURT: You may.
BY MS. EISENSTEIN:
Q I'd like to turn your attention to what's been marked as Exhibit 1. Do you recognize that as the Safehouse model card?
A I do.
MS. EISENSTEIN: Your Honor, I'd move for the admission of Exhibit 1 into evidence.
THE COURT: Hearing no objection it's admitted.
(Whereupon Safehouse's Exhibit 1 is marked for identification and moved into evidence.)
BY MS. EISENSTEIN:
Q And just turning your attention for a moment to the very first page of that, this is normally -- before I do that, this is normally a card. Is that right, that's -- that you have as part of the demonstration of your model. Is that correct?
A It is. The first page is the back of the card. The second page is the front.
Q Okay. If you don't --

A Double-sided.
Q -- mind pulling up Exhibit 1, Page 1? I'm just highlighting the text in the middle there. Great. So it says, "Safehouse, a public health approach to overdose prevention in Philadelphia." Would you describe that as your mission statement?
A Yes.
Q And when you say public health approach, can you provide a little bit more explanation as to what you meant by that when you created that mission statement?
A So we view -- I view overdose prevention as a public health approach. When you have so many citizens dying of overdose, we are in a -- you know, we declare it as a public health crisis at this particular point. It's the crisis of the century and we think that this public health approach is lifesaving. So that was a piece of it.

The other thing that I would say is that we are -- we were always very realistic that this is one part of an overall approach that needs to be instituted by various providers, the city and government.
Q And so it was August 2018. That's almost exactly a year ago. Is that right?
A Correct.
Q And it sounds like you've been working on this project even before that during your time on the task force with the

mayor. Is that right?
A Correct. So with the Mayor's Task Force lasted -- it started -- I think it started sort of midyear of 2017 and went on for I want to say about seven to eight months.
Q Okay. And in developing the model for Safehouse, can you talk about who else you consulted with? Let's just start with locally who were the -- who were providing inputs into how this would work in -- here in Philadelphia?
A So we had -- remember we were drawing from the experience of the overdose prevention subcommittee and the Mayor's Task Force. So there were over 100 people who participated in the task force, experts from all over the city. And other parts of the world came in to sort of educate and give us sort of the basis of how to run this.
Q And by this you mean?
A How to -- how to set up Safehouse essentially. And what an overdose prevention -- what -- how an approach would be the most effective. And then locally we started to talk with some folks who would advise us on how to -- what the model should look like.

The other thing is that we're counting, you know, basing some of this on my 29 years of experience in providing the kinds of services that we outlined on the card from Prevention Point.
Q And you had mentioned that you had considered some of the

existing sites worldwide in formulating the Safehouse model. Is that right?
A Correct.
Q Can you talk more about what knowledge you have of those other sites and how they informed the approach that you took with creating a model for Safehouse's operations?
A I mean, I -- we visited Vancouver and we visited Toronto several -- you know, we were there at several sites, sawt he difference between freestanding and embedded sites and saw what worked in that country. Came back, created an advisory group and began to sort of figure out how to lay out the model in Philadelphia. And what -- you know, there are some differences in the model that we're proposing that we saw from Canada, essentially. So there are some differences.
Q What are some of the differences from, for example, the Canadian model?
A We are, you know, hoping and in some cases the Canadian models -- in some cases the Canadian models did have medically-assisted treatment; in some cases they did not have them attached to them. We sort of decided that having access to treatment was something that was paramount to the development of the project here in Philadelphia. That's one of the distinctions. I mean, some of them did have them but some of them didn't.
Q And you talked about the formation of an advisory board.

Can you talk about who sits on your advisory board and how they've assisted you in formulating an appropriate model?
A So the advisory board has several people on them, some of them are hospital administrators or run hospital systems. We have the commissioner of Health. We have the commissioner of Behavioral Health. We have --
Q And is that -- that's -- when you say the Commissioner of Health you mean the Philadelphia --
A I'm sorry, yes --
Q -- Commissioner of Health?
A -- the Philadelphia Commissioner of Health, the Philadelphia Commissioner of Behavioral Health. We have a dean from one of the universities and then we have several clergy that serve as part of the advisory board. And now -- and some of them on the board of directors.
Q And so the dean that you spoke of at one of the universities, is that a public health --
A It is.
Q -- oriented --
A It's a public health -- it's a public health university, School of Public Health.
Q And did you also consult with outside physicians and public health experts in formulating the model?
A Yes.
Q If you don't mind, can we turn to Page 2 of Exhibit 1,

please? So this is going to be a little small for the screen to see, but can you see it okay --

A Mm-hm.

Q -- up there on your card?

A Yeah.

Q Great. So on Page 2 of Exhibit 3, can you describe what this card signifies?

A So this is the flow of the services and, you know, it's sort of an outline of what services we would offer at Safehouse.

Q And so just starting at the top and maybe we can zoom in as we go. When someone first -- and we're going to do a brief overview and then we'll dive deep, okay?

A Okay.

Q All right. So starting at the top with respect to registration, can you talk about what, you know, what that -- just briefly what that process involves? And we'll get in more detail in a minute.

A Okay. So the person would come in. They would register similar to my description with syringe exchange, but I guess we can come back to that if we want --

Q Mm-hm.

A -- more detail. And they would be issued a unique identifier which would indicate the way that they would come in and out, how they would sign in and out to use any of the

services.
Q Okay. And then after the person registered walk through what the -- the range of options that could happen next at Safehouse.
A Sure. So there's an assessment for physical and behavioral health so we are going to sort of conduct a brief assessment with people to figure out what the needs are, what their needs might be both on the health side and the behavioral health side. You have these are the choices. Not everybody has to go through this in any particular order. There's medically supervised consumption. There's medically supervised observation. There are medical services and then there's wraparound services which will be available to anyone coming in. So if you come through the door you don't necessarily have to avail yourself of the medically supervised room. You can simply come in for medical services or you can come in for wraparound services.

And then there's a checkout process which would be making sure that the person, you know, we reassess needs and figure out if there's any other referrals that we can make for the person.
Q So let's start with when somebody walks in the door. Tell me what happens when somebody first arrives, you know, well, to be clear, Safehouse is not presently operating, correct?
A Correct, we're not operating.

Q And fair to say that Safehouse has been waiting on the outcome of this litigation before it's going to commence operations.
A That's correct.
Q Okay. And certain steps and even in terms of the planning have you been able to conduct all the steps that you would, given the pendency of this litigation?
A Not all of the steps. We are consistently planning and at this point, you know, we have -- this is one model but this model can look different. It could be a freestanding model or it could be an embedded model where there are other social services or medical services being provided.
Q So when you say a freestanding model you mean that all of these services would be self-contained in a single building and provided by Safehouse staff, for example?
A Correct.
Q And what do you mean by --
A Well, see, Safehouse staff and partnerships with other partners, right? So for example, wraparound services could come from a contracted city provider that will provide, for example medially-assisted treatment or they can come in and provide medical care. So there will be partnerships.
Q And that's the way you work right now at Prevention Point isn't it?
A That's exact -- it's the exact model.

Q Okay. And when you say embedded describe what you mean there?
A So embedded would be, you know, if a medical facility, for example, had some space in their facility that the portions labeled the consumption room, the observation rooms could be embedded within that service and then it -- the participants would avail themselves of all the other services that that particular provider would have available normally.
Q Okay. So let's take a step -- go back to where we were which is the person, with that in mind that there are a couple of different ways that this can come into being in a physical space, talk about what happens when somebody arrives at the door of Safehouse as you've planned it?
A So they would be greeted by a nice, friendly person and then we would do a registration process which is similar to what we do at Prevention Point at this particular point. We take certain pieces of their personal information, draw that all up and figure out a unique identifier. That would then get issued to the participant and that would be the first step. We would do a little bit of data collection in terms of some demographics, ZIP code probably where people are living, are they homeless, are they not? So there will be sort of an assessment with the registration.
And then they would go into the second phase or the second piece which is a more thorough assessment of what's

going on with their physical and behavioral health.
Q Okay. And you had been -- you heard the questions before when Dr. Perrone was testifying about a whole range of scenarios, like happens if the person, for example, who walks in your door appears to be a minor. Have you -- do you have a plan for how to encounter a situation like that?
A Yes. So, you know, if staff suspects that there's a minor, normally -- and we deal with this. We've been dealing with this in syringe services programs for years. Normally a staff will pull somebody aside and we would have intense conversations with a person and make sure that they (inaudible) referral so that they could get their needs met.
Q And so that's something that you in your own experience and your work have already encountered as an issue that you deal with in a routine way?
A Yes.
Q And what about -- there was a question about what if somebody's visibly pregnant who walks in your door? How do you handle that, for example?
A Same way. We will pull the person aside and try to ensure that they get the appropriate referrals to getting their needs met.
Q And, like, what if there's a person who it seems apparent to you they've never been an injection drug user before and now they suddenly are showing at your door to try it for the first

time. What would you do in that situation?
A I could say in my -- you know, in my 12 -- 11 years of working at Prevention Point that's never happened. Normally if somebody's coming in who's not an exchanger they're looking for another service.
Q Okay. So I want to turn to, if I can direct your attention to Exhibit 2, which I'm going to hand up to you.
MS. EISENSTEIN: May I approach the witness, Your Honor?
THE COURT: You may approach at any time, counsel.
MS. EISENSTEIN: Thank you, Your Honor.
THE WITNESS: Thank you.
BY MS. EISENSTEIN:
Q I've showed you what's been marked as Exhibit 2. Can you describe what's depicted in that picture?
A So this is a picture of the -- a consumption -- supervised consumption room. This is the picture for Insite in Vancouver, Canada.
Q Okay. Your Honor, Safehouse moves for the admission of Exhibit 2.
THE COURT: Hearing no objection it's admitted.
(Whereupon Safehouse's Exhibit 2 was marked for identification and moved into evidence.)
MS. EISENSTEIN: Thank you. Could we put Exhibit 2 up, please, on the screen?

BY MS. EISENSTEIN:
Q Okay. And so this you said is Insite Canada, right?
A Correct.
Q So not any existing facility of Safehouse, right?
A No.
Q Do you anticipate that Safehouse will have a relatively similar setup for its consumption room as this is depicted in Exhibit 2?
A Yes.
Q Okay. And so just walking in that far door there, describe -- this is the supervised consumption room, correct?
A Correct.
Q Describe what happens when the person where that door is on the far side and what it is they've done before getting into that room.
A So essentially before coming into the room they would have gone through the two phases that we talked about in the previous exhibit, the registration and the assessment for physical or behavioral health. That would have already been done. The person is requesting supervised consumption they walk into this room.
Q Okay. And so tell us what happens when they walk into this room or a room that looks somewhat similar --
A Right.
Q -- or set up in a similar fashion to this particular room.

A So what you see is kind of like a nursing station that is in the center of the room which would allow --
Q That's on the left.
A -- yeah, which would allow for the observation certainly of all of the booths that are -- or all of the stations that are set up. So what would happen is a participant would walk up to the nurse's station, request the equipment that they would need. So it could be a syringe, a tie, similar to what we give out at Prevention Point at this particular point. And then they would walk over to the assigned station that they have and grab a seat at the station.
Q Okay. And do they get any -- do they get any drugs when they walk in this room?
A No.
Q Are they given any heroin?
A No.
Q Any Fentanyl?
A No.
Q okay, any controlled substances distributed at this nursing station?
A No.
Q And you said that they are given a syringe -- sterile syringe equipment. Is that right?
A That's -- they would be given sterile syringe equipment and maybe, you know, bandages, alcohol wipes to sterilize the

area. So what they would need essentially for -- to consume.
Q And those are all the same things you currently give at the syringe exchange service at Prevention Point. Is that right?
A That's correct.
Q Now, the model also calls for offering people Fentanyl test strips. Is that right?
A Yes.
Q Do you presently give those out at Prevention Point?
A We do.
Q Okay. And so I don't think we discussed that before. Can you explain what a Fentanyl test strip is and why it's provided?
A So what we're distributing and what most providers are distributing is it's really sort of does it have Fentanyl, does it not? It doesn't tell you amounts. It doesn't tell you grades. It just tells you yes or no. So it's kind of like a dipstick and you can dip into the drug and see a result. And the result will tell you that Fentanyl's present or not.
Q And so I'm just going to walk over here (inaudible) just so we can be on the same page. So up until this point right here when the participant walks in is it fair to say that everything that happens up until this point is exactly the same as what happens at your current services at Prevention Point?
A That's correct.

Q Okay. And then this -- you had told us before that in Prevention Point the person has to essentially then leave if they're not involved (inaudible) or other services. Is that right?
A That's correct.
Q Okay. So then what's -- the difference here is that the person can stay in this room, right?
A Right. So the difference is -- there's huge differences. So let me point them out, if I may? The difference is that there would be medical staff observing a overdose reaction if one was to occur. And the immediacy of being able to provide that to the person by just running around the desk makes a huge difference in terms of what I was describing earlier. So what we have is the ability to medically observe what is going on and then provide medical care to an adverse reaction to a substance.
Q Will the staff necessarily know what substance is being consumed by the participants in this program?
A No.
Q Will they --
A No, because the staff -- the staff, you know, we're not distributing or selling any drug.
Q And was there a medical protocol that was developed? You heard about Dr. Perrone testify to that, right?
A Yes.

Q Okay.
A So the medical protocol we borrowed some of what was happening in other sites in Canada and adopted those.
Q And did you also have other input in terms of how that medical protocol would work here in Philadelphia?
A Yes. I think, you know, some of -- there are slight differences in the way that the two countries operate, so ours was sort of adopted and adjusted for how, you know, what -- how we would need to respond in the United States to keep someone safe.
Q And you heard Dr. Perrone testify that she was one of the people who consulted on that protocol, correct?
A That's correct.
Q Were there others that you worked with in developing that protocol?
A Yes. So our -- we asked our -- Philadelphia's Health Commissioner for some feedback as well. And then there were -- there was a couple of other physicians that looked at the protocol to ensure that we were on target.
Q Okay. And did that also include Dr. Bamford who's going to testify here later today?
A Yes.
Q And the protocol as it's been admitted is marked as a draft, is it not?
A It is.

Q I'm just going to hand you this (inaudible) Exhibit 3 so you have it in front of you.
A Thank you.
Q So you have not hired a medical director for Safehouse. Is that correct?
A We have not.
Q Can you -- and can you speak to why not?
A Essentially we're waiting for the results of the proceedings here.
Q And once you have a medical director after these proceedings are concluded, do you plan to develop a final version of the protocol with the assistance of that medical director?
A Yes. That would be the next step so we would certainly consult with the medical director and finalize this draft.
Q Okay. But based on what you've seen in terms of the various medical protocols that have been developed for sites in Canada and other places, is there a lot of variation as to the core components of the medical response and process?
A No, not to the core components of it.
Q Okay. And so do you anticipate that even after this draft is finalized and a medical director is hired that there's going to be a significant change in the supervised consumption model that we were just discussing?
A No.

Q You talked a bout there being medical staff here at that desk. Can you talk about what, if any, involvement that staff would have in any consumption after the sterile equipment is provided?
A None, just pure observation. So what will happen is that staff would consistently observe anyone who is consuming onsite to make sure that there isn't an adverse effect to what they're using.
Q And so what is -- so the purpose of the staff is what?
A Is medical observation and then if there is indeed an overdose a response to that. So a medical intervention responding to the person who's overdosing. And as we said repeatedly, and I know Dr. Perrone said the same thing, it's a matter of seconds and minutes when you can get to someone in order to reverse an overdose safely.
Q And so Safehouse is going to be stocked with naloxone. Is that right?
A Yes.
Q And will it also have other equipment for respiratory support?
A Yes.
Q And --
A So essentially we would have oxygen tanks. We will have masks for -- so that we could resuscitate someone if we need to. Probably a defibrillator, so there's a number of equipment

that we wouldn't be able to sort of take on the field because we're running. So that's like if you're drawing the distinction between what Prevention Point does now and what we would be able to do in this model, this model has a lot more advantages to what we're doing now.

Q All right, because you already have crews that run out to provide this service, correct?

A Correct.

Q But now instead of those crews you would have this model of medically trained staff to be able to respond here, right?

A Right. And in spite our best efforts of running out, people are still dying at an alarming rate.

Q What kind of -- you see in this picture that there are many booths and I think it might be as high as nine or ten that are in this particular picture.

A Mm-hm.

Q Do you envision that there would be within Safehouse a multiple station or booth-type facility like there is in the Insite example?

A So that would be a freestanding model, but yes, that would be one of the models that we could -- we are proposing.

Q And in that model what happens if, let's say, multiple people -- you describe there are times when multiple crews have to respond to an overdose at the same time. Do you have a plan in place or will you have a plan in place for responding if

there were multiple people at once who needed assistance?
A Yes. So the staff probably -- typically there will be three people behind there. We could essentially have one person working on an individual, but you also have to keep in mind that there are other services in the facility so that all of the facility staff, and whether they're a partner staff or not, would get trained in overdose prevention and therefore could come in and assist in the room if there were multiple overdoses at the same time.
Q Okay. After somebody leaves this area what happens as they leave?
A So there would be the second -- so it's the second sort of box which is the overdose observation area. I mean, I'm sorry, the medically supervised observation area. And that's where we would be watching people. As you heard Dr. Perrone testify earlier, sometimes it's not always instant that someone will react to or go into overdose immediately. It might take a few minutes and so therefore we will ask people to sort of have some time in a observation room where there would be additional staff watching over them and making sure that there's no adverse reaction to the substance that they took.
Q So it says her in the first bullet here that overdose reversal and emergency care is one of the services that is going to be provided, not only in the consumption room but also in the observation room. Is that right?

A Correct. And that's just an additional sort of another safety layer that gets -- that was built into the model in order to make sure that people had a little bit of extra time if they needed it so that we could observe them.
Q And in point of fact, in Prevention Point as it stands today, do you end up providing that same or similar service?
A We do that. We do this every day at Prevention Point. At this point there are people who have come through our doors who have consumed outside and then they'll come in and we are -- we observe them. So this is another part of what we're doing at Prevention Point at this particular time, yes.
Q Okay. And then under that is there are certified peer specialists and offer of services. Can you speak more to what those involve?
A Sure. So a certified peer specialist would sort of be the key staff in the observation room. And that's a person with lived experience usually and then they're the folks, as you heard Dr. Perrone testify earlier, they're the folks that are really successful in connecting with people and encouraging people to sort of seek treatment. And so when we say that last bullet point of offer of services, we would be then talking about the entire -- the entire continuum of services that got offered by us or by another provider or by the City of Philadelphia, you know, that contracted provider that we could then link someone to those various services. And that could be

homeless services. That could be drug and alcohol treatment services. That could be mental health services, all, you know, a varied array of services.

Q And so if we could just go back to the full card for a moment? And so you were just talking about on the last two, the last two bullets there, wait until it gets pulled up, the last two columns, I should say --

A Mm-hm.

Q -- medical services and wraparound services that that's where you were speaking about all these other opportunities for care that would be offered that it would be from that medically supervised observation room that they would typically be referred to or provided with that additional care. Is that right?

A Not necessarily. We will offer all of the services during all of the interactions so people will be told of all of these services that are available during every process, every step of the process. So that will be offered in registration. It'll be offered when we're assessing. It will be offered as they enter into the consumption room and, yes, then it will be offered in the overdose observation room.

Q I want to talk for a moment about medically-assisted treatment and how that will be offered with respect to Safehouse. So there was some questioning of Dr. Perrone about how that's regulated and how that would be provided. Do you --

you heard that testimony, correct?
A I have.
Q And you had also talked about how presently at Prevention Point you have MAT providers either on staff or -- and in -- physicians who are onsite who are in partnership with Prevention Point. Is that right?
A Correct.
Q And so you have experience, it's fair to say, on how MAT works in the context of your services. Is that true?
A Yeah, a lot of experience.
Q Can you just explain the process of -- from your current experience and how that's going to play out at Prevention Point of how someone can have the opportunity to be initiated into MAT directly from the services that they're using, other services that they're using.
A Sure. So it's important to note a couple of things here. First that when -- the fact that medically-assisted treatment, which in this case would be buprenorphine, right, medically-assisted treatment gets offered and is almost immediately available to the person that's requesting the intervention there. But the piece -- you know, we've talked about assigning and sort of going through the overdose prevention process anonymously, when it comes to medically-assisted treatment it is clear that we need to write prescriptions for people and that they're -- that they're seeing a physician or a medical

provider to prescribe this. So there is a different process.

There is an intake that people will need to go through. There are medical assessments that need to get conducted and will get conducted. And they either will be conducted by a licensed professional who is operating under the law in the way normally that a medically-assisted treatment provider would operate. So whether that be someone who that's on Safehouse, on the Safehouse staff or a contracted provider by the City of Philadelphia, they would have gone through the registration and the licensing that's necessary for them to provide that intervention.

Q And so MAT is not just being provided to anonymous individuals off the street. Is that right?

A No.

Q All right.

A No. It never does. We do it mobily now at Prevention Point so we're doing this out of vans and it's never -- it's never done anonymously. You cannot do it anonymously.

Q Okay. And so you collect their name, right?

A Right.

Q And they typically need insurance don't they?

A Yes, but if they're -- so we have a specialized fund, for example, as we operate as Prevention Point now there's a specialized fund to fund people their first couple of prescriptions to make sure that we are giving folks and taking

care of them at the time of what we call in the literature their motivational moment, which is they're asking for help right then and there. We need to give it to them as soon as we can, usually within a couple of hours.

Q Do you presently store buprenorphine or other medically-assisted treatment substances like Suboxone onsite at Prevention Point?

A We do not.

Q Okay. And would you plan to store any of those controlled substances at Safehouse?

A No.

Q So how does the -- you described it as a prescription, how does that work --

A So --

Q -- when somebody --

A -- yeah, typically --

Q -- gets a prescription?

A Typically what we do is we have one of our peer specialists accompany someone to the pharmacy. They go together. They pick up the prescription. They fill the prescription, pick it up and then come back. And if we need to observe -- that if the provider needs to see the person and observe the person taking the medication for the first time and wants to watch them for a little while that usually happens. There's also home induction. It really depends on the

individualized plan that the provider, the medical provider is agreeing with the participant and how that works out.

Q Okay. And do you have, you know, already existing protocols for -- or do your physician partners will -- well, there's informed consent and ensuring that people are apparently accepting that care?

A Yes. Everyone that enters into any of our other programs as described here would have to go through an informed consent.

Q You heard Dr. Perrone asked about whether the medical protocol addressed the safety and operations of the staff. Did you hear those questions?

A Yes, I did.

Q Have you spent any time working on protocols for participant safety?

A Yes.

Q Can you talk a little bit about your efforts and your plans to address safety concerns within the building?

A well, so first of all, those plans would not be in the medical protocol. It would be in the operations manual of -- the draft operations manual of Safehouse. But secondly, what we do, and, you know, it's sort of we have to draw on our experience of what we see at Prevention Point every single day, so there are times when if someone is being aggressive, as, you know, Dr. Perrone was questioned, we basically there's -- we have trained staff that are trained to deescalate and there are

times when sometimes we have to escort somebody out of the building. That happens. And there are times -- rare, rare times when we have to call 911 to have some police intervention. But that's very, very rare.

Q Okay. And so people in the immediate aftermath of consuming frequently come into Prevention Point, don't they?

A Right.

Q Okay. So even if they're not -- if you don't know or permit them to consume onsite you're seeing people right after they consume.

A Right.

Q And so you've had experience it sounds like handling the various scenarios that can arise and have protocols for -- already that you've experienced and tested within the context of your prior experience at Prevention Point.

A Yes, and typically what we're doing is observing people to make sure that they're still breathing.

Q I want to talk about a few other aspects of Safehouse's protocols within the facility. Will Safehouse charge any fees to its participants when it walks in the door?

A No.

Q Will it generate revenue from any of the activities we just discussed?

A No.

Q Will Safehouse allow any kind of exchanges of currency?

A No.
Q Does that happen right now at Prevention Point?
A People aren't allowed to exchange anything other than syringes.
(Laughter)
Q Will Safehouse sell or manufacture any unlawful drugs?
A No.
Q Other than what we just described of the exchange of or provision of sterile consumption equipment, will Safehouse provide or sell any drug paraphernalia?
A No.
Q Will the Safehouse employees be permitted to administer unlawful drugs in this supervised consumption facility?
A No.
Q What about the sale or distribution of drugs by the participants? Will that be allowed?
A No.
Q And how do you anticipate enforcing that rule?
A Well, first off, if you go back to the layout of the consumption room, right, it really is an open space. The whole purpose is that we would be observing people a lot more carefully than they're used to being observed on the street. And so it provides very little opportunity for people to sort of exchange stuff when you have somebody watching you consistently.

Q And so these, whatever is being consumed is something that the person would have had to have brought with them from outside of the facility? Is that right?
A That's correct.
Q Is there -- will Safehouse -- is Safehouse limited to certain types of controlled substances like Fentanyl or heroin for -- or will other types of consumption -- could other types of consumption occur there?
A We would restrict anything that's combustible, so anything that you have to light with -- use a lighter for or smoking would not be allowed.
Q And is that because ventilation concerns or something else?
A It's because of ventilation concerns. We, you know, I mean, I would assume that -- not assume, I mean, we've investigated it. It's pretty expensive to sort of equip a place that would be able to handle smoke.
Q But if somebody came in and wanted to take their oral medication under supervision would that be okay?
A Yes.
Q You had discussed that Safehouse will furnish Fentanyl test strips for the users' benefit. Is that right?
A Yes.
Q But will Safehouse staff necessarily know the identity of the substances consumed by any individual user?

A No. And the Fentanyl strips are a yes and no kind of response, so what it does is it provides sort of a speed bump to the participant because what it would say is there's Fentanyl in what you're about to consume and you might want to adjust the dosage. And that's sort of the purpose of Fentanyl strips. It's what people -- how people use them now in every, you know, the folks that are using this is how they use them now is to inform them.

Q Will participants be able to share consumption equipment in this facility?

A No.

Q And what about if one participant wants to help another participant inject or use or consume drugs? Will that be allowed?

A No.

Q And will the Safehouse staff at any time handle any of the -- any unlawful drugs that might be brought by its participants?

A No.

Q Will they be allowed to help the person consume drugs in a physical way?

A No.

Q I want to talk for a minute about location. Do you presently have a location where you're operating?

A No.

Q Okay. And have -- you know, you've engaged in an effort, have you not, to find a location for Safehouse to operate?
A We have.
Q Can you talk a little bit about what factors you're looking at in terms of locations and what are some of the options in general terms of what a location might entail for Safehouse?
A Sure. So as I've said, we have proposed two different models. One would be a standalone facility where sort of similar to the picture that's up there now where Safehouse would operate the standalone facility and then partner up with other contracted city providers to bring in other support services as -- such as MAT or a referral to housing, linkage (ph), medical care, all of those. That's one freestanding model.

The other would be to embed the consumption room and the observation room into an already existing either medical service or social service agency and that would be another option. And then we can ensure that the participants coming in for Safehouse services can also avail themselves of the other services that a partner agency might have available to them and that they already are providing.

The terms of location, what -- the way that we are approaching it is to, you know, the city keeps what we call heat maps. They have -- they can by ZIP code tell us the

number of overdoses in a ZIP code and it would make sense for us, right -- so I will say that in terms of location this is a city-wide problem. We have -- we have I think no ZIP codes at this particular point or maybe one that has no overdose deaths associated with it. So it's a city-wide problem that needs a city-wide response.

So I will say that, but it would make sense for us to locate sites in the heavily hit ZIP codes that we're seeing the most deaths.

Q So you had talked about the fact that the services you provide here won't directly generate revenue, right?

A Correct.

Q Can you just touch briefly on how you anticipate how the Safehouse is presently funded and how you will anticipate it will be funded in the future?

A It would be -- it would be funded by private donors and foundations that wish to support an overdose prevention method.

Q And you had mentioned that some of the services that are provided are provided by the city, for example?

A Correct. The wraparound services would be provided by some of the city partners. So not necessarily the city per se, but they have contracted providers that already provide medically-assisted treatment services or they have recovery spaces and recovery programs. You know, there's housing programs. Those partnerships we would affiliate with Safehouse

to provide the other array of services that people might avail themselves to.

Q And you spoke to some of those including the MAT services already being city-funded, city-provided. Is that right --

A Correct.

Q -- with respect to Prevention Point?

A Yes.

Q And have you already been working with the city in providing those services with respect to Safehouse, if -- when and if it opens?

A Yes. So we've been working with the city to identify contracted agencies that would provide the various services --

Q And --

A -- that are described on the cards.

Q And what about timeline? When do you -- how quickly do you anticipate opening your facility once this lawsuit resolves?

A So that one's -- that one's a little tough. I mean, I think we would like to open as soon as we can after a determination.

MS. EISENSTEIN: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. MCSWAIN:

Q So Mr. Benitez, you and I have met each other before,

right?
A Yes, sir.
Q So I came out to your location at Prevention Point and you were kind enough to give me and some of my colleagues a tour last year.
A Yes, sir.
Q And you -- you've really dedicated your whole life to helping others, right?
A Yes, sir.
Q And you've been at Prevention Point for did you say 11 years?
A Almost 11, mm-hm.
Q And you've done a lot of good at Prevention Point.
A Thank you.
Q And you're proud of that?
A Yes, sir.
Q As you should be. Let me just ask you a little bit about the name Safehouse. Why did you pick Safehouse?
A I think that it was, you know, it was certainly a debate, but it was an area that -- I mean, it's a name that implies safety and I think that's sort of the -- I mean, I'm not sure that there was a whole bunch of discussion or hidden meaning behind the name.
Q So you're trying to stress the safety, like, as if some -- well, some people also refer to these proposed sites as safe

injection sites. The same idea that focuses on safety?
A Yeah. I would -- I would classify them as "safer."
Q So -- but part of the marketing, for lack of a better term, of these sites is that they are going to be safe or safer than injecting heroin or other illegal drugs on your own, right?
A Correct.
Q So do you think it's possible that could cause some people who are contemplating taking heroin and who had never done it before, it might cause them to take it for the first time at Safehouse?
A No. I think that most of our studies are showing us that people who pick up and use heroin usually get introduced by a close friend or a family member. And so there's some kind of introduction to it that is more based on your -- the networks of people rather than sort of someone coming into their own decision about I'm going to pick up because there's a safer -- there's a place for me to do it.
Q So if somebody's taking other drugs, maybe they smoke a lot of marijuana or they take other drugs that are not as serious as heroin and Fentanyl, you're saying it's absolutely not possible that somebody could say, hey, now there's a safe place called Safehouse for me to take these drugs and medical people are standing by. I'm really scared what might happen to me if I have an OD so I think I'll go try it at Safehouse.

You're saying it's absolutely impossible (inaudible)?
A No, that's not what I'm saying. Everything's possible, clearly. What I'm saying is it's not likely.
Q Are the people who come into Safehouse do they have to give their name?
A If they require a certain service like medically-assisted treatment or they want some kind of treatment service, medical care, the answer to that question is yes. If they're on the Consumption side of it it is anonymous.
Q Okay. And Dr. Perrone had testified to that earlier that you don't have to be (inaudible), right?
A Correct.
Q And you were here for her testimony?
A Correct.
Q And the idea -- one of the ideas behind Safehouse is that there's not going to be any judgment or people who come in and want to inject these drugs, right?
A Correct.
Q No stigma. It's supposed to be a welcoming environment where if they want to inject these drugs or try these drugs they can do it without any judgment or stigma, right?
A Correct.
Q What about minors? What if somebody's under 18? Do they have to (inaudible)?
A Yes.

Q How would you know if they're under 18 if they don't have to give their name?
A If someone, I mean, you know, if someone happens to be a minor or they look young enough we will question them. And if a person can't produce ID then we will make sure, right, that we give our best effort to make -- to ensure that that person's going to get the care that they need at another facility.
Q So your testimony is that if somebody comes in and they look like they could possibly be 18 or younger that they should be -- get carded?
A Yes. That's what we do now in syringe services programs.
Q And they would be turned away if they (inaudible)?
A No, that's not what I said. I said that what we would do is make sure that we get them to an appropriate place so that their needs could get taken care of.
Q Would they be allowed to inject heroin if they brought it --
A No minors, no.
Q Minors would not be allowed?
A Minors would not be allowed.
Q So they wouldn't be able to get (inaudible) consumption.
A Correct.
Q I think you testified that last year Prevention Point reversed 500 overdoses?
A A little over 500, yes.

Q Over 500?
A Mm-hm.
Q So in a sense would you say that Prevention Point saved 500 lives?
A Ye.
Q So when you're talking about saving lives and there were other times in your testimony you talked about the lifesaving aspects of these consumption rooms in other countries and you talked about how they're very successful around the world, you're talking about the number of overdoses you reversed at these sites, right?
A Yes, sir.
Q So what if, just imagine now if a user would come into the sit and then they would OD and they would be revived and then they would go somewhere else the next day and they would shoot up not at the site, and if they were to have a fatal overdose, is a situation like that possible?
A Sure.
Q And that probably happens a lot, right?
A It probably does, yeah.
Q And Safehouse would not be open 24/7, right?
A It would be the hope that we could do that but I would imagine that starting off no.
Q So we're talking about saving lives. I just want to understand the numbers that you have, the claims of

(inaudible). If we're talking about saving lives that person who came in who had their OD reversed when he came into Safehouse would be considered someone you had saved when in fact the next day they were dead, correct?

A Mm-hm. Yeah.

Q So you'd still put that person in the saved lives category, right?

A Right but I would also argue that there might be the same individual, right, that came in, we reversed the overdose and went into treatment.

Q Well, sure. That could happen. That would be the happiest outcome (inaudible).

A Mm-hm.

Q But there could also be the story where you're saying you saved a life when in fact someone just died.

A Mm-hm.

Q It's not that you back out those numbers. You keep track of the people that are in the site, have an overdose reversed and then suffer some tragic fate and you back that out and say, well, now it's 499 instead of 500. You don't do that, right?

A Correct.

Q Okay.

A But neither do emergency rooms.

Q Okay.

A Right? I mean, you know --

Q Right, so this is a convention whenever people are talking about saving lives you're talking about reversing ODs right?
A Correct.
Q Okay. So just hypothetically you could have new users that could come into the site. There could be lots of new users could come into the site and they could have ODs reversed and then subsequently they could die on the streets, too, right?
A Correct.
Q And if that were the case you would say you had saved 10, 20 or however many it was lives when in fact all of those people had died and they hadn't even tried drugs before Safehouse existed. Is that possible?
A It -- I mean, I think anything's possible. It's my -- in my 29 years of experience that's not the norm.
Q Well, you've never worked at Safehouse, right? It doesn't exist yet.
A Yeah, but I've worked at -- around a needle exchange for 11 years that typically is not the norm when we're seeing people come in new and, you know, it's just not the norm.
Q Oh, I understand that, but is unprecedented, right? This has never happened in America, right?
A Yes.
Q Never been an injection site like this that's being proposed?

A Agreed.
Q But there have been some studies done of other sites in other countries, right?
A Yes.
Q And Vancouver is a good example and I think that's generally because there's a lot of studies that have been done about the Vancouver site, correct?
A Correct.
Q We've got probably more data about Vancouver than we have about anything else. Is that correct? Is that fair to say?
A That's fair.
Q Okay. And the Vancouver site at Insite, the (inaudible) there I believe started in 2003. Does that sound right?
A It sounds right.
Q And it exists today, right?
A Mm-hm.
Q And do you know what has happened to the number of overdose deaths, not the number of reversed ODs at the site, the number of overdose deaths in Vancouver from 2003 to the present?
A I would imagine you're going to tell me that there was an increase.
Q Well, there's been an increase, a pretty strong increase every year since about 2012.
A Mm-hm.

Q That's where it's the most (inaudible) today. Sound right?
A Okay.
Q In 2012 there were 65 overdose deaths in Vancouver and in 2017 there were 335 and that's the publicly available data on Vancouver. Does that generally sound right?
A Right.
Q So you had said that these sites were very successful around the world, Vancouver included, and it's not your question. I just want to understand if the OD deaths are skyrocketing in a city that has one of these sites, why is that very successful?
A Well, first of all, what the studies show is that in the immediate area, right -- there are other studies that show that in the immediate area where Insite is located the actual number of overdose deaths are down. If you look at an immediate area. So city-wide, right, you're quoting a city-wide statistic, I'm not an expert in what's happening in Vancouver, but I can tell you that I know that, you know, there's not sites all over the city like Insite.

So, you know, I would sort of question some of that data.
Q So you think what's important is just what's happening in the immediate area around the site for both -- or is city-wide important as well?

A No, I think that it's city-wide which is why we're talking about multiple sites throughout the city.
Q Right, you said the city-wide problem (inaudible).
A Correct.
Q Right?
A Mm-hm.
Q But would you agree with me that when we're looking at whether we're saving lives and whether these sites are successful what really matters is not how many overdose reversals there are at the site, but in fact, how many people stay alive, right?
A Right.
Q And so you really have no idea either from looking at the Vancouver studies or any other study whether doing this in Philadelphia we can keep, on that basis, more people alive?
A I would say that we -- you know, the purpose of what Safehouse is designed to do is to reverse an overdose at the time that a person is experiencing that, thus giving a person the opportunity to make a choice on whether they want to obtain either medical services or treatment when otherwise they would not have that choice.
Q I understand that, but isn't that a pretty narrow way to be looking at it? Shouldn't we look at it overall that it's saving lives overall? Isn't that important as well?
A I agree and I think that, you know, because of the way

that these sites have to deal with some of the stigma and the way that we have to protect participants coming in so, i.e., an anonymous registration from prosecution it makes it difficult for us to follow that -- follow them on long term -- on a long-term basis.

Q Okay. The bottom line though seems to be that in terms of net saving of lives (inaudible), you, like everybody else, has no idea whether this is going to be successful or not?

A I disagree. I think --

Q Why don't you agree?

A Yeah, I respectfully disagree. I think we're going to save lives. I think it is one portion, right, because, see, the other piece of this is that we have to sort of think it through. There is -- this is one portion, one sliver of an overall prevention method that we could employ. It's going to be it's just one piece of it. And the only thing that this is designed to do is to save a life immediately.

Q Are you familiar with the study that was done by Dr. Larson for Philadelphia about these sites?

A Is --

Q Probably by your work on the task force (inaudible)?

A Yeah, mm-hm.

Q Are you familiar with that?

A I am.

Q So Sharon Larson's study looking at basically what the

Philadelphia effect was likely to be if a supervised consumption facility might be in effect. Are you familiar with that --

A So --

Q -- the fact that study was done?

A Yeah.

THE COURT: Mr. McSwain, I'll let you pick a time to break. If you've got a ways to go, if this is a break in your order --

MR. MCSWAIN: Sure.

THE COURT: -- of presentation, we can take our mid-afternoon recess. Does that work for you?

MR. MCSWAIN: Thank you, Your Honor.

THE COURT: All right. Then I'll stand adjourned for about ten minutes.

THE WITNESS: Thank you, Your Honor.

THE DEPUTY: All rise.

(Off the record at 3:00 p.m.)

(On the record at 3:13 p.m.)

(Sidebar begins at 3:13 p.m.)

(Sidebar ends at 3:16 p.m.)

MR. MCSWAIN: Your Honor, May I approach the witness?

THE COURT: You may, and you may at any time, Counsel.

MR. MCSWAIN: Thank you, sir. A copy for the Court,

may I hand it up?

THE COURT: Yeah.

BY MR. MCSWAIN:

Q So Mr. Benitez, when we left off we were talking about the Larson (ph) report that was done for the city and you have that in front of you now. Do you use that?

A I do, yes.

Q Are you at least generally familiar with that?

A Yeah, somewhat.

Q Okay. Why don't you turn to -- well, why don't you tell us just briefly what your familiarity is. Do you know who Dr. Larson is?

A I don't know her other than the name, so --

Q Okay.

A -- never met.

Q Let's turn to Page 15 and look at the bottom. The page numbers are kind of bottom left.

A Yes. Okay.

Q And then do you see under Paragraph -- it's number one, why don't you go ahead and read that paragraph into the record.

A "The vast majority of available evidence in recent years comes from only one SCF, the Insite SCF in Vancouver, Canada. The current models for harm reduction estimates are sensitive to population-specific factors. In turn, hyper local population level characteristics, (example the proportion of

people with -- or people who inject drugs rates of blood borne conditions) and social and economic factors determine the need and potential utilization by PWIDs of SCFs. The majority of the available literature with useful statistical methodology and analysis relies more commonly on the Insite SCF than any other site. It is uncertain how relevant or applicable the assumptions are to communities of other geographies."

Q Okay. Insite SCF they're talking about the Vancouver site?

A Correct.

Q And SCF stands for supervised consumption facility?

A Yes. It was that.

Q Okay. So do you generally agree with that statement?

A No.

Q And why not?

A I think that it varies. I mean, certainly the statement sort of makes the indication that there was most of the studies are on Insite, which is probably right. I'm not a research expert but what I would say is that, you know, I think that there are portions of this that I agree with and portions that I don't. The portion that I agree with is that there are varieties in different geographies. That's probably right. We -- that's why the Safehouse model was conceived and adjusted to fit Philadelphia.

Q Okay. I want you to look down to Paragraph 4. It's a

little shorter, a little easier to read. Can you read Paragraph 4 into the record also on Page 15?

A "Because it appears that existing SCFs have not incorporated rigorous evaluation into their design and implementation it has been difficult to" -- sorry, I can't see the word --

Q Disentangle?

A -- "disentangle the full impact of SCFs on relevant harm reduction outcomes."

Q So Dr. Larson and her team are saying that it's basically hard to know what would happen in Philadelphia, right?

A That's what she's saying, yes.

Q Do you agree with that?

A I would say that -- yes and no. Yes, there's some mystery as to whether or not when we save a life in the immediate what that person's going to do. You know, we can't predict that. I disagree in the fact that we will save a life in the immediate. That will happen instantly and that person will get yet another chance to sort of change -- the opportunity to maybe change their lives.

Q So you agree with some of the things that Dr. Larson is saying there and you disagree with some of the things. Is that fair?

A Yes, fair.

Q Okay, which kind of highlights the fact this is a rather

complex, uncertain area?
A I agree.
Q Okay. Would you agree with me, moving on to another topic -- you don't have to look at that document anymore --
A Okay.
Q -- do you agree with me that the users at a proposed site like Safehouse would be breaking the law?
A I think that they would, that they -- do you mean in terms of, like, actually consuming?
Q It's illegal to possess heroin, right?
A Yes.
Q It's illegal to inject heroin, right?
A Yes.
Q It's illegal to use heroin.
A Yes, under the current law, yes.
Q Okay. So the actual users if they were to come into Safehouse, not referring to the medical personnel or folks who would be there to help in the event of an OD, I'm talking about the actual users, the actual users would be breaking the law every time they were in the site, right?
A Hmm, under the current condition probably.
Q Under the current law, right?
A Right.
Q Okay. So what if the police or DEA tried to make an arrest at the site of a user. Would Safehouse try to stop it?

A How could we?
Q Well, I'm just asking you --
A No.
Q -- if what you would do?
A I mean, we would -- we would try to negotiate, like, you know, when someone got served. It's sort of the same situation that happens at syringe services programs all over the country right now. We try to work with law enforcement to make sure that if they have to serve a warrant they do it so that it's the safest manner that we can do it. So we're trying to protect all of our other constituents that are in the facility and the staff, right? So it may not be the most appropriate time to come in and arrest someone in the facility because that might put a bunch of people at risk.
Q So --
A So yes, we would negotiate, like, hey, is this the best time to serve that warrant?
Q okay. But you agree with me that the users would be breaking the law under all circumstances if they were to use drugs in the site, illegal drugs like heroin and Fentanyl.
MS. EISENSTEIN: Your Honor, there's been a number of questions about what the legal implications are as to the users. I don't know that this -- when this is a (inaudible) that Mr. McSwain is.
THE COURT: Well, I think it's self-evident that

they'd be violating the law and I think at one point the witness conceded as much.

MR. MCSWAIN: Okay.

THE COURT: So --

MR. MCSWAIN: Thank you.

BY MR. MCSWAIN:

Q You testified about various rules that would be at the proposed site about things that the users can and can't do. Do you recall that?

A Yes.

Q Like no distribution of drugs, I think that was one of them. Is that correct?

A Correct.

Q No selling of drugs, correct?

A Correct.

Q No exchange of currency. Is that right?

A Correct.

Q No sharing of consumption equipment, right?

A Correct.

Q And no helping each other consume drugs.

A Correct.

Q Is that correct?

A Yes.

Q How are you going to enforce that? How would you possibly enforce that, for example, if somebody was in the consumption

room and then they were sharing their equipment or they were sharing their drugs with another user? What's your plan?
A So we -- you know, we have a lot of experience dealing with this and the reality is that the question assumes that the person that is coming in to consume can't follow rules. Most folks do. And on the rare occasions that they don't we put them out. That's normally what happens at Prevention Point. We try to negotiate with people so that they're not doing it again and that's the whole approach of harm reduction is to try and approach people and negotiate and make sure that they stick within the boundaries of what we're asking people to do. And the majority of folks do that.
Q I think you testified that you believe there'd be little opportunity to break the rules.
A I agree. (Inaudible).
Q Is that consistent with what you're saying?
A Yeah.
Q Okay. So you just -- you expect the users to follow the rules at this new facility doing something that's never been done in the country before?
A Yes.
Q Okay. You testified also about the services that Prevention Point provides and a lot of those services are similar or really the same as the services that would be provided at Safehouse, correct?

A Correct.
Q And I think you actually have used the word -- I can't remember if you testified to this or maybe it was in your outline of your expected testimony, but the idea of mirroring the services that Prevention Point has now would be mirrored in Safehouse, right?
A Correct.
Q So really the main difference, maybe the only difference between what Prevention Point is going and what Safehouse would do is the injection of illegal drugs, right?
A Correct.
Q Okay. And Prevention Point has never allowed injections at its site, right?
A That's correct.
Q You were there for 11 years. It's never been allowed during your 11 years, right?
A That's right. There's a rule that says that you can't use in the facility.
Q And Prevention Point was founded in 1991. Is that correct?
A Correct.
Q So it's never allowed injections in Prevention Point from 1991 to the present, correct?
A Now, I didn't say they didn't occur. I said they're not allowed.

Q No, I understand that that sometimes you said that drugs get into the building even though you want people to follow the rules. But they don't always follow the rules, right?
A Sometimes.
Q Okay. So -- and the reason you didn't have injections in Prevention Point is because it's against the law, right?
A Correct. We were concerned about what the governments would do in terms of seizing property and closing the facility, so yes.
Q And has the law changed during that period of time on having to do with these proposed sites?
A No.
Q Okay. So why didn't you do it before? Was it just -- it was the fear of legal liability?
A Yes. I think I answered it. We were -- we were rather concerned about what the government's approach would be in terms of either closing us down, so we didn't want to interrupt the essential lifesaving services that we have for 15,000 people.
Q Okay. So it was clear to you at all times when you were contemplating the creation of Safehouse that the federal government thought this was illegal, right?
A It was clear to me that the federal government thought that it was illegal. It was not clear to me that it was illegal.

Q Okay. But it was clear to you that the federal government and the Department of Justice position was that this is illegal and you were concerned that if we were right then you might lose your building or there might be some other liability, right?
A I'd say that's fair, yeah.
Q Okay. So when you're forming Safehouse wouldn't it be important to disclose the fact that there's this really outstanding legal question out there about whether or not these things are legal or not? Because the federal government absolutely thinks they're illegal. Isn't that a piece of information that you would disclose about the formation of Safehouse that there's a question here because the federal government thinks that these things are illegal?
A Yes, and I think we've disclosed that on every single document and on -- I mean, it's been a point of media attention for the last year and a half. So I think we -- yeah, we clearly have disclosed that we disagree with the government.
Q Okay. You have disclosed that?
A Yeah, I think so.
Q In all of your relevant paperwork?
A Yes, sir, I think so.
Q Okay. So Mr. Benitez, you have in front of you what's been marked as Government Exhibit 3 and this is the paperwork that Safehouse submitted to the IRS for their nonprofit status.

Are you familiar with that?
A Yes.
Q Okay. And if we could turn to -- this is not numbered all that helpfully. It's about 15 or 20 pages in. I put a little corner tab on it for the Court's convenience and counsel's convenience and for your convenience, Mr. Benitez. Do you see where you signed this document on September 14th, 2018? There should be a little tab up on the top right-hand corner if you see that?
A Yes.
Q It's the form -- it's the form 1023, Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code, and the last page of it looks like it has your signature. So it says Jose Benitez, President and Treasurer, and you dated it September 14th, 2018. Do you see that?
A Yes.
Q Okay. And is that your signature?
A Yes.
Q And you were involved in the preparation of this paperwork?
A Yes.
Q And, in fact, above your name it says, "I declare under the penalty of perjury that I'm authorized to sign this document on behalf of the above organization, and I've examined

this application, including the accompanying schedules and attachments. And to the best of my knowledge it is true, correct and complete." Do you see that?

A Mm-hm.

Q Okay. And then there's a series of attachments as noted in that sentence I just read that are further on in the document, and there's -- these are also did the corner turn down the page? This is maybe 20, 25 pages further in. And at the bottom it says, "Page 3 of 9" and at the top it says, "Applicant's Planned Activities." Do you find that page? Again, if you go off of the little turned down corner --

A Yes, I've got it.

Q Okay. So it says there's a numbered Paragraph 3, Applicant's Planned Activities. And in there it talks about what your plan is. Why don't you review that page? And we'll just take a moment for you to have an opportunity to read that.

(Pause)

A Okay.

Q Okay. And then why don't you switch to the -- turn to the next page. It's not quite as relevant, but I want to make sure you've seen the whole section. I'll give you a chance to read that.

(Pause)

Q And you can just let me know when you're done, please?

A Okay.

Q Okay. So it describes the planned activities in general but it says nothing about injecting illegal drugs, right?
A Uhh, it actually in the first paragraph under three, Applicant's Planned Activities --
Q Mm-hm.
A -- the first sentence -- the second sentence in the paragraph reads, "Application. Applicant will provide these individuals with access to clean syringes, a medically supervised safe consumption room and access and referrals to additional treatment and counseling, housing, primary medical services and other related comprehensive social services."
Q Correct.
A So I would say that that defines -- that it's clear, to answer your question, it's clear on the application.
Q Okay. So your position is that's clear that illegal drugs will be injected at the site?
A It says, "clean, syringes and medically supervised safe consumption room."
Q Does it say anything in there about illegal drugs?
A No.
Q Okay.
A Not that I read.
Q And then the next page that I want you to look at is just a few more pages further in that document. This one is also a turn-down at the corner where the title says "B. Applicant

will only engage in lawful activities that accomplish its charitable purposes."

A Mm-hm.

Q Do you have that page?

A Mm-hm.

Q Okay. So I want you to read that page and let me know when you're done, please?

A Okay. Tell me the page number again? I'm sorry.

Q It actually doesn't have a page number, which is not helpful, but it has the little tab that I did and the title B says, "Applicant will only engage in lawful activities that accomplish its charitable purposes."

A Mm-hm, got it. Thank you. Okay.

Q I'll give you a moment to read that.

MS. EISENSTEIN: Your Honor, I just want to make clear that whether the witness can read the exhibit that is being provided to him in terms of the text? It's very small, a very small font. Just that can be clarified in the course of questioning.

BY MR. MCSWAIN:

Q Are you able to read it, Mr. Benitez?

A Yes. It's taking me a minute, but --

Q Okay, take your time.

(Pause)

A Okay.

Q And then the next page, it's about a half a page and then it terminates where it says, "C. Applicant is not organizing and operating an action organization." Just read everything above that to yourself.
A Mm-hm.
(Pause)
A Okay.
Q So would you agree with me that in this section you're saying that you are going to be participating in lawful activities, carrying out lawful activities, providing harm reduction and overdose prevention services again, and again, activities are lawful. And there's nothing in there about the Department of Justice's position that what you are planning is actually illegal?
A I don't think the supervision of somebody consuming safely is an illegal practice.
Q That's your opinion, right? Previously you testified that at every stage when you're submitting paperwork and talking about Safehouse that you said that the Department of Justice thinks that this is illegal.
A Correct.
Q Do you still stand by that testimony?
A Yeah, I just don't think that we're -- we're engaging in an illegal activity in terms of observing and reversing --
Q All right, that's your opinion.

A -- and reversing someone's -- and reversing someone's overdose.
Q Correct. Is your testimony that you always disclose that the Department of Justice thought this was illegal, is that consistent with what's written in here?
MS. EISENSTEIN: Objection. That was not what the witness' --
THE WITNESS: That's not what I said, Your Honor.
MS. EISENSTEIN: -- testimony was.
THE COURT: Well, the witness will defend himself.
THE WITNESS: Yes. That's not what I said.
BY MR. MCSWAIN:
Q What did you say?
A I said that we -- that we -- that we actually disclose what we were doing, what our intent was, which is to provide a observation for overdose prevention. That's exactly what it says in the application. That's what I signed to. That's what I signed there.
Q Do you think you had some sort of duty of candor to say I this application that this is what we want to do but the federal government clearly thinks it's illegal?
A I think we described exactly what we intend to do on the application.
Q Okay. Let's assume that's true. That's not really answering my question. Do you feel like you had some duty of

candor to say in here that the federal government thinks this is illegal?

A And I am saying -- my response is that we described the exact activity that I described earlier off the card. It is what is described in the application.

Q All right. Are you familiar with an op-ed that Deputy Attorney General Rod Rosenstein wrote --

A I'm familiar with it.

Q -- in the New York Times talking about the -- or his view and the department's view that safe injection sites are illegal?

A I'm familiar with it.

Q Okay. And you know that that came out before this application was filed, right?

A Okay, yeah.

Q Okay. Okay. You can put that document aside, please. You testified a lot about how you want users at Safehouse to get treatment, to engage -- it will be a way to engage with them so that they can get into drug treatment, correct?

A Yes, sir.

Q Well, they can also be referred to treatment when they come to Prevention Point, right?

A Yes, sir.

Q So from a treatment standpoint why would Safehouse be any better than the existing services at Prevention Point?

A It wouldn't. It would be the same.
Q So in terms of getting people into treatment you don't anticipate any more success of getting people into treatment if Safehouse were to exist as opposed to Prevention Point on its own?
A I mean, I think that's one of the -- that's one of the unknowns. We don't -- we don't know that yet.
Q Okay, it's one of the unknowns. All right. Well, are you familiar with how -- you said that other cities who have these sites have been very successful. You remember testifying to that?
A Yes.
Q Okay. An Insite in Vancouver, again, coming back to that one because there's so many studies about that one, are you aware of the fact that those studies have showed that people who go to those sites, there's actually a less than one percent referral success rate of getting people to go into treatment who come to the Vancouver Insite.
A I will say that Canada's treatment system is different than ours. So in that sense the geography makes a lot of difference here. I will say that we at Prevention Point were successful in getting over 800 people into treatment last year and I would say that given my experience it would stand to reason that we would be as successful at Safehouse.
And I will also say that Safehouse's primary mission

is to save someone's life. That's the first goal in it.
Q Okay. So it's not really focused on treatment. It's to --
A Well, it -- I didn't say that. I said it's a first call.
Q Uh-huh.
A I said that it would -- it would be as successful -- in my professional opinion it would be as successful as getting people into treatment as Prevention Point is.
Q But not more successful?
A I don't know that.
Q Okay. Is it true that prolonged heroin use makes it harder for people to be successfully treated for addiction?
A I do not know that that's a fact. What I will say is that we have new drugs like buprenorphine and naltrexone. There's a new sort of ammunition of drugs that we're using to sort of treat opiate use disorder. So I think the question is still out on that one.
Q So you think that it's unclear whether prolonged use makes treatment more difficult?
A I'm saying we don't have enough --
Q Makes it harder?
A I'm saying -- I'm saying that we have new drugs that, you know, we don't have a whole bunch of experience using at this particular point so the answer is I don't know.
Q Well, when you come into an injection site whether it's

Vancouver or the proposed site here, the idea is to make the drug user as comfortable as possible with the process, right?
A Correct.
Q Which may lead to prolonged use, right?
A In certain cases that might be right.
Q Do you think that might be the reason why Vancouver has such an abysmal record of getting people into treatment?
A I'm not an expert in what Vancouver does or doesn't do, so I have no opinion on the matter.
Q All right. Is community support for the idea of Safehouse important to your operation? Do you think about that when you think about how to set things up for Safehouse?
A Of course.
Q Okay. And legislative support would also be important, right?
A It would be nice.
Q Okay. And certainly Congress has recently passed a lot of opioid-related legislation but none of it has allowed safe injection sites, right?
A Correct.
Q Same thing with the Pennsylvania legislature, there've been lots of -- lots of statutes and lots of things that have come out of Harrisburg having to do with the opioid crisis but nothing to allow Safehouse to exist, right?
A Correct.

Q Same thing with the Philadelphia City Council, right? Not even any resolutions in favor of these sorts of sites.
A Correct.
Q No ballot initiatives and no ballot initiatives planned?
A None that I'm aware of.
Q Okay. And you talked about how experts, and you went through lots of different experts that are in favor of these sites and your work on the task force and the like, are you familiar with the fact that the Surgeon General is opposed to injection sites?
A Yes, I am.
Q And the head of the Substance Abuse and Mental Health Services Administration is opposed to injection sites.
A Yes.
Q And those people would be pretty important experts, right?
A I'm not sure because I don't know their background in drug treatment and how specific it is.
Q You don't think the Surgeon General is an important expert when it comes to this issue?
A I don't know what his background is so I don't know if he has a specialty in drug and alcohol treatment. So the answer is I don't know.
Q Okay. Do you know that the Kensington Community overall is opposed to injection sites? Would you agree with that?
A No. I don't think that that's factual.

Q Based on what?
A I think that there's other -- there have been some studies that are being conducted and there is -- you know, there's definitely opposition in communities and there's also a lot of support. I get to see both of that, you know, both sides of that.
Q You had a meeting in Kensington where you spoke about what you wanted to -- the operations, what you wanted to have at Safehouse and people showed up from all the community organizations and they all stood up there and you gamely took questions. You were -- you stood there as long as it took. You remember that?
A Oh, I remember very clearly, Counselor.
Q Okay. And I was there, too.
A Mm-hm.
Q Did you know I was there?
A Yes.
Q Okay. And every single community organization that came up there came out against injection sites and got a standing ovation from the crowd. Do you remember that?
A No, sir, that's not what happened.
Q What do you think happened?
A There were -- there were -- I would say that that's the majority, you know, that was some of what happened. There were also people who adamantly stood up for it and declared that

saving people's lives was important. And so they also stood up -- there were people that stood up for that. It was a minority, but there were people there.

Q Did they represent any community organizations, the people that stood up and spoke in favor?

A Yes.

Q I want to talk about Insite for a minute and the suggestion that there were very few people who were directly referred to treatment at Insite. And you mentioned that you're not an expert in the Canadian system. Is that right?

A I am not.

Q But have you learned anything about some of the differences in terms of direct opportunities for treatment from supervised consumption facilities in the Canadian system, including whether it be in Insite or in other similar facilities in Canada?

A Yes. I think when we visited there were waiting lists for treatment and in some cases there were long waiting lists for people to get into treatment. Contrast that to what we see in Philadelphia that is not the case. We have been working in our city towards what we call treatment on demand and, frankly, we've done a pretty decent job of getting there.

Q Mr. McSwain talked to you about community support and indicated a particular meeting in question where you were getting some difficulty back from the neighbors. Is that

right?
A That's correct.
Q Is a -- one particular community meeting a representative sample necessarily of the Kensington neighborhood?
A No.
Q You work every day in the neighborhood at Prevention Point. Is that right?
A Yes.
Q And in fact have you -- you spend time working on a citywide basis on issues of the opioid crisis and overdose prevention. Isn't that right?
A Yes.
Q And you meet with community members?
A All the time.
Q And you're also familiar that there have been studies on the issue of community support for supervised consumption sites.
A Yes.
Q And in particular are you familiar with a study that was run out of Drexel University, specifically as to Kensington's viewpoint on supervised consumption?
A Yes.
Q And what was the result, if you can remember them, of the study that Drexel recently produced, and it was this year in 2019, correct?

A Yes.
Q Can you discuss the results of the Drexel study and with respect to community opinions?
A I can tell you that I don't remember the exact numbers. I can tell you that the Drexel study in its summary produced overwhelming support, community support for overdose prevention sites.
Q And did you conduct that study as part of Safehouse or was that independent of Safehouse?
A It was independent.
Q There was a lot of questioning about whether you should go to the legislature to change the law in order to pursue your objective of opening a supervised consumption site. Do you recall those questions?
A Yes.
Q And you've indicated that we -- in your direct examination that you've been waiting on certain activities to go forward with what you deem to be an important and critical intervention for the outcome of this litigation. Is that right?
A Correct.
Q Do you see this litigation as part of the effort to resolve what the law presently is?
A Yes.
Q And is it fair to say that maybe one opportunity in the future, if we're wrong, would be to try to change the law?

A Yes. I would say that that's a -- that certainly is an opportunity but I will also say that our state legislature had been talking about syringe services programs for the last few years and, you know, it's sort of, like, this is even a more immediate. We're seeing people die from overdoses. You know, the state is still sort of struggling with -- the state legislature is struggling with whether syringe services programs, whether they want to make it statewide legal or whatever.

Q And Mr. McSwain questioned you about a whole range of different legislative bodies that you might have appealed to. Is that right?

A Correct.

Q What about just staying right here in Philadelphia he didn't ask you, did he, about our own Health Commission and its opinion and all the activities of supervised consumption, did he?

A Sure, I can talk about that little bit. I think the Board of Health resolve that we are in an emergency and that they are in support of an overdose prevention site. Similarly, they did that years ago when there was -- when there was an AID/HIV epidemic happening and people who inject drugs were -- made up 47 percent of all the new cases.

And so it was that health -- the Board of Health who declared that emergency and Prevention Point became, you know,

it sort of was born out of that legislator (sic) with -- out of that sort of declaration of the emergency and allowed our mayor, then Ed Rendell, to declare that he would issue an executive order. I mean, if you look at it, it's sort of the same. There are parallels, right? There was an emergency then and, you know, frankly, the legislator (sic) did not -- did not move and we had to do something quickly about it. And that was the mechanism.

We're now in 2019 kind of dealing with the same thing in the terms of that. So you have that. You have a Health Commissioner that -- our Philadelphia Health Commissioner who has declared this as one of the most public health tragedies and issues that are going on in the century. So it warrants for us if -- as a citizen it warrants us to take action if our lawmakers aren't.

Q Okay. And so back when Prevention Point was founded was, I know, was the executive order from the mayor and an order from the Board of Health, Prevention Point didn't ask Congress for its opinion, did it?

A No, we did not. We did not.

Q Okay. You didn't ask the Pennsylvania for its opinion, did it?

A No, we did not.

Q Okay. And then maybe Mr. McSwain isn't aware since he didn't mention it, but on July 9th, 2019 that you're aware that

the Philadelphia Board of Health enacted a resolution that -- endorsing the operation of overdose prevention facilities in Philadelphia.

A They did, yes.

Q And specifically supporting the establishment of overdose prevention facilities where people may inject self-provided drugs in the City of Philadelphia. Isn't that correct?

A That's correct.

Q There were questions that you were asked on cross about the likelihood of some of -- deciding to experiment for the first time with heroin or with another opioid that would be injected at Safehouse because they might be under the -- because they were under the impression that this was a safe activity to do.

A Mm-hm.

Q Do you remember those questions?

A I do.

Q You've been in the arena providing syringe exchange services where you provide safe -- sterile consumption equipment to drug users for many, many years, right?

A Yes.

Q And Prevention Point's been doing this for 27 years, right?

A Correct.

Q And in your experience, how many times have any of those,

as they've been a first-time user who's showed up at Prevention Point seeking to try it out for the first time?
A Zero. Typically people who come to see us for our services have used in the past.
Q You had said at one point in responding to questions that the difference, the only difference was -- between Prevention Point services and Safehouse services was the fact that people were being -- was agreeing with Mr. McSwain that people would be allowed to stay inside at the time that they were consuming or injecting. Is that the only difference that you see or can you expand on that?
A Yes. I think that the -- you know, if adding the supervised consumption is the difference. The model pretty much mirrors everything else that we're doing at Prevention Point at this particular point, other than consumption and the observation.
Q And what is the opportunity as you see it in terms of saving lives to providing that additional service?
A The opportunity is that if I'm observing someone from here over there, right, and the person is having some kind of reaction my time getting from here over there is a lot shorter than me having to run five or six blocks or even outside to revive someone. And we heard earlier all the medical -- all the medical data tells us that the sooner that we get to someone in an overdose the more likely they are to live.

Q And if you reverse an overdose and allow that person to live, do you consider that to be a life saved?
A Absolutely. Regardless of what happens after that, that's that person has another opportunity to figure out what they want to do. And sometimes those choices are tough for us because we're not -- you know, we see this at Prevention Point every day. People choose to do other things and, you know, we can't, you know, we don't have that magic wand to be able to cure everything. But what we can do is save someone's life with medical intervention under observation.
Q Because if somebody dies of an overdose death are they able to enter into rehabilitation treatment?
A Can't go into treatment if you're dead.

MS EISENSTEIN: No further questions, Your Honor.

THE COURT: Anything further, Mr. McSwain?

MR. MCSWAIN: I just had a quick one about the Drexel study, Your Honor, since that was asked about.

THE COURT: That's fair.

RE-CROSS-EXAMINATION

BY MR. MCSWAIN:
Q This so-called Drexel study, are you aware that this was, in fact, an in-person survey, correct? Tables were set up along a one and a half mile stretch of Kensington Avenue and whoever happened to wander up to the table and decide to fill it out, that was the sample size.

A That's not my understanding of how the sample size was obtained. My understanding that there were moments when there were tables set up, but there were also folks that were walking up and down the avenue and there were folks that got -- there were businesses, business owners that were surveyed, which by the way, again, majority supported the concept of Safehouse. You have people that had specific address restrictions so that they had to live in the ZIP code. So that was my understanding of the Drexel study.

Q Okay, so then --

A It's (inaudible) different from yours.

Q Okay, but it was in no way some sort of randomized scientific study where the sample size was taken from those sort of principles. Instead it was an in-person survey where there was no science to choosing the people who took it.

A I couldn't answer that because I didn't conduct the study, so I don't, you know, I'm giving you the knowledge that I have about it. But I don't know.

Q Okay, thank you.

A Thank you.

MS. EISENSTEIN: Nothing further, Your Honor.

THE COURT: Mr. Benitez, go back to Exhibit 1, please?

THE WITNESS: Yes.

THE COURT: Focus on the second horizontal bar if you

would, please, where it says, "assessment of physical and behavioral health."

THE WITNESS: Yes.

THE COURT: Are you with me? All right. Where it talks about offer of services, I want you to expand on the content of that and what is being actually said to someone who has come to your proposed Safehouse.

THE WITNESS: So people -- so what we would do is say to the person that, you know, we have medically-assisted treatment available. We can get you into treatment if -- we can do it here we can get you to a long-term treatment facility if we need to. We can send you outside of the neighborhood or whatever, you know, outside of the ZIP code because for some people it's about, you know, we have to offer what they feel would be the most successful for them. It could be in terms of a service that during our assessment somebody is -- has a severe wound so we would be referring them to one of our doctors to make sure that we monitor the wound, treat it, get them into -- in some cases it might be that were sending someone to an emergency room. In other cases it could be that we're reuniting people with family because we have done that so that we're reconnecting people so they can sort of recover and then go back home or go back home and arrange for recovery there.

THE COURT: Let's assume that perhaps some people

will enter your premises and they are not aware that there are safe consumption rooms as an option. Are they then affirmatively held out to a person who enters like that, by the way, we have a safe consumption room available? Or is that something they have to ask for?

THE WITNESS: No. We -- well, I would think that we would probably offer the service if it's someone who is a consumer we would offer the service. We would say --

THE COURT: Well, what do you mean by consumer, a known prior attendee at the facility or someone just based on physical observation you think is a consumer? How would you make that determination?

THE WITNESS: No. We would certainly do that during the assessment phase and figure out whether or not -- like, a typical -- when someone's registering a typical question is have you consumed drugs? When's the last time did you consume drugs? What kinds of drugs are you consuming? So we would have some information to base that off of, Your Honor.

THE COURT: In terms of the proposed model and how you intend to publicize it, is it -- is there going to be a public dissemination of the availability of safe consumption rooms?

THE WITNESS: Typically the -- well, the way that we do -- that we advertise at Prevention Point is pretty much word of mouth because this is a community that is tightly knit and

so the drug-using community will spread the word. So typically no, we, you know, we would not do a whole bunch of advertising about it. That's just not been our way for the last 20 something years.

THE COURT: Now, you mentioned that when somebody comes in and there's a greeting and the registration and in some instances identifying information is gathered. Let's now hypothesize a situation where somebody's already been through that process and it's a subsequent trip to the facility.

THE WITNESS: Mm-hm.

THE COURT: All right? The protocol that you just described in terms of offer of services, is that repeated each time somebody comes to the facility or is that only the first time they come to the facility?

THE WITNESS: That will be repeated every single time someone walks through the door.

THE COURT: The same protocol?

THE WITNESS: Yes. Yes, sir.

THE COURT: You had mentioned that there would be no participation by any of the Safehouse staff in the process of injection of the illegal substances. What if somebody is there, they're within earshot, as I assume the model -- supposedly because you're observing them in the process of consumption of the drugs and says I can't find a vein. Would the Safehouse personnel participate in any way in responding to

a request like that?

THE WITNESS: The staff may respond by saying, you know, you have to rotate sites, I mean, there may be a response that way, but there would benothing -- there may be an educational opportunity there that the staff would certainly educate folks and that would be in hopes of reducing wound care. But there would be no physical contact or instruction.

THE COURT: And in connection with what Prevention Point does not, and keeping in mind that you don't want to impede the therapeutic process, does it provide any literature or warnings about adverse consequences of drug use in is current operation?

THE WITNESS: We do not, sir.

THE COURT: All right. Is anything like that contemplated with respect to Safehouse?

THE WITNESS: We have not contemplated that, but I will say to you that our protocols, you know, some of them are still in draft form. So that is something that we certainly can consider.

THE COURT: But it's not been a point of discussion thus far?

THE WITNESS: No.

THE COURT: I think those were all the questions I have, but if they've prompted any questions on the part of counsel you should feel free to follow up.

MR. MCSWAIN: None from the government, Your Honor.

THE COURT: Thank you.

MS. EISENSTEIN: None from Safehouse, Your Honor.

THE COURT: All right, thank you, Mr. Benitez.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: You may call your next witness.

MR. FABENS-LESSEN: Your Honor, Safehouse would like to call its final witness, Dr. Laura Bamford.

THE DEPUTY: Please raise your right hand. Please stand.

LAURA BAMFORD, SAFEHOUSE WITNESS, SWORN

THE DEPUTY: Please be seated. Please state your full name and spell your last name for the record.

THE WITNESS: Laura Bamford, last name is B-A-M-F-O-R-D.

THE DEPUTY: Thank you.

MR. FABENS-LESSEN: Your Honor, for the sake of efficiency I'd like to introduce for the record the CV of Dr. Bamford, which has been pre-marked in your binder as Exhibit 6, but then I will also give a brief summary of her credentials.

THE COURT: All right, proceed.

MR. FABENS-LESSEN: Dr. Bamford, Dr. Laura Bamford is prepared to testify today based on her more than a decade of -- and her training and experience as a general internist and

infectious disease specialist. Dr. Bamford specialized in the treatment of patients with infectious disease, including HIV and Hepatitis C, as well as patients with opioid use disorder. Dr. Bamford received a Bachelor's degree from Lafayette College, a medical degree from Thomas Jefferson University and a Master of Science in clinical epidemiology from the University of Pennsylvania.

She completed an internal medicine residency at Columbia University and an infectious disease fellowship at the University -- at the Hospital at the University of Pennsylvania. She is board-certified in internal medicine and infectious disease.

Dr. Bamford is a member of the Buprenorphine and Primary Care Committee in the Infectious Diseases Society of America and she was a member of the Philadelphia Mayor's Task Force to combat the opioid epidemic. Since 2012, Dr. Bamford has been an associate clinical professor of medicine at the Perlman School of Medicine at the University of Pennsylvania and from 2008 to 2011, Dr. Bamford was an assistant professor of medicine at the Drexel University College of Medicine.

Dr. Bamford has hospital privileges at the University of Pennsylvania and since 2012 she has been a staff physician at Philadelphia FIGHT Community Health Center where she serves vulnerable patient populations, including patients with HIV and at risk for HIV. Since 2012, Dr. Bamford has been the medical

director of Clinica Bienestar, a Federally Qualified Health Center which is housed at Prevention Point Philadelphia.

THE COURT: All right. Thank you, counsel, and I'll note for the record I also had the opportunity to review Dr. Bamford's credentials in advance of the hearing today.

MR. FABENS-LESSEN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. FABENS-LESSEN:

Q Dr. Bamford, is there anything else you'd like to add to your CV just after having my summary?

A No, just to add that I've been the medical director at Clinica Bienestar since December of 2013, so almost six years and, you know, had the great privilege of working with Jose Benitez in this clinical collaboration between Philadelphia FIGHT Community Health Centers and Prevention Point.

Q And that's a great place to start. So would you tell the Court a little bit about your work at Philadelphia FIGHT?

A So yeah, so Philadelphia FIGHT is a Federally Qualified Health Center. The main offices are housed here in Center City. Philadelphia FIGHT started as an AIDS service organization over 25 years ago and now has grown into a collection of health centers and recently got designation as a Federally Qualified Health Center.

And Clinica Bienestar is a satellite of Philadelphia FIGHT Community Health Centers. We received federal funding, a

grant through the Health Resources Service Administration about six years ago now to start Clinica Bienestar. So we actually built the clinic, you know, from the ground up. It didn't exist prior to this grant funding. And, you know, we knew even at that time there were a dearth of services in Kensington for people living with HIV with a history of injection drug use.

And so even though Kensington's only five miles from here, we knew that folks will not travel. You know, the transportation barrier is too great and so we literally decided to take the clinic, you know, to Kensington to the epicenter of the HIV, Hepatitis C and opioid epidemics to decrease as many of the barriers as possible to getting the care that the patients that I see so desperately need.

Q And so this is with respect to the Clinica Bienestar in particular, not Philadelphia FIGHT as a whole?

A That's correct. And Clinica Bienestar is a satellite FQHC site, so it's part of Philadelphia FIGHT just located five miles north.

Q So could you say in particular where the clinic is located?

A Yeah, so the clinic is actually located within Prevention Point Philadelphia's harm reduction service center and it's, again, a clinical collaboration between Prevention Point and Philadelphia FIGHT. We decided to merge the expertise in Philadelphia FIGHT has in HIV care and Hepatitis C care and

opioid use disorder care with the longstanding trust that Prevention Point has had in the community and with the harm reduction services that they provide in Kensington.

Q And so within this integrated model where the clinic is inside Prevention Point could you tell us a little bit about the typical patient population that you serve at the clinic?

A Yes. So I think as Jose Benitez mentioned, you know, the population that we see there is largely the population that Prevention Point serves with the exception that my patients are all living with HIV. So it is an HIV clinic, a Federally Qualified Health Center and Ryan White-funded clinic, but like the other patients at Prevention Point the patients that I see are largely homeless. Forty percent report being street homeless in the previous week. Fifty percent report history of serious mental illness including serious depression. Fifteen percent are incarcerated at any given time, any given month. And close to 70 percent are also living with Hepatitis C in addition to HIV, and then well over 90 percent are living with an opioid use disorder and most with active injection drug use.

Q So could you kind of unpack that connection as an infectious disease specialist between intravenous drug use and either infections or infectious diseases such as HIV and Hepatitis and why there is such a close connection?

A Yes. So both HIV and Hepatitis C are blood borne and so a very efficient way of transmission is sharing needles or other

injection equipment or blood is passed from one individual to another.

Also patients are actively using so it's also very difficult in a typical medical waiting room if you've recently used or you're going through opioid withdrawal. And so at Clinic Bienestar we can support all of that and people can kind of come and go as they need to.

Q And what percentage of your patients at the clinic would you say are active intravenous drug users?

A It's fluid but probably, you know, 50 percent at any time. And because opioid use disorder is a chronic disease, you know, that chronically relapses and remits that probably 50 percent.

Q And, well, does -- the next question is what percentage would you say have opioid use disorder regardless of whether they're actively using or whether they're on some other form of treatment?

A So well over 90 percent have opioid use disorder. I think one thing that is interesting about the clinic is not everyone so we do attract patients who live in Kensington who, you know, don't want to travel to Center City for care and know that we deliver high quality care. Also as the name suggests, we also cater to individuals of Puerto Rican descent so I didn't mention earlier the language barrier. So there myself and my staff all are bilingual in Spanish and English so, you know, a

lot of folks it's difficult for them to leave Kensington if you don't -- if, you know, anything other than Spanish is not your first language.

Q So given your experience working with a pretty much predominantly patient population that has opioid use disorder, can you tell us a little bit about when your patients started using opioids and how that process began for your average patient?

A Yeah. Many started, and a lot have told me, you know, a lot of -- I've had a lot of patient vignettes, but a lot in their late teens and early twenties and we do know that people who have started heroin use recently the vast majority, like 80 percent, started using prescription opioids. In the 1960s it was very different. People went directly to heroin more but today people start with prescription opioids.

And actually if you look at a map of the United States and you look at states where you have the highest opioid overdose death rates they're very nicely near states where there's the most prescriptions for opioids written by health professionals.

Q And in your experience do you think it's likely that a patient would use opioids for the first time in a supervised consumption setting having never had any, you know, prior exposure to opioids whatsoever, based on the availability of that service?

A No. And I think that syringe service programs have demonstrated that they in themselves do not increase opioid use. I guess in the same way that putting seatbelts into cars doesn't increase reckless driving.

Q And what would you say is your experience with the patients in terms of long-term care versus, you know, one-off visits from individual patients? Do you have any kind of long-term patient doctor relationship with most of your patients at the clinic?

A Yeah, we have very high retention rates on the order of 88 percent. We studied this because this was a grant funding from HRSA, so yeah, 88 percent retention rates which are far higher than Ryan White-funded clinics nationally. And mostly when people are lost to care it's because they are incarcerated, but we have prison linkage specialists who meet with folks mostly in the Philadelphia Department of Corrections and help them re-engage with us after periods of incarceration.

Q So there's a continuous period of engagement in your patients, many of which you've seen over a period of years, not just a few appointments?

A Yeah, many I've seen, you know, for the six years we've been there. And, you know, as Jose Benitez mentioned, we're really family to these people. They really call Clinic Bienestar a medical home and, yeah, and I've had long -- longstanding relationships with folks.

Q Could you talk a little bit about those relationships and your experience kind of in this community generally, meaning the community of patients that you treat, but also in Kensington in particular and with the focus on patients with opioid use disorder?

A Yeah. I think the reasons we've been so successful, the reason that we have such a high retention rate goes back to the trust that Jose Benitez also mentioned. The staff at Prevention Point and the staff, my team, at Clinic Bienestar we deliver care in a culturally competent, and I mean cultural economy (ph), not only culturally competent because of the large people we see of Puerto Rican descent, but also when it comes to substance use disorder. And we deliver it in a nonjudgmental way and so when folks return to us I think they're quite honest about their use and which allows us to best help them. So if people have gone for periods of time when they haven't used and then have returned to using they're quite honest so that we can scale up efforts to better support them.

Q And I'd like to turn to Safehouse now, and you are familiar with Safehouse's proposed model. Is that correct?

A That's correct.

Q And the services that Safehouse will provide, how do those overlap with the services -- the medical services that Safehouse provides, how do those overlap with the services that

you've already provided the clinic?
A Yes. There are definite parallels and in the same way that we've tried to collocate as many medical services at Clinic Bienestar so that folks don't need to prioritize one or another. It's similar to what Safehouse is doing and I see Safehouse as just, you know, or at least as a supervised consumption facility is just one of a menu of medical services that should be offered to people with a history of opioid use disorder. So just like Clinic Bienestar, Safehouse proposes to link people to medication-assisted treatment and opioid use disorder treatment, offer vaccinations, offer HIV testing and Hepatitis C testing, offer pre-exposure prophylaxis which helps prevent HIV. They could refer patients for that and even for general primary care. And it's worth noting that this is, you know, the population we're talking about is very marginalized and often these patients don't have primary care providers or direct access to medical care. So I really see Safehouse as being a gateway to all of these services, to primary care and HIV and Hepatitis C testing and immunizations.
Q So I'd like to come back to that point in a little bit, but I do want to touch on the one service that is not provided at the clinic or Prevention Point as a whole, which is supervised consumption. And to be clear, that is not something that you allow or see while you're in the clinic treating patients. Is this correct?

A No, not in the clinic, but when I park my car, you know, a block or two away I see it all over the street as I'm walking into the building. So it's happening on the street but not -- yeah, not inside of Prevention Point.

Q Could you explain that a little bit? So where do you see, I guess, consumption of -- or intravenous drug use kind of out in the open on your day-to-day when you're in Kensington?

A People are out on the sidewalk or in tents that are on the sidewalk in Kensington.

A And do you see people overdose either, you know, around the clinic or at the clinic often?

A Yes. There are days that I'm there, you know, every Tuesday and Wednesday and there can be anywhere from one to five or six overdoses right in the immediate vicinity of Prevention Point.

Q And have you had experience responding to these overdoses while you're at the clinic?

A Sometimes. The staff at Prevention Point is super skilled in the reversing overdoses. Sometimes they'll call me if there's further complications if someone's having a seizure related to an overdose or needs CPR if they've been found too late and now need chest compressions and, you know, more advanced medical care.

Q And in terms of the overdoses that you've seen at Safehouse and around the area, is it safe to say that those

give you a sense of need for supervised consumption services based on what you've seen in the area?

A Yes. And I think you were alluding to some differences between Clinic Bienestar and Prevention Point and then what Safehouse would offer and offering, you know, supervised consumption with, you know, ready accessibility to someone, to a medical professional who can reverse an overdose is just part of the benefit of supervised consumption. Right now we're in the midst of an HIV outbreak in Philadelphia. We've seen 115 percent increase in new HIV infections in the city since 2016. Jose Benítez mentioned that there were, you know, 47 percent of all new infections in 1991 were attributed to HIV and we've decreased that to five percent by 2016. And now those trends are reversing. You know, all of the great prevention services that we've done, you know, with potential to, you know, disrupt all of that, that progress.

Q And --

A And so not only HIV but Hepatitis C we've seen a three times increase in new Hepatitis C infections in this country since 2010, all attributed to injection drugs use. And so not only in supervised consumption facilities, not only is there a medical professional nearby who can help reverse an overdose, but people are using in a less rushed way and not sharing injection equipment because they're in their own cubicle so those will reduce HIV and Hepatitis C risk. And then also

using in an unrushed way, cleaning the skin well with alcohol will reduce serial bacterial infections. We've also seen an enormous increase in hospital admissions for endocarditis, skin and soft tissue infections, severe blood stream infections. All of those things are on the rise and could be curtailed with safer injection.

Q And so based on your experiences, although you've heard discussion about saving lives through overdose reversal, there are other, you know, medical health benefits that -- such as spread of infections and things like that that can arise out of a supervised injection site?

THE COURT: Counsel, I think we're wandering into areas that I precluded in the pretrial --

MR. FABENS-LASSEN: Apologies, Your Honor.

THE COURT: -- in the pre-hearing ruling so --

MR. FABENS-LASSEN: Apologies, Your Honor.

THE COURT: -- I mean, there's a great deal about HIV and Hepatitis C and I'm --

MR. FABENS-LASSEN: No, I --

THE COURT: -- I'll take notice that clean needles will prevent those things, but why don't we swing back to opioid use?

MR. FABENS-LASSEN: Exactly. Yes, Your Honor.

BY MR. FABENS-LASSEN:

Q With that said, I would like to ask you about your

familiarity with Safehouse's medical protocols and are you familiar with them, Your Honor -- or Dr. Bamford?

A Yes, I helped -- I reviewed them and helped draft a protocol.

Q And to what extent were you involved in the drafting and in the review and how did you become involved in that process?

A Just asking to testify today as a fact witness, I think's part of, you know, my testimony I was asked by Ronda Goldfein to review this protocol knowing that I have experience in caring for this patient population.

MR. FABENS-LASSEN: And so, Your Honor, may I approach the witness?

THE COURT: At any time you may.

MR. FABENS-LASSEN: And for the record, I just presented the witness with the Safehouse protocols which have already been marked and admitted into evidence as Exhibit 5.

THE COURT: Understood.

BY MR. FABENS-LASSEN:

Q And Dr. Bamford, these are the protocols that you were involved in reviewing and writing. Is that correct?

A That's correct.

Q And you had mentioned that these are generally -- and your involvement is based in part on your work at the clinic. Is that correct?

A Yes.

Q And so are these protocols that you have actually implemented in practice and used in your medical practice with patients at the clinic?

A Yes.

Q And I'd like to kind of go in focus to the particular protocols regarding opioid use disorder and medication-assisted treatment, if that's all right? So beginning with opioid use disorder, could you just provide a general overview of what opioid use disorder is and what are the kind of symptoms that go along with it?

A Sure. So opioid use disorder is a chronic brain disease that relapses and remits just in -- with a similar frequency to other chronic diseases like diabetes or asthma or hypertension. And it's manifested by two component, first, a physical dependence to opioids. And in fact, anyone who takes opioids for six days or more will develop a physical dependence and will go through opioid withdrawal. What differentiates that physical dependence alone from someone having a true opioid use disorder is intense cravings for the opioid. So patients with an opioid use disorder and the brain disease is manifested in intense cravings for opioids in the same way that depression manifests as a depressed mood or Alzheimer's disease manifests as memory disturbance.

Q And so what would you say the connection on that physical side of things, the connection between the physical withdrawal

symptoms and the prevalence of use are of opioid use in particular?

A Yeah. So when the physical dependence isn't adequately treated or -- and someone goes into withdrawal, then, you know, people are -- there's going to be pressure to use again, one, because people are feeling really uncomfortable because they're in opioid withdrawal. And then that combined with ongoing cravings will create this pattern of use and non-use.

Q Could you describe what these cravings are like from what you've heard from your patients or what you're understanding is about kind of what type of cravings someone with opioid use disorder will experience?

A Yeah. Patients have -- my patients have described it as kind of a necessity like food or water that they can't survive without the opioid.

Q And then that is in part, and your understanding, is because at least according to the medical community opioid use disorder is a disease?

A That's correct.

Q And is that understanding shared, in your view, outside of the medical community, that opioid use disorder is a disease?

A No. I think sometimes there's misconception about that, that it's viewed as a character flaw or a moral failing and not the chronic disease that it is.

Q And in your view has that perception of opioid use

disorder affected your patients in any way?
A Yeah, I think it's created stigma and judgment, you know, on the part of medical providers and the general public. And instead when someone is struggling more instead of having the medical care scaled up or thinking about how to come up with a different treatment plan, instead they're faced with judgment.
Q And in your experience in light of the cravings and physical symptoms that you had been talking about earlier, is an abstinence-based approach to treating opioid withdrawal -- opioid use disorder effective the same way it would be for, you know, other substances such as alcohol?
A It hasn't -- you know, the evidence shows that it's not. That up to 80 percent of individuals will go back to using opioids with the abstinence approach alone.
Q And so what would be the preferred course of treatment for a patient with overdose -- I'm sorry -- opioid use disorder aside from just telling them to abstain and try to detox and deal with the withdrawal symptoms?
A Yeah. So the gold standard is medication-assisted treatment. And whether that comes in the form of Methadone or buprenorphine or Naltrexone, it's what recommended by the World Health Organization and the American Society of Addiction Medicine.
Q And buprenorphine is also known as Suboxone, right?
A Yes, Suboxone is buprenorphine with naloxone.

Q And that's the most common form of MAT used at the clinic or at Prevention Point currently. Is that correct?
A Yes, that's correct.
Q And could you explain just a little bit at a higher level how Suboxone works to essentially combat either the cravings or the symptoms associated with overdose or opioid use disorder?
A Yes. So buprenorphine is a partial agonist. An agonist means that it binds to the opioid or mu receptor and activates it, but only partially activates it. You know, that in comparison to Methadone, which is a full agonist, so fully activates the opioid receptor. But the way that these medications work to treat opioid use disorder is when you give these, when these are prescribed.
Q And I know it's a kind of cycle, but --
A Yeah.
Q -- generally speaking?
A About 75 percent.
Q And how does that rate at the clinic compared to other places that are not maybe located in a central place where the need is as pressing as it is in Kensington?
A Yeah. I know I can only speak from the national numbers but estimate around about 20 percent of individuals who -- with an opioid use disorder would be eligible for MAT are actually receiving it.
Q And why do you think that is? Are there, you know, access

issues for patients who actually want MAT access? Or is it just a patient readiness issue?

A Yeah. There's some of both. I think on a provider level there aren't enough providers in the United States who have an X waiver (ph) to treat everyone who would be eligible for medication-assisted treatment. I think the waiver process itself is a barrier. The eight-hour training for physicians and a 24-hour training for nurse practitioners and physician assistants. And then, you know, except for maybe the program that Jose Benitez mentioned where they can get people started without insurance and most people, you know, aren't going to be able to access buprenorphine without insurance, and even in folks who have insurance still a lot of the insurance companies dictate the formulation of MAT that an individual can get. And then also I've had the experience that certain pharmacies don't carry it in Philadelphia, even in Kensington our patients will get to the pharmacy and there they'll be told that, you know, they don't have a supply any longer or they've run out for the day.

Q So to surmise (ph), is it fair to say that despite the fact that MAT is the gold standard of treatment that there are access issues that prevent patients who should or otherwise would want MAT from getting access to it?

A Yes.

Q And how do those barriers affect patients who have MAT --

or who lack access to MAT but also have opioid use disorder?
A If, you know, patients don't access -- don't have access they'll go on continuing to use.
Q And so in your view is it likely or significantly likely that if you or a patient does not have access to MAT the same day that it's sought that they will essentially use opioids in other ways such as intravenous drug use?
A Yes, that's correct.
Q And why is that?
A Because of, you know, the -- because of how uncomfortable people feel when they're in opioid withdrawal and because of the intense cravings that if both of those aren't treated with medication-assisted treatment patients will need to treat themselves with heroin or Fentanyl from the street.
Q And as far as you're aware, have those access issues led to either overdose or -- overdoses or other harms related to intravenous drug use?
A Yes. I mean, yes. I've -- in my experience I've definitely seen patients go on to use and even have fatal overdoses when they couldn't access medication-assisted treatment.
Q And so you'd mentioned earlier that you view Safehouse as a gateway to access to various forms of care. And we had spoken about some of that earlier, but how do you view Safehouse in particular as a gateway to accessing MAT,

especially given these barriers that you've been speaking about?

A Yes. So I think when -- are getting people to come in and just in the same way that not everyone can be a (inaudible) star is always there accessing the same services I think because of the menu of services people can access medication-assisted treatment even if they're not presenting to consume drugs that they've obtained outside, but also because of the observation room, you know, after people have consumed, and in my experience when patients are in opioid withdrawal they can be very agitated and anxious and not be able to sit still and it can be a very difficult time to engage them to discuss anything else, you know, especially other health needs.

And so having the observation room after someone has consumed is a great opportunity when patients are feeling well to discuss medication-assisted treatment, getting into inpatient treatment programs, referral to a primary care physician and a whole bunch of medical services.

Q And you say this is the ideal opportunity to discuss this with patients. Have you seen in your experience that they're more receptive, not just to having the discussion but to treatment after they are, as you say, well, after they've consumed?

A Yeah. Yes because they're comfortable and they're feeling well. They were feeling very sick prior to consuming and now

they're feeling better.
Q And for patients who for whatever reason are either unwilling or unable to access MAT, how would supervised consumption benefit them in particular?
A Well, I think that it -- supervised consumption keeps people alive until they're, you know, ready or until they are able to access -- overcome the barriers that I mentioned to accessing medication-assisted treatment.
Q And could you explain that a little bit about your view that supervised consumption keeps patients alive? What is that based on?
A So based on data from other supervised consumption facilities worldwide where they've seen decreases in overdose-related deaths. Either -- one, there's never been, despite of millions of injection episodes in these facilities worldwide there's never been a fatal overdose. And despite being millions of overdoses, there's never been a fatal overdose in any of these consumption sites.

And then in places like Vancouver after Vancouver opened in 2003, within two years there was a significant decree, about a third of opioid-related overdose deaths in the five blocks -- five-block vicinity of Vancouver. And in Madrid when a supervised consumption site opened there in 2000, within a decade they had a 50 percent decrease in opioid-related deaths in the whole entire city of Madrid.

Q And you had spoke about supervised consumption in Vancouver. That's the Insite facility that was discussed during Mr. Benitez's testimony. Is that correct?
A That's correct.
Q And you said that some of the numbers related to Insite's success rates are generally -- cannot be extrapolated to the experience in the United States or Kensington in particular. Is that correct?
A Well, I think that -- I mean, I think that they cannot be extrapolated. I'm sorry, could you clarify?
Q Are there meaningful differences between the experiences that Insite has had versus what's expected to be the proposed site at Safehouse that would maybe affect outcomes or affect your understanding of how meaningful Insite's experience is as applied in Kensington?
A Yeah. So I think that when Insite opened in 2003 they put a whole bunch of services in place at once. So there was the supervised consumption rooms but also syringe exchange. They were doing HIV and Hepatitis C testing. And we've had, you know, all of those services with the exception of supervised consumption so I think one of the arguments has been, well, in places like Vancouver we don't know what -- which variable led to overall reduction in overdose-related deaths because all of these different things were put into place at the same time. But here we've been doing all of these other things and still

have this astronomical number of opioid-related deaths. And so I think if we were to, you know, if we were to, you know, open a facility like Safehouse here that would be this -- the different -- you know, the different variable.

Q And you said there's an astronomical number of overdose-related deaths in this area. Have those affected your patients as far as you're aware?

A Yes. I've lost 25 patients in the last two to three years, 24 to fatal opioid overdoses and one to a very serious bacterial infection.

Q And that's just during the last two years you said?

A In the last two to three years, yes.

Q And you said all of your patients have HIV or AIDS?

A That's correct.

Q And how many patients during that time have you lost to HIV or AIDS?

A I've lost none to HIV -- complications of HIV or complications of Hepatitis C.

Q And do you feel that for those patients that you've lost the opportunity to consume onsite under medical supervision could have made a difference?

A Yes. And I think would have kept them alive until they were ready or could access medication-assisted treatment.

Q And do you feel it's worth saving your patients' lives if they want to be saved?

A Yes. I -- none of my patients want to die and many have, you know, said to me, like, please, I -- you know, do something. I need help to not have a fatal overdose like so many of their friends or family members.

Q Does that answer stay true, do you feel it's worth saving a patient's life if only for ten days?

A Yes, because it's ten more days of opportunity to keep trying to get people the help that they need and deserve.

Q What about ten hours?

A It's the same. It's ten hours, you know, and we talk about this a lot amongst my team is we've seen so many deaths and just the interactions with us. And I think it's another big piece of Safehouse and Prevention Point and Clinic Bienestar is we treat people with dignity and respect. And so maybe they're not going to live the life expectancy of the average of 79 in the United States, but we've kept them alive longer and made their lives a little bit better in the process.

Q And as a doctor who treats these patients do you feel obliged to do so if you can save a life of one of your patients?

A Absolutely, and my patients have the most amazing stories. Each, you know, they're the most resilient individuals to live on the streets of Philadelphia in January. Yeah, and they all have amazing stories.

Q And just to be clear, if someone is overdosing and they do

not receive Narcan or any medical treatment, will they die?
A If -- I mean, if -- yes. So if the opioid overdose progresses, yes, they will die.
Q But if they are timely administered Narcan can you say with a degree of medical certainty that they will not die?
A Yes.
Q So if you administered Narcan to one of your patients who was overdosing would you view that as saving that patient's life?
A Yes, and I've done so many times.
Q And would you recommend that your patients use Safehouse if they are active opioid users?
A Absolutely.
Q And from a clinical perspective do you support Safehouse's proposed model which involves supervised consumption and observation?
A Yes.

MR. FABENS-LASSEN: One second, Your Honor, please?

THE COURT: All right. Be mindful of the hour, counsel.

MR. FABENS-LASSEN: Understood.

THE COURT: And we have -- there are just a little concerns to address.

MR. FABENS-LASSEN: I have no further questions, Your Honor, thank you.

THE COURT: Counsel, before you begin, I'd like to see you at sidebar. And then we have the CSO working overtime and we have issues of utilities running things, so why don't you approach and we'll get a sense of where we are.

(Sidebar begins at 5:16 p.m.)

(Sidebar

THE COURT: We are good.

(Sidebar ends 5:17 p.m.)

CROSS-EXAMINATION

BY MR. DAVID:

Q Good evening, Dr. Bamford. In your view, the (inaudible) of consumption facilitates Safehouse's medical protocol because patients are frequently more lucid after consumption, right?

A That's correct.

Q And the increased lucidity may facilitate engagement with counseling?

A That's right.

Q And the increased lucidity may facilitate engagement with offers of medical care?

A Yes.

Q In your view the act of consumption facilitates Safehouse's medical protocol because consumption often eliminates withdrawal symptoms.

A That's right.

Q And by eliminating withdrawal symptoms consumption makes

the patient more amenable to discussing entering into treatment or accepting MAT, right?

A That's right.

Q And in these ways consumption at Safehouse, in your view, enhances access to medical care.

A I think that Safehouse in general does because offering safe consumption is a gateway to all of these medical services. And then when someone has consumed they're not feeling well -- I'm sorry, they're feeling better. They're not as anxious. They're not as irritable and easier to engage with.

Q And because they're feeling well and their withdrawal symptoms have gone away and they're more lucid, consumption serves a medical use in Safehouse's treatment, correct?

A That's right.

Q And to be clear, consumption includes consuming heroin, right?

A That's right.

Q And no one can have a prescription for heroin?

A No, not currently (inaudible).

Q And anyone -- well, do you think it's a good idea that people could have a prescription for heroin for treatment of this kind?

A No, because we have very effective means of medication-assisted treatment elsewhere in the world. It's been thought -- it has been described maybe prescribe morphine because it

more closely resembles heroin pharmacologically than buprenorphine or Methadone.

Q Okay, but today int eh United States no one can have a prescription for heroin.

A No.

Q And anyone who has heroin bought it illegally, right?

A That's correct.

Q And anyone who has heroin is possessing illegally?

A Yes.

Q Are you aware that Congress has determined that heroin has no currently accepted medical use in treatment?

A Yes.

Q And given that the Safehouse medical protocol uses consumption to serve a medical purpose, including facilitating access to care, do you disagree with Congress' determination that heroin has no medical use in treatment?

A No. And heroin itself, no, has no use. Supervised consumption I think has use.

Q Okay. But you said earlier that you're going to use consumption. That will serve the patient achieving lucidity and elimination of withdrawal symptoms, right?

A Right.

Q And that the patient in that condition is in a better state to approach about medical care?

A Yes.

Q Now, you were involved in writing some portion of Safehouse's medical protocol, correct?
A Yes.
Q But you didn't write all of the protocol.
A No.
Q And Dr. Perrone testified, and I think you were here, that she didn't draft any of the protocol, correct?
A I think I missed that piece.
Q Are you aware of who did draft the part of the protocol that you did not draft?
A I believe the Health Commissioner's Office.
Q And who is that specifically?
A Tom Farley's (ph) office, our Health Commissioner.
Q So Tom Farley's office drafted the protocol that's Safehouse Exhibit 3?
A I think they helped write the protocol, yes.
Q And what American physicians are you aware of that contributed to the drafting of the actual text that's in Safehouse Exhibit 3?
A What American physician?
Q Yes.
A I think Dr. Farley, Dr. Holm (ph), who works in his office. He's an expert in opioid use disorder. And then myself and Dr. Perrone.
Q And you have privileges to treat patients at the Hospital

at the University of Pennsylvania?
A That's correct.
Q And you're not here today testifying today on behalf of HUP.
A No.
Q And HUP hasn't approved the Safehouse medical protocol.
A No, but they approved my testimony -- my -- they approved that I could test fact witness today.
Q Okay. Your practice at HUP and other academic hospitals, that informs your opinions about appropriate protocol, right?
A That's correct.
Q And Dr. Perrone discussed it earlier. HUP has a policy prohibiting patients from bringing illegal drugs on premises.
A Yes.
Q And that policy is typical among hospitals, right?
A Yes.
Q And the purpose of that policy is that treating doctors need to know exactly what patients are putting into their bodies.
A Yes.
Q And if patients have taken unknown or illegal drugs, that would potentially affect drug interactions?
A That's correct.
Q And it would potentially affect treatment decisions?
A Yes.

Q And HUP's policy when illegal drugs is discovered is to call security, right?
A I think yes, most of the time yes.
Q And the drugs must be confiscated and properly disposed of by someone authorized to do that.
A Yes.
Q And that policy is typical among hospitals.
A Yes.
Q And HUP does not use onsite consumption of illegal drugs to serve a medical use, right?
A No.
Q No hospital in the United States uses onsite consumption to serve a medical use.
A No longer. In the past alcohol was prescribed in hospitals to treat alcohol withdrawal, but that's no longer a practice.
Q And other than that example there's no hospital in the United States that uses onsite consumption of illegal drugs to serve a medical use?
A No.
Q And there's no narcotic treatment program in the United States that uses onsite consumption of an illegal drug to serve a medical use?
A No.
Q And there's no opioid treatment program in the United

States that uses onsite consumption of illegal drug to serve a medical use, right?

A No.

Q Now, earlier there was testimony about Fentanyl strips. Do you recall that?

A Yes.

Q And I believe Mr. Benitez testified that a Fentanyl strip if it was positive would allow the patient, if the patient wanted to, to adjust dosage. Do you recall that testimony?

A Yes.

Q But there's no protocol that a patient can follow for how to adjust their dosage if the Fentanyl strip has tested positive, is there?

A No, but the patients can use in a different way, so they can use less of the sample than they might have. They might use it intranasally instead of injecting it because that's a less risky form of use.

Q But Safehouse is not going to provide that kind of information to a person whose Fentanyl strip tests positive, are they?

A It's part of the harm reduction. There's a manual called "Getting Off Right" that's written by the Harm Reduction Coalition that's written by consumers and service providers so that kind of information could be provided and based on harm reduction.

Q But it's not in the Safehouse medical protocol and to provide any information to the patient what they should do if the Fentanyl strip tests positive, right?
A Not that I'm aware of, no.
Q And unfortunately, some patients actually may be looking to consume Fentanyl, correct?
A Well, unfortunately I don't think there is anything but Fentanyl on the street anymore. It's very hard to find just heroin.
Q And unfortunately sometimes when there's a bad batch and that's known in the community, people will seek out the bad batch because they understand it's very potent. Isn't that right?
A Sometimes.
Q Now, a patient who goes to the consumption room and uses illegal drugs, Safehouse does not require that person to stay in the observation room, correct?
A No.
Q They can leave at any time, right?
A Yes.
Q They can go out into the public, right/
A That's correct.
Q They could get behind a wheel and drive a car.
A I -- yes. Yes.
Q There's no rules or protocols that Safehouse has that

would prevent somebody from going out into the world and taking any action.

A That's right, but right now folks are using on the street and doing all of those things. And so at least at Safehouse there is the option of being in the observation room and, you know, having more support for people to talk to people to get into treatment. Right now when people go to use they go out to the street to use so we lose that opportunity when people are, you know, a captive audience in the observation room.

Q Now, we talked about how you testified that patients are more lucid after consumption and that can be an opportune time, in your opinion, to provide counseling and medical care and induction to MAT. And heroin use can eliminate the symptoms of withdrawal. We talked about that, right.

A Yes.

Q And we talked about but in the United States no one actually prescribes heroin for that purpose.

A Right.

Q But Methadone is a legal drug that a physician could prescribe in such circumstances.

A Only in a licensed Methadone maintenance facility.

Q Right, and it can be --

(simultaneous speaking)

Q -- dispensed specifically at an opioid treatment program, and OTP.

A But I can't prescribe it for those purposes.
Q I want to ask you a few questions about OTPs and I think Dr. Perrone testified to some of this, but OTPs operate legally. Am I right that they have to be accredited by a federally deemed accrediting body?
A Yes.
Q And to receive such accreditation requires an onsite survey?
A Yeah. I am not familiar with all the things that Methadone maintenance programs go through. You know, I never worked on one, yes, so I can't speak to all of the accreditations that are necessary.
Q Okay. You don't know whether the survey would include observations regarding medication storage?
A I'm, I mean, because of the kind of facility they are they're allowed to store Methadone onsite, but that's different from regular medical clinics that can't store controlled substances onsite.
Q Okay, but I'm asking in order to get accredited are you aware that certain observations are going to be made by a federally deemed accrediting body before they get that accreditation?
A So you mean a visit from a -- yes. I'm not aware of the policies of Methadone maintenance programs or the accreditation that's necessary. Again, I've never worked in one. I've only

referred patients there.
Q Okay. Let me ask it this way. You don't expect that Safehouse will receive an onsite survey from anybody, do you?
A I don't think Safehouse plans to store any controlled substances onsite.
Q One thing that the accreditation requires is the development of a diversion and control program. Are you aware of that?
A Yes.
Q And that includes a list of steps to reduce the risk of diversion.
A Yes.
Q And that's -- a diversion control program, that's not something that's in Safehouse's medical protocol, is it?
A It's part of -- but it's part of -- I mentioned that part of management of -- and delivery of medication-assisted treatment is recurrent urine drug screens. So if someone's urine does not have buprenorphine in it then we're concerned that there's diversion and that person, I would talk to that person about perhaps needing a higher level of care, maybe a referral to a Methadone maintenance program where they have more structure and support. So that's built into that protocol and the urine drug screening monitoring that we do. Sometimes it's weekly. Sometimes it's biweekly. Sometimes it's monthly depending on how stable an individual is.

Q Well, we talked about it's Safehouse's plan to offer buprenorphine to patients who are willing to enter into treatment. And for those patients who are in moderate to severe withdrawal who agree to treatment, Safehouse plans to administer the first dose of buprenorphine prescription onsite, right?

A Yes.

Q And we talked that buprenorphine is a Schedule III drug under the Controlled Substances Act.

A Yes.

Q And you have a DEA license, right, Dr. Bamford?

A That's correct.

Q And you're a registrant under the Controlled Substances Act?

A Yes.

Q And you prescribe buprenorphine?

A Yes.

Q Are you aware that the regulations implementing the Controlled Substances Act require physical security controls for practitioners who will be administering controlled substances onsite?

A Yes.

Q Are you aware that the Controlled Substances Act requires that Schedule I and II drugs on premises that they're stored in a securely locked, substantially constructed cabinet?

A Yes, but we're not storing any of those onsite.
Q Now, that's drugs on premises will be stored and you -- there will be Schedule I and II drugs onsite at Safehouse, right?
A That are brought in by participants but not that are stored onsite.
Q Right, but there's -- but what participants bring in those obviously are not going to be securely locked or put into a cabinet of any kind, right?
A No. And I'm not an attorney, but I think the purpose -- the reason we're here is to decriminalize use within the walls of Safehouse alone.
Q If Safehouse were allowed to operate would that provide an opportunity to conduct research on the efficacy of this medical model and in particular using -- having consumption and facilitate engagement with medical services?
A Yes, absolutely because any time you implement a new program like this it's important to know that you're achieving the outcomes you desire is that of reducing mortality, that reducing new HIV infections and Hepatitis C infections, that patients are getting linked to medication-assisted treatment and primary care. Yes, it would be important to study all of that.
Q And like you said, unlike in Vancouver, this would be the introduction of just one variable. So it would present an

opportunity for research to see what that variable does.
A Yes.
Q Are you aware that the Controlled Substances Act actually provides a pathway to construct -- to conduct research using controlled substances?
A I'm not aware of that.
Q So you're not aware that you can actually apply to the government to do research doing Schedule I drugs.
A Oh, yes, sorry. I do. And when I was a resident at Columbia there were studies with cocaine at the hospital, yes.
Q And in fact that kind of research is being conducted at Penton (ph) today.
A Yes.
Q And that's how researchers have conducted legally research on the use of marijuana for medical purposes, right, under that research exception?
A I guess so, yes.
Q You're not aware of that?
A Not -- no, I don't know the -- all the details.
Q If Safehouse wanted to conduct research on using heroin to facilitate engagement with medical services it could have applied to the government for approval to do so under the Controlled Substances Act, right?
A I can't speak to that. I wasn't part of the, you know, the protocol and the planning of how best to proceed.

Q But you're aware that it did not do so?
A I'm not aware of that.
Q All right. And do you know that if it had done so it would have needed a recommendation from the Pennsylvania State Board of Medicine?
A Again, I'm not aware. I wasn't involved. I was asked to testify based on my medical experience alone.
Q Right, but I think that you are aware that the Pennsylvania State Board of Medicine has not recommended Safehouse's medical protocol.
A I was not aware of that.
Q The administration of Naloxone, that doesn't require medical training, does it?
A No.
Q And that can be performed by a non-physician.
A That's correct. We --
Q And that can be performed by somebody who's -- has no medical background whatsoever, right?
A Yes. They just need to take a short training for first responders.

MR. DAVID: No further questions, Your Honor.

THE COURT: Any redirect?

MR. FABENS-LASSEN: Yes, Your Honor, (inaudible).

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. FABENS-LASSEN:

Q Dr. Bamford, I just have a few quick questions for you.

A Yes.

Q Do you view the mission and the purpose of Safehouse as facilitating drug use or facilitating medical care?

A Facilitating medical care. Again, the patients I see are very marginalized and often don't have access to any kind of medical care. And I see Safehouse's -- as a gateway to getting them access to a whole bunch of services.

Q And when you said decriminalizing use within the walls, did you mean the operation -- that the purpose of this lawsuit is to determine the criminality, in a sense, of the operation of a supervised consumption site?

MR. MCSWAIN: Objection. Leading.

MR. FABENS-LASSEN: Or what did you mean by that?

THE COURT: It is leading. I'll sustain that.

BY MR. FABENS-LASSEN:

Q Could you explain what you meant by decriminalizing use within the walls as it relates to this particular lawsuit?

A I just meant what's happened worldwide, that in other parts of the world substance, you know, illicit substance use outside of supervised consumption facilities is still illegal, but it's decriminalized within these facilities to keep people alive.

Q So you were speaking about the facility itself?

A The facility, within the walls of the actual facility --
Q And --
A -- the physical building.
Q Understood. And you had mentioned that no Schedule I or Schedule II drugs will be stored onsite at Safehouse. That's correct?
A That's correct.
Q And do you view a user -- so a participant at Safehouse who essentially brings and consumes and then leaves as storing those substances onsite?
A No. They're just very transiently there.
Q And so you don't view Safehouse as a OTP that was discussed earlier?
A No.
Q And is the fact that from a -- that clinically supervised consumption sites are unprecedented in the United States affect your opinion that it would save your patients' live?
A Absolutely. Like I said, I lost 25 patients. And I think if they were -- had been using in a place where someone could respond very quickly also in other parts of the world, obviously a lot of these sites can't be open 24/7, but again, there's things that happen within supervised consumption. There's, like, other education, other harm reduction education, dispensing of injection equipment, things that help keep people safe even during the time that they're not using the facility.

Q But let me -- I appreciate that. Let me ask it a little differently. That view that you hold, your medical view as to what's effective for your patients, is that undercut by the fact that to date there's not a clinically operated safe supervised consumption site in the United States?

A Yes, I think so. I think we've put all these other harm reduction mechanisms into place, like syringe service programs and Naloxone distribution and we're still facing 1,166 overdose deaths in Philadelphia last year.

Q And do you think that the federal government's view that they've expressed in this lawsuit that it's legal -- that operating a supervised consumption site is illegal is part of the reason why hospitals such as University of Penn or other clinical providers have not yet opened a supervised consumption site?

A That's correct.

MR. FABENS-LASSEN: Thank you. No further questions, Your Honor.

MR. DAVID: No questions, Your Honor.

THE COURT: All right, Doctor, you may step down.

(Witness excused.)

THE COURT: Counsel, I wouldn't expect us to do anything more today. Obviously everybody will want to think about how we deal procedurally with the testimony today, so I commend you to that task. I had said we would immediately post

the audio online. It being 20 minutes to 6:00 I hope I can still do that. And if I can't it's because the individuals in the clerk's office who would have done that are no longer there. So but we will adjourn promptly to see whether or not that can be accomplished. Unless there's an urgent reason for me to stay, counsel? No? All right. Let me go see if I can keep my commitment to transparency.

MR. FABENS-LASSEN: Thank you, Judge.

MS. EISENSTEIN: Thank you, Your Honor.

MR. DAVID: Thank you, Your Honor.

THE DEPUTY: All rise.

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C E R T I F I C A T I O N

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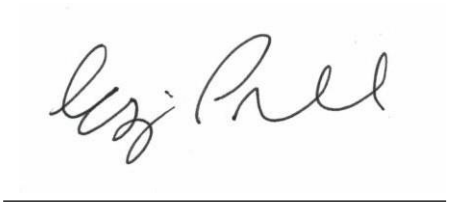

DATE: August 26, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	Case No. 2:19-cv-00519-GAM
Plaintiff,	
v.	U.S. Courthouse 601 Market Street Philadelphia, PA 19106
SAFEHOUSE, et al.,	
Defendant.	
. . . . .	September 5, 2019 1:08 p.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE HONORABLE GERALD A. McHUGH
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE COURT: This is the United States of America v. Safehouse, et al. Civil matter 19-519. And would counsel please identify themselves for the record.

MR. MCSWAIN: Good afternoon, Your Honor, Bill McSwain of the United States. I have with me Greg David, Erin Lindgren and Bryan Hughes.

THE COURT: Counsel.

MS. EISENSTEIN: Good afternoon, Your Honor. Ilana Eisenstein on behalf of Safehouse and Jose Benitez. I have with me Ronda Goldfein, Megan Krebs, (inaudible) and the remainder of the Safehouse litigation team.

THE COURT: All right, counsel. I thought I would begin today's proceeding with sort of a review of what I said at the last proceeding, which is to say that what's pending before this Court is a fairly narrow and technical legal issue. And that is the application of a federal criminal statute to a particular course of conduct. The issue before me is not whether it's good public policy. The issue before is not whether it's good public health. This is certainly not a zoning issue. And where I am to decide where such a facility should be if it were lawful. My job here is to apply a statute to a set of facts. We had an evidentiary hearing earlier, and most of that hearing addressed these broader questions of public policy and public health. In fact, it overwhelmingly addressed those issues, rather than the narrow

statutory issue that's in front of the Court.

And I think for purposes of public debate, perhaps that's a useful exercise. For purposes of the issue before me, I've concluded that no testimony of any witness should be considered in resolving this motion, because it is a motion for a judgment on the pleadings. And for the nonlawyers present, what that means is the government has filed a case and made certain allegations.

Safehouse has answered and made certain allegations. And I'm being asked to accept all of those facts as true. No dispute as to the facts without having evidence or having a trial, and then make a legal ruling based upon the stipulated facts of the parties. And so, for these purposes, I will not consider the testimony at the hearing. Although certainly I got some flavor of the arguments from the hearing. I'd mentioned to counsel when we had a recent discussion, that they should assume the Court would be well-versed in the statute and the applicable legal principles.

In fact, I think a lot of what I want to do today, counsel, is to discuss with you questions that have occurred to us, and issues that we think are potentially relevant or important, cautioning everyone not to try to read anything too much into any particular line of inquiry, or any particular

question that have occurred to us, and issues that we think are potentially relevant or important, cautioning everyone not to try to read anything too much into any particular line of inquiry, or any particular question. And those lawyers in the room all know how difficult it is to ever understand where a case may be going.

And if people are saying well, which way is the Judge leaning? Well, the Judge is worried about getting it right. And so, the questions here are questions that are important to me in grappling with the complicated issues in front of me. The government has brought the motion for judgment on the pleadings, and so they have the laboring oar. And so, who's going to argue on behalf of the government?

MR. MCSWAIN: I will, Your Honor.

THE COURT: All right, Mr. McSwain. You can stay at counsel table if you like or come to the podium. Wherever you're more comfortable, because a lot of what I'm going to be doing today is asking you questions, all right? So, it might make sense to be at counsel table if you're more comfortable there. But, approach the party if you so desire.

MR. MCSWAIN: Thank you, Your Honor. I -- I'd prefer the podium.

THE COURT: Wherever you're comfortable.

MR MCSWAIN: May it please the Court, counsel, Bill McSwain with the United States. Your Honor, in one very important way, everybody involved in this case, I think, is on the same side. We all want to combat the opioid epidemic. Where we differ is on the methods for doing so. Most importantly, for purposes of today's hearing, as Your Honor already indicated, are the legal issues. And we believe that injection sites are forbidden under federal law. And I think you've summed it up perfectly, both in the prior hearing and in your comments before I came to the podium, about it's your job here to apply a statute to the facts. The statute at issue is 21 United States Code Section 856(a).

THE COURT: I've actually had that made available in the ELMO (ph), Mr. McSwain.

MR. MCSWAIN: Terrific.

THE COURT: Ms. Hack (ph), would you bring that up, please?

MR. MCSWAIN: With your indulgence, Your Honor, when you bring it up, may I go through the words just quickly?

THE COURT: For purposes of the record, yes. But then, I'd like to get some of my questions answered.

MR. MCSWAIN: Sure. So, 21 United States Code Section 856(a), now on the screen, makes it a crime to either,

number one, knowingly open, lease, rent, use or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing or using any controlled substance. Or, number two, manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, 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. Your Honor, I think the statute is clear that Congress has made a judgment, and I think I can sum that judgment up very simply as don't set up a place to do drugs.

THE COURT: Let me ask you this, Mr. McSwain, the statute in question was passed in 1986 and amended in 2003. Is it the position of the government that safe injection sites were in any respect within the contemplation of Congress at either stage?

MR. MCSWAIN: Absolutely, yes. Not just injections sites, but any so-called medical use of heroin and other illegal substances. That's because the statute expressly says there's no medical use of heroine, there can be no prescriptions for heroine, nobody anywhere anyhow is allowed

to use heroine under the law. So if I, for example, had a time machine, and I went back to that time that Congress passed the statute. And I said, hey, Congress, listen up. I got an idea. My idea is I'm going to invite people onto my property. And I'm going to invite them to use heroine as much as they want, anytime they want. But, I'm going to have medical personnel on-site, available to combat any overdoses. The answer from Congress with that hypothetical would have been no way.

THE COURT: Well, you're channeling Judge Posner now, who basically would say in a situation like this we would go back in time, and we would conjure what it is that Congress might have had in its mind. And he's written about that. And let's say, hypothetically, I don't think there's broad support for that in the case law. And say, hypothetically, I don't think analytically that's the best way to go. And I understand the argument you're constructing here that, because in the Controlled Substances Act there was no lawful use of narcotics that was contemplated, that it necessarily follows, by inference or by logical conclusion, that Congress also meant to address this activity. Fair enough.

My question was different and more precise. And that precise question is, if we look at what we'll call the

legislative evidence surrounding the passage of the statute in 1986, or its amendment in 2003, can you point to any legislative evidence that would suggest that there was specific contemplation of things such as safe injection sites -- keeping in mind your argument about the broad language.

MR. MCSWAIN: Well, I would say first off, the best legislative evidence is always the words of the statute.

THE COURT: Understood.

MR. MCSWAIN: If we look at the words of the statute, for example -- well let me, let me describe my view of the statute broadly and then specifically answer your question.

THE COURT: Yeah. I am going to look for a specific answer to the question. Well, we have (a)(1) and we have (a)(2). And I think that what (a)(1) and (a)(2) are doing in conjunction is they are taking that judgment that Congress has made that said don't set up a drug house. And (a)(1) is saying don't do it directly, and (a)(2) is saying don't do it indirectly. And to answer your question directly, I think your concern is most directly addressed by (a)(2), because look at the language of (s)(2).

For example, it says, with or without compensation. So it's not a case where Congress is saying that there has to

be some money-making drug operation in order for 856(a) to apply. (a)(1) says don't do it directly. Don't open up the house for the purpose of having people, or -- for the purpose of dealing, manufacturing, using drugs and a right (ph) to (inaudible).

THE COURT: We can draw numerous inferences as the -- as to how the language could be interpreted. And we could even say that one literally reading the words of the statutes could say it would apply to this situation. So, let's assume that's true.

MR. MCSWAIN: Okay.

THE COURT: Let's also assume that, that may not be enough, for a variety of reasons. Going back to my question, and that is specifically with respect to the concept of safe injection sites, is there any legislative evidence that was within the contemplation of Congress?

MR. MCSWAIN: I don't mean to avoid your question, Your Honor. But again, obviously the best legislative evidence is the actual words of the statute.

THE COURT: Okay.

MR. MCSWAIN: Not just the words of (a)(2).

THE COURT: Other than the words in the statute --

MR. MCSWAIN: Well, other than the words, other than

the words in (a)(2), there's also the other words, talking about how it specifically -- there is no medical exemption for heroine. So I think it does directly address your question. Congress was contemplating all types of situations where heroine might be used in a so-called medical way. Like in treatment centers and hospitals, whatever. And they said no. And what that really --

THE COURT: Well, with respect to some drugs. Not heroine, but with others, there were specific conditions that were made for physicians to use them either by way of prescription in clinical trials, or for research purposes. And that was clearly within the contemplation of Congress, and I'll concede all that. So, I take it that the answer to my question is no, you cannot point to anything in the legislative evidence that would show that safe injection sites were specifically within the contemplation of Congress. And if I'm wrong about that, then point to where that would be. Because, I'll be candid with you, I haven't been able to find it. But, I'll also be candid with you, I'm not surprised I was not able to find it, because with respect to the idea of harm reduction, before we even get to safe injection sites, it was an evolving medical discipline, and it's highly unlikely that it would have been within the can (ph) of Congress in

1986 or 2003. And we can -- we can talk about the ways that it's tested later but is there anything specifically -- specific you can point to, sir, in the legislative evidence.

MR. MCSWAIN: If you're looking specifically for legislative history?

THE COURT: Well, I'm using the word evidence deliberately because I'm trying to keep in mind that the term legislative history is sometimes loaded and misused. And, as we've been analyzing the problem, we've tried to show a lot of discipline in how we approach it and looking at how scholars are approaching what is or is not properly considered, if anything, recognizing that if the government's correct and the language is absolutely clear, we may not get to that. And recognizing that Justice Scalia would say, "I think his word is garbage", one never considers it. I think that the -- there is ample precedent in recently en banc decision from the Third Circuit in Pellegrino, that says in certain instances yes, it is appropriate. So, whether we call it legislative history or legislative evidence, can you point to anything there?

MR. MCSWAIN: First of all, I'm going to put aside my statutory arguments because you want me to put it aside. And I agree with your mentioning of Justice Scalia, where he

thinks of legislative history as like coming into a crowded party and looking across the room to pick out your friends, I think is the way he described it. It's very malleable. And so it's much more important to look at the actual words of the statute. But, there are some statements by Senator Biden. There also are some statements at the time of the amendments to 856 that don't specifically talk about injection sites, but the language and the logic of the statements would apply to injection sites.

For example, in the 2003 amendment, Senator Biden said, "The bill targets any venue whose purpose is to engage in illegal narcotics activity." That's very broad. He talks about and idea (ph) it would help in the prosecution of rogue (ph) promoters who not only know that there is drug use at their event, but also hold the event for the purpose of illegal drug use. It doesn't mean that they're selling drugs.

THE COURT: He also says it's addressed to predatory behavior elsewhere in his statements about that. He also says that it was meant to have a limited scope which is in part why they address the language in the way that they did. And in (2) not only talked about knowingly, but knowingly and intentionally. So suffice it to say there are many nuggets both ways.

And for the benefit of both parties, both parties in their briefs have cited statements by Senator Biden after the enactment of the statute. And again, looking at some of the scholarship on legislative history and indeed some case law, we're loathe to put much weight on post-enactment statements. And so both parties cited those in their briefing. And in terms of how we have tried to exercise discipline and looking anything beyond the words of the statute, we've applied that standard. So, I think it's useful for the parties to know that.

MR. MCSWAIN: We didn't do a lot of that in our brief, Your Honor. So there are a couple more statements I'd like to point out that may be helpful to you?

THE COURT: Not right at the moment, because I think, for those purposes, we've done a pretty deep dive into the legislative record. And we've tried to parse very carefully what was said when and in what context. Because, again, some of the things that legal scholars have said in looking at legislative evidence is, it needs to come with an appreciation of the Congressional process and Congressional rules. So, indeed it matters greatly at what point in time something is being debated, something is being said and something is being amended. So, we're going to be applying

that discipline and looking at it. But, I understand, I think, the position you're taking, that there's a great deal there that could, in an intellectually honest way, be taken both in the words of the statute and in the discussion and applied to Safehouse. That would essentially be your argument.

MR. MCSWAIN: I would agree with that, but I would say if there's an express prohibition, that Congress has reached this exact issue when they said, "no medical use." And there is one case that came pretty darn close to analyzing the situation just like that. I'm sure you're familiar with it, the Patel (ph) case in the Eighth Circuit.

THE COURT: We're talking -- there was a rock concert?

MR. MCSWAIN: Yes.

THE COURT: All right.

MR. MCSWAIN: Safe stock. They had a musical festival and one of the defendant's arguments was we have a medical facility. That's what they called it. That's what they -- the Court described in the opinion. Eighth Circuit said there is a medical facility in our Actus (ph) Music Festival, and the purpose of the medical facility was to reverse overdoses. And the Court found liability under (a)(2)

there.

THE COURT: If they found liability on that basis, I think the case had a lot of weight. Because, indeed, when we looked and we said well, that's in interesting perhaps parallel here. But when you look at the other overwhelming evidence of the concurrent teen (ph) illegal drug use -- in fact, the concern promoter there actually had different schedules of drugs. You can't use these but you can use those. And that was all part of the jury's deliberation in the evidence of the case, with the first-aid stand being there.

MR. MCSWAIN: Yeah.

THE COURT: But I don't think central to the evidence that resulted in convictions.

MR. MCSWAIN: Sir, I'm not going all forward (ph) with this situation, I agree with you. But it's interesting that -- at least that parting even (ph) had been floated before. And it's not -- you're not riding on a complete Tubeau (ph) Rosalyn (ph). You have at least that case, that has looked at this issue, and it's very close to our issue.

THE COURT: But I'd go out and study the facts up closely to see how much weight you think you carry. And I thought that was a creative argument by the defense, given the

overwhelming evidence against concert (indiscernible) owner who also committed depravity. But I'm not sure that really carries great weight in a situation like this.

MR. MCSWAIN: I would agree that there's not any case that's directly linked to this case. But there is language, lots of language in the statute that directly applies to this. And also, I think that Oakland Cannabis Buyers case, the Supreme Court case that you've -- we've talked about some already in the Court, is very applicable. There, they were talking about marijuana as a Schedule I drug, just like heroine. Not talking about Schedule II, like in the Horrity (ph) case, which is different, where you can write prescriptions for Schedule II. Schedule I, can't write prescriptions for it, have no medical use for it, but there's one express exception that's available only for government approved research projects.

But that is not a project that was being pursued in that case. It's not a project that's being pursued here. So there are no exceptions. So, Congress has directly already reached this issue and said no. And what that Oakland Cannabis Buyers case really stands for, if you boil it down to sort of the layman's language -- when Congress says no, no means no. That's what that case says.

THE COURT: Except Safehouse is not handing out any illegal drugs, correct?

MR. MCSWAIN: They're not handing out drugs. But under (a)(2), and under statute 856 that doesn't matter. All that matters is that you're making your place available for use, and --

THE COURT: Yeah. No, we're going to get into (a)(2) in a moment, because I'd like to move there next. But I will say this about both that case and Gonzalez v. Argid (ph) that Safehouse is citing, I don't think either of them shed great light on the issue before the Court. I think that part of the Gestalt of the case -- and they give us a perspective on how it is that the Controlled Substances Act takes into account the fact that these substances are used in different ways, and in the background of the problem of drug use, legal and illegal, there's a medical context. But, aside from that, I'm not sure that they directly inform the issue before the Court.

I'd like to talk a little bit about (a)(2), and the difference between (a)(2) and (a)(1), because the government does cite an impressive battery of Circuit decisions in its brief. And obviously, we've looked at them very closely. And, in all candor, when I look at those cases, all of them

seem to follow the Fifth Circuit's decision in Chen. And they follow the Fifth Circuit's decision in Chen on the point as to whose purpose it has to be in (a)(2). And they do it without any real analysis of what the Circuit did in Chen. And I don't say that in a critical way, because I don't think in any instance the record before those circuits required them to get into a deep analysis of whether Chen was correct in the distinctions that it drew. But, one of the things that I am concerned about is that Chen says, that if we look at (a)(12) and we look at (a)(2), according to the Fifth Circuit, (a)(2) would be redundant. And the only way to make it non-redundant is to apply the rule against surplusage, and to assume that in (a)(2), the purpose has to be the purpose of the actual user of the drugs rather than the possessor of the facility. And I'm probably going to use the word possessor here, just because we've got owners and renters, and all manner of others.

And what troubles me about that, Mr. McSwain, is I think you can easily read (1) and (2) not to be redundant, because I think you read (1) to say that's where the possessor themselves are engaging in the activity or -- is engaging in the activity. And (a)(2) is where others are, but their purpose is to have those others engaged in it. So, I didn't

share the Fifth Circuit's bafflement as to what the difference between (1) and (2) is. Why can't (1) and (2) be read the way I've suggested? (1) is the possessor themselves is engaging in the activity --

MR. MCSWAIN: When you talk about the possessor, do you mean the possessor of the place or of the drugs?

THE COURT: The place.

MR. MCSWAIN: The place, okay.

THE COURT: Place. Possessor of land. I mean --

MR. MCSWAIN: Got it.

THE COURT: -- and I'm using possessor because we've got owners, we've got lessors --

MR. MCSWAIN: I understand.

THE COURT: -- we've got operators, we've got squatters. We've got all kinds of folks. So, I'm using possessor. And I think logically, one is written to say the possessor themselves is using the property for that purpose. And (b), the possessor is, for the purpose of allowing others to do it, engaging in that conduct. And I think that the purpose requirement would apply equally to the possessor in both (1) and (2). Chen disagrees. Chen says no. When you get to (2) you don't look at the possessor's purpose, you look at the user's purpose." And I'm having trouble with that

proposition, because I'm not baffled in the way that Chen was baffled.

MR. MCSWAIN: I think the way Chen -- well, first of all, I don't think that Chen is the only case that really analyzes the issue. Some of the other cases, Tubeau, for example, and other circuits, they're not just saying we follow Chen blindly. They're looking at the same statute and they think there is some meaningful discussion there. But to answer your question --

THE COURT: I didn't find it. Just to be candid with you, because we looked for it.

MR. MCSWAIN: (a)(1) and (a)(2) can't talk about the same purpose, or the possessor's purpose in the same way because, if they did that, the statute would be nonsensical and self-defeating. And what I mean by that is you can be a stone cold crack dealer, and you could say that my purpose is to make money. My purpose is not for drugs to be used. And therefore, if you look at (a)(1) or (a)(2) I get off scot free. It would be a self-defeating statute. It doesn't make any sense. You have to look at (a)(1) and (a)(2) and first of all assume that Congress was not simply being redundant. They're not going to have an (a)(1) and (a)(2) --

THE COURT: I don't think they were redundant. And

I don't think (a)(1) and (a)(2) are redundant. And I think if somebody argued as a defendant what you just argued, the Court would say that has no merit. Because we're looking about the use to which the property is being put, either by you as possessor and you doing something there or you as possessor intending for somebody else to do something there. So I think we fundamentally disagree about whether or not they're redundant.

MR. MCSWAIN: Well, maybe we're really (ph) talking past each other. In (a)(2), I think the key is that the possessor is making available for use to others, and it's their purpose -- the others' purpose -- that matters, which is the way that Chen interpreted it, which I thought. And you're disagreeing with that?

THE COURT: Absolutely.

MR. MCSWAIN: Okay. Well, I think if you disagree with that, well then you are running headlong into the absurd situation where a crack dealer could say, "I get off scot free, because my purpose is the only one that matters. And my purpose is to make money."

THE COURT: I think that's word play. And I think in court we'd say that it's word play and say that I defend it. No. We're talking about your use of the property.

You've got this property and you're using it for this purpose. Or, you've got this property and with the intent to allow others to use it for this purpose, while allowing them to do so. That's what I think a Court would say, and that's what I would say.

MR. MCSWAIN: Well, going down that path, I would say that, if you look at the facts in this case, it is a necessary precondition to Safehouse's stated purpose. I mean, they're -- they want to unilaterally say that, "Our stated purpose is to save lives."

THE COURT: Mm-hm.

MR. MCSWAIN: We prevent overdoses. How do you want -- there's some medical reason. But a necessary precondition to that is the use of drugs. That means that 856 covers it. If you want to talk about word play or semantic play, that's word play and semantic play.

THE COURT: Well, we're going to get to purpose and how purpose can operate on many levels, I think, as we get deeper into the discussion. But I'd like to stay on Chen for a moment, okay? To show you the degree to which we've tried to look at this, all right? So, when Chen says GD's (ph) and we're going to read the statute in a different way, they apply a Kemp (ph), right?

MR. MCSWAIN: Mm-hm.

THE COURT: The rule against surplusage. And, as Professor Lewellyn (ph) said in a famous article years ago, "One of the problems with Chen, which are now in vogue but not so much back in the day, is for every Chen there's a counter Chen". And so, the canon against surplusage is all set by the canon of consistent usage. And that is, if a word is -- a word is presumed to have the same meaning throughout the text. So, here we are. And we've got within the very same subsection of a statute, use of the word "for the purpose of". And the Chen court says well, in (1) it means one thing and in (2) it means another thing. So, in applying the rule against surplusage, they're violating the rule against consistent usage. And isn't that a problem for a court in looking at what, I think, in tableau they talk about the logic of Chen. I'll be honest with you. I'm grappling with the logic of Chen and not quite seeing it. What would your response be to the violation of the rule in favor of consistent usage?

MR. MCSWAIN: My response would be to frame it slightly differently. Purpose in both one and two has the same meaning in terms of purpose meaning object, goal, whatever synonym you want to use. But the key is whose

purpose?

THE COURT: Oh, okay. Yeah.

MR. MCSWAIN: So you have to look at -- you have to look at the context of the whole statute and all the words in one and two and the broader statutory scheme to come up with the logical conclusion, really, I think the only logical conclusion is that whose purpose in (a)(2) is the user's purpose and whose purpose in (a)(1) is the possessor's purpose?

THE COURT: So Congress without explicitly drawing that distinction uses purpose, you know, one after the other in the same statute and just leaves it to the reader of the statute to then infer that in (2) it's the purpose of the user? I mean, that's what you're really asking me to conclude.

MR. MCSWAIN: Well, I'm asking you to conclude that on all of the words in (1) and (2), so here are some of the key differences if I could enumerate them?

THE COURT: Well, there's only one I'm interested in, okay? In (2) we have -- in (1) we have knowingly and for the purpose of. In (2) we have knowingly and intentionally for the purpose of. So would you agree with me that if you add intentionally in (2) your -- that's a somewhat perhaps

higher standard that would need to be met for purposes of criminality.

MR. MCSWAIN: I think that the positioning of knowingly and intentionally in (2) is different, for example, of the positioning of knowing in (1), so let me just -- let me describe for a moment what the differences are between (1) and (2) textually because I think they really are important. And it's important to look at all of them.

THE COURT: I'll give you the leeway to do that, but --

MR. MCSWAIN: Okay. See if I can convince you.

THE COURT: That's what you're here to do.

MR. MCSWAIN: In (a)(1) it says knowingly open. That again is consistent with the idea of directly opening a drug house, knowingly open, whereas the beginning of (a)(2) talks about manage or control. It's more indirect. You're not knowingly opening a drug house. You're just managing or controlling a place.

And then also you have in (a)(2), very important that you don't have in (a)(1), make available for use. That sort of changes the whole tenor of (2) compared to (1). (1), again, is direct. Don't you open yourself knowingly open directly a drug house. Number two is talking about making

available for use. Well, making it available for who? Making available for others. Making it available for the people that Chen was talking about and every other circuit that has looked at this, all five courts.

So you also have with or without compensation. I think that's consistent because you don't have with or without compensation in (a)(1). You have --

THE COURT: Well, that's because (a)(2) is addressing a wider variety facility, right?

MR. MCSWAIN: Correct.

THE COURT: Yes.

MR. MCSWAIN: But that's also --

THE COURT: The rave, the rock concert, et cetera.

MR. MCSWAIN: Correct, but that's also consistent with the idea of making available for use to others because in a lot of those situations where you're making available for use for others, you're not making money yourself. You're not in it for the profit. You just happen to know, you have the knowledge that there's drug use at your location and that's why Chen and other courts have said you can't have a willful blindness instruction in (a)(1), but you can have one in (a)(2) because in (a)(1) it's direct.

THE COURT: Oh, I agree with that. And candidly I

think the Court has tied themselves up in knots to a certain degree because you can still have willful indifference conduct -- a standard instruction even if the purpose in (a)(2) first to the possessor of the land. But let me ask you this. Did Chen say anything about intentionally in its discussion? I mean, did they even mention the fact that intentionally also appears in (a)(2)? Because again, I didn't see it.

MR. MCSWAIN: I don't think they discussed that, but I think the fact that knowingly and intentionally is in the middle of (a)(2) and not in the beginning of (a)(2) matters. They're talking about knowingly and intentionally renting, leasing, profiting from or making available for use the place for the purpose. That's consistent with intentionally making available for others, not for yourself, not to set up the drug house yourself, because (a)(1) and (a)(2) are different. We have to assume that Congress didn't just make a mistake and --

THE COURT: Well, but --

MR. MCSWAIN: -- having it overlap.

THE COURT: I actually think Chen may have shed a little light on the argument you're making now and I'd go to Footnote 9. Okay? And this is what Chen says. "Our research reveals at least 16 federal criminal statutes that use the combination of knowingly and for the purpose of. A review of

those shows that the purpose requirement clearly goes to the actor in the statute, the one who has the knowledge." Right?

And so if based on that review of 16 criminal statutes they said that that requirement would go to the actor, which in this case is the possessor, and it would go to them as (a)(1). Why not (2) as well? I mean, why doesn't the same analysis apply there that it carries all the way through to the actor if in 16 federal criminal statutes where those terms are combined that's the individual to whom it refers? That's why I --

MR. MCSWAIN: But you -- you would have to look --

THE COURT: -- have a problem with Chen.

MR. MCSWAIN: I would say -- I mean, I haven't looked at all 16 of those cases that are cited in Footnote 9, but --

THE COURT: It's statutes actually.

MR. MCSWAIN: -- or those statutes, but if you're going to look at those statutes, again, we'd have to look at the whole statute. You have to look at all the words in the statute and that would inform whether -- that would inform whether purpose is referring to one person or another. Here we have to do the same thing. When you look at (a)(2) and you see the additional words, "or make available for use," you see

the additional words "with or without compensation" we know there's already an (a)(1). The logical conclusion is that (a)(2) is referring to others' purpose.

THE COURT: But doesn't it say knowingly and then right after knowingly comes and intentionally? I mean, it follows right after knowingly in (2), does it not?

MR. MCSWAIN: Yes, that you knowingly and intentionally make available for use somebody else doing something for their purpose. There's no inconsistency there. There's no barrier you're running into just because they use the words knowingly and intentionally to (a)(2). It has to refer to the possessor's purpose. It can refer to the user's purpose because it's talking about, right after those words, "or make available for use," implying that it's made available for use to others. Otherwise, why would those words be in there?

THE COURT: Well, I'm supposed to give meaning to every word, correct? And so I'm supposed to give meaning to the word intentionally. And so you would agree with me that I have to grapple with in (a)(2) Congress has added in addition to knowingly and for the purpose of, knowingly and intentionally for the purpose of.

MR. MCSWAIN: I agree. Every word of the statute

should have meaning, but here it's easy because Safehouse knowingly and intentionally is making available for use to people who are going to bring heroin onto the property and use it. There's no hard, factual issue.

THE COURT: Well, we're going to --

MR. MCSWAIN: There's no (inaudible).

THE COURT: -- we're going to get to purpose in a moment and I think I'll get off with Chen and his progeny and everything else. But before I do I just wanted to touch on one of the other cases the government cited, and it was the Third Circuit case that they cited. It's a non-precedential case, but it is a case that you cited. And it was written by Judge Schwartz joined by Chief Judge Smith and joined by former Chief Judge Sirica (ph). And so do you have that handy?

MR. MCSWAIN: I don't have it in front of me but I'm familiar with the case if --

THE COURT: Right, and --

MR. MCSWAIN: -- you want to ask me a question about it?

THE COURT: Yeah. I mean, I want to look at how the Third Circuit when they were addressing the statute couched it because even though it's a non-precedential case I guess it's

persuasive authority like a circuit decision that's not within the Third Circuit. And there you had a conviction under (a)(2) for use of an apartment for purposes of drug dealing. And the Court reviewed the evidence and they upheld the conviction. And in doing so they said accordingly the jury was entitled to infer Bachman (ph), he was the defendant, intended that the property be used for manufacturing and storing controlled substances.

Now again, Mr. McSwain, this is under (a)(2) and in that case the Third Circuit looked to the possessor's intent and the possessor's purpose in deciding whether or not the conviction could be sustained. So what am I to make of that as persuasive authority in terms of my concerns with Chen? Hasn't the Third Circuit looked at the statute through the same eyes that I'm looking at it through?

MR. MCSWAIN: We cited that case for the general proposition that a statute or a conviction under 856 (ph) was upheld, but it's non-precedential for a reason, honestly, Your Honor. It's not something I think you should rely on. When the Third Circuit issues non-precedential opinions it's for a reason. It's because they don't go through the same kind of vetting, the same kind of analysis, offer much longer opinions, opinions that are then circulated to the whole Court

before they're issued where they would have looked much closer at (a)(1) and (a)(2). And I think that language that you're citing is a little bit loose. I don't think that it's accurate. I think that (a)(1) and (a)(2) are different and it was a matter of them upholding the conviction in a short, non-precedential opinion. And the Third Circuit is also very strict about not relying on non-precedential opinions if we're having a Third Circuit argument in this case.

THE COURT: I rarely cite them and I raise it in part because the government did. But it just -- it struck me as interesting that at least on their review of it they seemed to have the same general take that I did. So we'll see what all that means later.

Let's sort of, if we can, transition because -- and you've been there already, to the issue of purpose, okay? And Safehouse, I mean, you say this -- the meaning is plain here. And this is illegal and Safehouse is now -- and I'll call this an ordinary meaning argument rather than a plain text argument or a plain meaning because that's fraught with peril as well. And in support of that on the definition of purpose, Safehouse cites the various dictionaries. And I'll begin with the observation I'm not a huge fan of citing to dictionaries, but the supreme Court does so. Did so in Yates and last week

the Court of Appeals en banc did so and said we begin there.

So Safehouse says, if you look at Black's Law Dictionary, purpose is "an objective goal or an end." And then they cite Merriam Webster and they say purpose is "something set up as an object or end to be attained." So let me just ask you, in your view, what is the objective goal or end that Safehouse is pursuing with this proposed project?

MR. MCSWAIN: Well, there are a number of objectives or goals. I don't quarrel -- I don't quarrel with the dictionary definition of purpose. I would say that there's the threshold question of whose purpose matters, but we've already kind of talked about that --

THE COURT: Right.

MR. MCSWAIN: -- between (a)(1) and (1)(2). But certainly cases -- there are plenty of cases out there that say that as long as a purpose, meaning a purpose, that's enough in (a)(1), that you don't get to unilaterally just say that I have one purpose and I hereby declare what my purpose is. Just like my --

THE COURT: That would be silly.

MR. MCSWAIN: Right, just like if you're --

THE COURT: (Inaudible), right.

MR. MCSWAIN: -- the crack dealer and you say that

my purpose is just to make money. Well, that's not really going to be good enough. Again, but I think the reason for that is because you have to look at what is a necessary precondition to all the other purposes you might talk about? So if you're the crack dealer and you say I'm just going to make money, well, it's a necessary precondition that there's illegal drug use on your property and you're inviting people to do it.

And if you're Safehouse, if you say your purpose is to save lives, that's a laudable purpose, but it's a necessary precondition that you're inviting people onto your property to break the law. And so therefore that purpose, I think, would violate (a)(1).

THE COURT: Isn't Safehouse going to get up and say, well, before anybody injects on our premises we first assess them and we've given them an offer of service? And our goal would be to prevent them or dissuade them from using drugs, and we proceed to injection only when that initial purpose has failed. And coincidentally, if they do inject it remains our purpose to dissuade them from using drugs and then in an emergency save their life so that ultimately we hope to dissuade them from using drugs. Is that not --

MR. MCSWAIN: They've never said that. They've

never said that. It would surprise me if they were to say that. It's directly contrary to what Mr. Benitez said. I know we're not going to get into the testimony, and you made that clear, but for us to say that Safehouse's purpose is to stop people from using drugs and when people come in they're going to give them a speech about don't use drugs --

THE COURT: Well, it's not a speech, but they are assessing them and offering them services and services would include medically assisted treatment, correct?

MR. MCSWAIN: I think that it would be engaging in make believe for us to say that the purpose of Safehouse is to stop people from using drugs. The purpose of Safehouse -- the purpose of Safehouse is their medical -- they profess to be their medical purpose, but I think that it's clear that a necessary precondition is the use of drugs. And certainly the purpose of the people coming to the facility will be to use drugs.

Again, I don't want to belabor Mr. Benitez's testimony, but --

THE COURT: Don't.

MR. MCSWAIN: -- he was talking about, you know, what -- well, Safehouse in general. I won't talk about Mr. Benitez, but Safehouse in general --

THE COURT: We can proceed to discovery in trial, but I mean, I don't think that's what we were here to do.

MR. MCSWAIN: Well I would just say that there's no support in the record for the hypothetical that you're describing.

THE COURT: All right. So when they say assessment of physical and behavioral health offer of services, what do you take that to mean?

MR. MCSWAIN: Could you repeat that please, Your Honor?

THE COURT: Well, I'm looking at Exhibit 1 to the government's complaint. And after registration it says "Assessment of physical and behavioral health offer of services." And that's in advance of anybody entering a consumption room.

MR. MCSWAIN: I don't think any of those services are designed to stop people from using the consumption room. I think that the reason that they're there and the reason that Safehouse exists is so that people can come and use the consumption room. So again, I think this is going down a path that is just anti-factual.

THE COURT: Okay. And then that may be defined by the scope of the Pleadings. And maybe we read the Pleadings

differently, but we'll wait and see what Safehouse has to say.

Let's say I certainly agree with you that there's no merit to an argument that the sole purpose would have to be unlawful, that -- an unlawful purpose would suffice. Where -- is there any limiting principle to the statute that you see?

MR. MCSWAIN: Well, there is a limiting principle I think in the Courts that have discussed the idea of a purpose of a purpose being enough under (a)(1), have talked about how it can't just be an incidental purpose.

THE COURT: Right.

MR. MCSWAIN: It can't be just sort of something very minor and Safehouse cites in their briefs, and I wanted to get into some of these hypos about, say, a child is a drug addict and they come home and they're using drugs in their parent's home and could that possibly be actionable under 856? That would only be an incidental purpose. And presumably --

THE COURT: Yeah, that is. I agree with you. Let me give you a different hypo that's similar but --

MR. MCSWAIN: Okay.

THE COURT: -- but related. And that is it's an adult child, so it's not in loco parentis. They are using. The parent's said don't use and finally said move in. We don't want you to use, but if you're going to use we want you

to use right here in our presence and we've got Narcan here. So shoot up but do it while we're here and do it while we can resuscitate you. Would that be reached by (a)(2)?

MR. MCSWAIN: I think it wouldn't because of the words you said about "don't use." That's not their purpose for their son, their adult son or adult daughter to be in the home is to use drugs. They're trying to stop that person from using drugs. And let me take your hypo one step further since we're in this grey area --

THE COURT: Sure. That's fair.

MR. MCSWAIN: -- where if those parents knew that their son or daughter had a major drug problem and knew that their friends had major drug problems and their friends liked to come over to the house and use drugs and then they said to their son or daughter, "Hey, you know what? I'm going to the Bahamas for a month. You know, you know where all the food is. You know the phone book" --

THE COURT: You're taking my hypos for Safehouse.

MR. MCSWAIN: Right. No, I'm saying, "I'll see you later. I'll see you in a month." And if during that month that house turned into party central that could be a violation of 856.

THE COURT: Okay.

MR. MCSWAIN: That could be a violation under (a)(2), okay? So now these hypos I think are very useful --

THE COURT: Right.

MR. MCSWAIN: -- but the initial hypo that you asked me about would not be a violation of the 856 because it's only incidental and the parents are trying to stop the drug use.

THE COURT: But let me ask you this very precise question. Is it the government's position that Safehouse is trying to promote the use of illegal narcotics?

MR. MCSWAIN: It is the government's position that as a necessary precondition to everything that they want to do that illegal drugs are going to be used, and that is prohibited by Congress expressly.

THE COURT: I understand the government's position, but what's your answer to my question?

MR. MCSWAIN: Whether they're trying to promote it or not?

THE COURT: Yeah, right.

MR. MCSWAIN: I think that it is inevitable that they are, in fact, promoting it. And again, they haven't -- they haven't alleged, I don't believe, and without focusing on the testimony, although Mr. Benitez did talk about this, they haven't said that there's going to -- it's going to be more

successful getting people into treatment than what we already have in Prevention Point. So the purpose of Safehouse is not to get people into treatment because Prevention Point is already doing that.

THE COURT: Right.

MR. MCSWAIN: And the testimony is consistent that it's not going to be any more successful at Safehouse than it already is at Prevention Point. So therefore, the logical implication of setting up Safehouse is that there's going to be more drug use. So yes, they are promoting drug use.

THE COURT: Okay. But is there going to be more drug use than is occurring outside the door or over at MacArthur Park (ph)?

MR. MCSWAIN: I think you can argue either way. Certainly we would argue that there would be. We believe that there would be, but again, you have to come back to the statute. I mean, we've kind of -- we've wandered pretty far away from 856.

THE COURT: Oh, I'll -- I'm testing the limits of 856.

MR. MCSWAIN: If there's more drug use on the property, which is what 856 cares about then it's a criminal violation. What happens in the rest of the neighborhood, what

happens in the rest of the city may be theoretically interesting but it's ultimately irrelevant to the question before you.

THE COURT: If the question before me is purpose I'm not sure it's irrelevant. Let me try a different hypothetical. We know that already Prevention Point is doing needle exchange. We know that they routinely respond to overdoses. Say Safehouse says we're going to buy a lunch truck and we're going to retrofit it and we're going to have our oxygen and defibrillator and our Narcan there and we're going to pull up to the park where people shoot up every day and open the window and we're going to just assume people will come and shoot up there in front of our emergency vehicle.

Literally the statute doesn't apply to that, correct?

MR. MCSWAIN: I think that's correct because it doesn't -- they're not knowingly opening a place and they're not manager or control any place. so I think --

THE COURT: But yeah --

MR. MCSWAIN: -- the statutory language doesn't reach it. And again, that's what matters, the statutory language.

THE COURT: They're doing everything but in a mobile

unit.

MR. MCSWAIN: Well, if they were to have people come into the mobile unit that's different. But if they were just to pull up next to a public park, no, I don't think 856 would reach that. And those distinctions matter.

THE COURT: All right. Earlier we talked about the medical background of the Controlled Substances Act, right, and I said I think it's in the background of the case because I don't know that the exemption and the authorization provisions directly apply, although maybe we'll touch on that in a moment. But if you look at the 2003 refinement of the statute, certainly what was on the minds of Congress at that point did not involve any type of provision of medical services. Would you agree with that?

MR. MCSWAIN: I'm sorry, could you repeat that, Your Honor? I apologize.

THE COURT: Well, we're talking about raves. We're talking about concert venues. We're talking about other venues where people will go for purposes of use of illegal drugs. That's what was within the -- if we look at the debate that consumed Congress at that time those were the subjects on which they focused, correct?

MR. MCSWAIN: Yes, but I don't think you can ignore

the rest of the Controlled Substances Act, which I think directly addresses the idea of medical use of heroin which is prohibited.

THE COURT: Right, but Safehouse, let's say I'm not enamored of their argument that this is an authorized use, but they do point out that Congress was careful to say that there are certain activities on the part of medical providers that will not be reached by the Controlled Substances Act.

And if we're in a situation where explicitly this type of situation is not addressed, is that background relevant? You know, Congress says in some instances we take into account whether it's predatory conduct or whether there is some other purpose being served. What's your reaction to that?

MR. MCSWAIN: My reaction is that Congress has expressly ruled on this. It's 21 United States Code 812(b)(1)(B) and they have rejected the heroin is safe for use even under medical supervision. Again, what that stands for and then interpreting a very similar situation in the Oakland cannabis case, when Congress says no, no means no. And they've explicitly already addressed this issue even though it's a broader issue than just a debate about injection sites themselves. So the broader includes the lesser.

THE COURT: I understand your position, Mr. McSwain. Getting back to this issue of whether or not Safehouse could seek an exemption for the conduct that it wants to pursue, and I'm not sure how much weight this has or that it really has any bearing, but let me turn to the question that I sort of threw out earlier, which is within the statute, at least I didn't detect any mechanism that would allow for them to apply for permission to conduct and activity such as this. Can you steer me to any that exist?

MR. MCSWAIN: I don't think there is one that really exists. This is not a research project, for example. But the fact that there isn't one also highlights that they haven't even tried. They haven't tried anything in the state legislature. They really haven't tried anything in city council either and certainly haven't tried. And one of our main arguments, as you well know, is that they're on the steps of the wrong institution. They're on the steps of the courthouse. They should be on the steps of the legislature. They should be asking Congress to change the las and there should be a public debate about that, and we welcome that. Okay?

Like I said in the beginning, we're all on the same side here and Congress in the CARA (ph) Act in 2016, and the

support Act after that, is laser-focused on the opioid epidemic and they have never approved of injection sites. So this debate needs to happen in Congress. The public policy debate does not belong in the courthouse when it comes to this statute.

THE COURT: So I think what Safehouse would say is, well, we're in the courthouse because of A, of the threat of prosecution and then, B, the government decided well, we're not going to prosecute. We'll do this through a declaratory judgment action and that it's the government that should go to Congress because if it's not illegal then we ought to be able to do it.

And so -- and I -- look, you're going to disagree with that, but let me put that in the broader conduct -- context that you're raising, which is what's the appropriate venue to decide these issues?

MR. MCSWAIN: Mm-hm.

THE COURT: Because there's no doubt that Congress writes statues and sometimes the Courts are left to apply and interpret. But as I read the law, that happens in the civil arena, so it happens with civil RICO and it happens with Title VII. But I don't see that it happens in the field of criminal law where generally speaking Courts are urged and in many

instances do, in fact, exercise restraint saying that when it comes to the criminalization of activities that is uniquely the decision of the legislature.

And this sort of, I guess, backs us into the rule of lenity discussion, right, which I know you said doesn't apply. And I think on one level it doesn't apply. But isn't there an institutional separation of powers seen to the case law on the rule of lenity? And haven't -- hasn't the Supreme Court itself repeatedly said that when it comes to criminalization if it's not clear that's the role of Congress. What would your reaction be to that?

MR. MCSWAIN: First of all, if you're suggesting that there's no such thing as federal criminal common law, I agree with you. It's sort of one of the starting points that it's all supposed to be statutory.

THE COURT: Right.

MR. MCSWAIN: So yes, we have to look at the statute.

THE COURT: Right.

MR. MCSWAIN: But here the statute, I think, is clear and certainly as Your Honor recognized during the last hearing it's sort of self-evident that the people who are coming onto the property would be violating the law, violating

--

THE COURT: They are. That --

MR. MCSWAIN: -- absolutely.

THE COURT: No doubt about it.

MR. MCSWAIN: Right. So if the people coming onto the property have the purpose of breaking the law and they are breaking the law, and the person is setting up the property so that the law can be broken, are themselves liable. That's very clear and the rule of lenity only applies when courts look at a criminal statute and they literally throw their hands up in the air and say, "I can't figure this out for the life of me. This doesn't make any sense at all." Okay. There's grievous ambiguity as I believe the Supreme Court has described it, so we're going to apply the rule of lenity.

That's not the case here at all. And that's why, for example, five circuits have looked at this and none of them have found any grievous ambiguity or any ambiguity at all.

THE COURT: Well, none of them has looked at a safe injection site.

MR. MCSWAIN: No one's looked specifically at these facts, although again you have Safe Stock (ph), which we already talked about, but they have looked at the statute and the way they've interpreted the statute would clearly cover

what we're talking about here. Again, because there's no -- there's no question that the people coming onto the property are there to break the law. Now, if that were -- if there were a grey area there I'd have a much harder argument, okay? That would be a totally different situation. Here we've got a slam dunk situation where every single person who's there is invited to come onto that property to break the law. That can't --

THE COURT: Oh, yeah.

MR. MCSWAIN: -- be allowed.

THE COURT: Okay, but again, if you want to look at the overall structure of the statute, right, that person coming onto the site to use will face a year, or depending on their record, three years for use and a nonprofit medical entity with a harm reduction strategy seeking to save their life would face a 20-year penalty.

Now, I'm not suggesting that Congress did that, but I am suggesting that it seems improbable to me that Congress would be doing that. And I am suggesting to you that that lends further weight to the suggestion that perhaps this was not within the contemplation of Congress. And that recognizing these divisions of power should a federal court be careful in extending that degree of criminality to this

conduct? That's the question I'm asking.

MR. MCSWAIN: Well, even Safehouse itself and Mr. Benitez said that they hadn't done this before because they thought they'd lose their building or they basically knew it was illegal. So what has changed over the 11 years that he's been working at Prevention Point? What's changed is that Safehouse has just gotten to the point where they said we know better. We know better. We're going to do this --

THE COURT: Well, either that or it's the death toll.

MR. MCSWAIN: Well, the opioid epidemic has been going on for years and also we are making a lot of progress. I know we don't want to get into the facts and evidence --

THE COURT: And that's the only comment I've made that's gotten beyond this record, but --

MR. MCSWAIN: Okay.

THE COURT: -- I felt compelled to make it.

MR. MCSWAIN: But I think that the way we brought this case, Your Honor, also points to the fact that this shouldn't happen. We shouldn't have the kind of criminal confrontation that you're contemplating. Okay? There's not going to be a -- there isn't going to be a situation, I presume, where somebody faces that sort of liability if the

Court, we think properly, says this isn't allowed. And there's a civil case where you can say it isn't allowed. And --

THE COURT: And I previously commended you for proceeding in that way.

MR. MCSWAIN: Well, thank you. I really -- we're all on the same side here in trying to deal with the opioid epidemic, but Your Honor, I think the hubris here is pretty astonishing from Safehouse.

THE COURT: Well, (inaudible) --

MR. MCSWAIN: They literally are to the point where they're saying we know better. We're going to do it anyway so we have no choice but to bring this case and we brought a civil case to give you an opportunity to rule. And I don't think that we are the bad guy for doing that.

THE COURT: I'm not calling you the bad guy and I've commended you for proceeding in this way, but the -- I have a hard time attacking the motive of folks on the front lines of what you say is (inaudible).

MR. MCSWAIN: Well, thank you.

THE COURT: So that exhausts my questions unless there's any other burning point you would like to make?

MR. MCSWAIN: No, Your Honor, but could I reserve a

couple minutes to respond?

THE COURT: I'm not going to cut anybody off here. I think you've already seen that with this Court.

MR. MCSWAIN: Okay, well, thank you.

THE COURT: (inaudible) we're not on that tight of a time schedule. And why don't we just take a five-minute break and then we'll resume. Thank you.

THE DEPUTY: All rise.

(Off the record at 2:02 p.m.)

(On the record at 2:10 p.m.)

THE COURT: I have a whole separate kind of questions for you, Ms. Eisenstein.

MS. EISENSTEIN: (Inaudible). Good afternoon, Your Honor. If I may make an introductory statement and I think some of this goes without saying, but Safehouse has a singular purpose, which is to save the lives of our loved ones who are suffering from opioid addiction and our community, which as this Court is well-aware, is ravaged by this overdose crisis. And we're accomplishing that mission by keeping people who are at risk of overdose in close proximity to medical care.

We strongly dispute the idea that drug use is a necessary precondition to fulfilling our purpose. We want nothing more and the purpose of Safehouse is directed entirely

at people ceasing the use of drugs and hopefully entering into treatment. There would be nothing better than for Safehouse to not be needed. Unfortunately, the time that we have between the time that a person consumes and the time that they need rescue from Naloxone or respiratory support and emergency care is preciously slim. And the directive of Safehouse is to close that gap, that very small gap in time that can be the difference between life and death.

Federal law in our view does not require we cast people out of the reach of medical care at the time when they are most vulnerable, which is the time of consumption and the immediate time thereafter. And that is the necessary consequence of the government's position here.

We believe that if Congress were to intend that it would have said so explicitly and that this statute, which as Your Honor pointed out in the questioning before, was in no way directed at supervised consumption or the overdose crisis that we presently face. It in no way explicitly addresses that or even implies that it was getting at the kind of public health and medical intervention that Safehouse intends to create here in Philadelphia.

THE COURT: All right, let's get to the statute.

MS. EISENSTEIN: Let's do it.

THE COURT: Right under (a) it says "except as authorized by this subchapter," and I really don't follow your argument that unless this activity is specifically prohibited it's authorized. It might be one thing to say, well, unless it's specifically prohibited it's not criminal, but I really don't see how you get to authorized.

MS. EISENSTEIN: Your Honor, I think it derives, and I know you said you aren't too convinced by Argue (ph) v. Gonzalez, but if you'll bear with me in the part of Argue v. Gonzalez where it talks about the general approach of the Controlled Substances Act to medical practice, it references back to one of the seminal cases dealing with the Controlled Substances Act, which was Moore. And Moore was a case that dealt exactly with this except as authorized by language in Title 21 United States Code 841.

THE COURT: I'm familiar with Moore.

MS. EISENSTEIN: So it was the same language there that Moore evaluated and then Gonzalez evaluated when the Supreme Court in both instances found that Congress does not regulate the legitimate practice of medicine. And that that is not an explicit authorization within the statute but that that is an implicit factor in what the Controlled Substances Act -- except -- except, and this is the important part of

Gonzalez, the important part of the cannabis buyer's case that the government relies upon and an important part of the Moore case -- except where Congress has said so explicitly.

And I'll read to you just for a moment from Oregon. It says, "When Congress wants to regulate medical practice in a given scheme, it does so by explicit language in the statute. And beyond that the statute manifests no intent to regulate the practice of medicine generally." And so but that -- so the reason we put it under that portion of the text was because that was the -- that was where it derived from from Moore and then that was the principle that was articulated from back in Oregon.

THE COURT: Well, yeah, let me ask you the threshold question I asked the government then. Is it Safehouse's position that either in 1986 or 2003 Congress contemplated safe injection sites? And when they have had to if you're authorized argument has merit? And I don't think they did.

MS. EISENSTEIN: Well, Your Honor, what I do think that Congress contemplated is they did contemplate what the scope of medical, appropriate medical care could be. And Congress articulated a scheme that is detailed in extraordinary -- in an extraordinary measure as to the do's and don'ts for medical practitioners in expressly enumerated

regimes.

And so it regulated medical practice in a very intentional way. And what the Supreme Court held is where it doesn't say that a doctor can't do something a doctor can do those things within good faith within a medical practice. And that's the standard that not only the Supreme Court articulated but that juries day in and day out are applying when it comes to trials of doctors who are allegedly engaged in pill mills or illegal drug distribution.

And so Congress did contemplate what doctors can and can't do. And I add --

THE COURT: Well, in Gonzalez the Supreme Court was addressing an affirmative regulation of medical practice. And that's really not the situation we have here. We have the government saying there's a criminal statute that bars the activity. And I'm still having difficulty seeing where this is either authorized or it fits within the Gonzalez principle.

MS. EISENSTEIN: So there's two parts to the Gonzalez decision. The first part talks about the scheme as a whole and that's where I think the important piece of this puzzle comes in because they (inaudible) the core criticized the Department of Justice for arguing that the Attorney General could impliedly criminalize physician-assisted suicide

where the statutes and the regulations hadn't expressly done so.

We think the case is even stronger here. In that case the doctor was actually prescribing a controlled substance for an activity that the government deemed to be improper. Here none of the activities that are regulated by the Controlled Substances Act are going to be performed by Safehouse at all. There's no dispensing, administering, prescribing, storing or distributing drugs by Safehouse at all.

THE COURT: But on your premises they would be using those prohibited drugs?

MS. EISENSTEIN: There would be -- there would be using which is not by my (inaudible) a prohibited act under the statute but possession is something that we're not doing. There's no way in which we could reasonably interpret it to be, let's say, in constructive possession of the drugs that are in the participants' pockets. So what the government wants to do is impute whatever criminal liability might follow from the people who are benefiting from Safehouse's services. They want to impute the criminal liability to us simply because they're on our premises. And I don't --

THE COURT: Well, let's go back to the idea of

medical practice, right?

MS. EISENSTEIN: Yes.

THE COURT: I mean, safe injection sites are certainly contemplated in the medical literature.

MS. EISENSTEIN: Yes.

THE COURT: But as I understand it there has been no state board or -- and there has been no medical professional board that has purported to prescribe standards for the operation of safe injection sites. Is that accurate?

MS. EISENSTEIN: I think -- I don't think it's entirely accurate, Your Honor, because recently the Philadelphia Board of Health passed a resolution endorsing the operation and the institution of safe injection sites and overdose --

(simultaneous speaking)

THE COURT: But that's a far cry from a regulatory scheme within the profession that would deal with the standards for this type of activity. So I mean, again, I understand that in the literature and I understand as well that among some medical associations there's an evolution toward harm reduction strategies and whether this is appropriate. But in terms of regulated medical practice at safe injection sites at least as far as I can tell, there

isn't.

MS. EISENSTEIN: but, Your Honor, what Safehouse is going to be doing is really no different than what occurs every day when an EMS person appears at the scene and is called to the scene with an emergency medicine physician is presented with someone who has --

THE COURT: On the resuscitation end it's no different.

MS. EISENSTEIN: Right, right, but all that is happening that is different today, that would be different under Safehouse's proposal than what happens today, I should say, is that instead of walking out the door from the syringe exchange after receiving clean consumption equipment, the person is simply allowed to stay under the close -- in the close proximity of someone with Naloxone and training to administer it and provide respiratory support.

THE COURT: And when you say all that happens the government's response would be, yes, but that all that happens falls within the little terms of the statute.

MS. EISENSTEIN: Right, and so the -- so the question there is does it fall within the terms of the statute? So one reason why we think it doesn't fall within the terms of the statute is that not only our purpose but our

actual activities are directed at providing medical care and as Your Honor pointed out, opportunities at every turn for medical treatment.

And I'd like to say a word about that because the government seemed to doubt the idea that we're offering treatment and that treatment is a goal. In their own Pleadings they attach as an Exhibit A our website which specifies not only the treatment options that will be given but also the fact that there is no evidence that offering medically supervised consumption increases the use or rate of use of controlled substances. So in their Pleadings incorporate that standard and we certainly agree with them as well as the -- not only the testimony but what's been recently incorporated into the record in Exhibit 1 certainly makes that clear if it wasn't clear from our Pleadings in the first instance.

THE COURT: All right. I want to get off that is authorized (inaudible) I think that the most you can hope for is that it's not prohibited. I'm having a -- I'm still having difficulty with the except as authorized. Let me turn to unlawful use because you argue that this can't apply because the statute doesn't apply -- or rather define the term unlawful using. And again, it -- just taking an ordinary

meaning approach, isn't it fairly clear that individuals who would be injecting in a consumption room they themselves would be an unlawful user?

MS. EISENSTEIN: Look, I'm not going to -- I'm not going to fight too hard on that point, but I think that the fact that using is not one of the prohibited acts in the Controlled Substances Act does make -- I mean, it is a --

THE COURT: You can't lose -- you can't use unless you possess, and --

MS. EISENSTEIN: Well, Your Honor, that's not entirely true. You can possess but you're not necessarily possessing unlawfully because there's plenty of circumstances, for example, if somebody had a prescription, right, and they were entirely in lawful possession of the prescription, let's say it wasn't -- they were carrying it home for their husband or their wife, right? And they they decide actually at the last minute I'm going to use this substance, they never were unlawfully possessing the substance, but they may have unlawfully consumed the substance.

THE COURT: Well, they were in the instant that they converted it to their own use I think is what the government would argue.

MS. EISENSTEIN: Right. And I don't think we need

to address that metaphysical problem, but I think --

THE COURT: Well, I'm just having trouble --

(simultaneous speaking)

THE COURT: I just --

MS. EISENSTEIN: Yes.

THE COURT: I don't see any real ambiguity in unlawful using and --

MS. EISENSTEIN: This is where I think the ambiguity comes in, and I think it goes to what is the core issue of the statute and why was 856 passed to include unlawful use when it's not a prohibited activity? Because that's really -- that to me is really the question that's raised by, well, you don't have unlawful using as something that's a defined term in the statute, so why did Congress throw it into 856?

And I think that it goes to what is the core concern of Congress when it passed the statute. And this -- when I talk about legislative history I'm not just talking about Senator Biden's statement, which by the way are helpful, but also the interpretation looking at the statute -- the statute's text in its role in the Controlled Substances Act and why it adds to, for example, a drug conspiracy and drug possession and drug distribution offenses.

And the courts that have analyzed it have said

Congress intended to criminalize the use of property for narcotics distribution. And that it's more than just the simple use or casual use of a property. And court after court -- the Courts that in some cases the government cites, have rejected the idea that simple consumption is enough because --

THE COURT: Well, they said incidental use is not enough and the government would say what you have here would not be incidental use. The government would say Safehouse is inviting use on a continued basis.

MS. EISENSTEIN: So we would -- I mean, we disagree with that point of view because I think in some senses the only reason that use is being permitted on the premises is to enable the proximity to medical care and treatment. So it is incidental in the sense of the idea is not to promote, facilitate, encourage the use itself. It's to encourage the ability to be resuscitated, saved and treated at the time and immediately after the use.

But when Congress enacted why did it include use when it enacted Section 856? It had in mind, if you think about the prototypical opium den or crack house that it had in mind back in the eighties when it enacted the statute. These houses were congregating users as part of a drug operation to create, if you will, a market for dealers and others who were

operating drug houses. So it was even though -- even if profit wasn't explicitly an element of the statute, that's the core of why Congress went after use and not just other distribution activities in the statute.

THE COURT: Okay. So if you say we need a definition of unlawful use, what's your definition of unlawful use?

MS. EISENSTEIN: My definition is tied -- it -- I don't dispute the fact that if someone is using drugs that they possess illegally that that's unlawful use. But where I think the limiting principle comes in in the statute is when you combine that with what the "for the purpose of" when you put those together. And what Courts have said is when it comes to use, and that's why I think they've required what I would say is a plus factor in use cases and actually there are really no use cases and that's another point I'd like to get to in a minute, which is we've scoured -- I'll get to it now -- which is we've scoured the records of the federal records and federal published cases and in 33 years we have never found a case where the government has prosecuted a case involving pure use.

And the government has pointed to that.

THE COURT: But the --

MS. EISENSTEIN: So the prosecutorial history suggests that they don't think that just personal consumption cases, cases where there's no distribution activity, where there's no manufacturing activity beyond just somebody using in a property, that the government has never prosecuted --

THE COURT: I know --

MS. EISENSTEIN: -- such a case.

THE COURT: -- you're missing something but under what federal statute would they prosecute unlawful use as compared to unlawful possession?

MS. EISENSTEIN: The use of a property. What I'm saying is they've never used 856 --

THE COURT: Oh, so it's use of a property.

MS. EISENSTEIN: They've never gone and found a group of people who are using an apartment to use drugs and prosecute it under 856. They've never gone to any other location. They haven't, you know, they've looked at rave parties, for example, which is under the 2003 statute. But how does a rave party differ from your everyday rock-n-roll concert that we know is excluded from the statute? It has to do with the degree and the reason for the use. And the use, what I call the plus factor, is that simple consumption, even where the owner or the operator or the manager or control

knows about this unlawful consumption, they see the clouds of smoke. They know what's going on. That's not enough. That is not enough under multiple Courts of Appeals' decisions.

And there's a reason for that because that would have no limiting principle under the statute. So I think when you combine unlawful use with for the purpose it becomes clear that when there's a use case there needs to be something more.

THE COURT: Well, that's a different argument. That's a different argument than saying the statute can't be applied because unlawful using is not defined. So you're -- that goes more to context and you're mirroring some of the government's argument that you look at these words in combination with the other words.

With respect to the contention that the use is incidental, say in the first three months of operation if no one used the safe consumption rooms, would that make the project a failure?

MS. EISENSTEIN: I think it would because hopefully that meant that people were coming to Safehouse. And if no one came to -- it's a public health intervention so if no one avails themselves of the opportunity to get care there, then it is not effective in that sense. But at the outset of someone's arrival the hope is they never would reach the

supervised consumption room. The hope is that they come to the registration desk and they go right into treatment or they get the other types of medical care that they need and that they never reach that place where they need to be part of the supervised consumption site.

Unfortunately, in the case of people suffering from opioid use disorder that's just not realistic in terms of the statistics for the vast majority of people who are suffering from the type of addiction that this service is designed to serve.

THE COURT: All right. We've been skirting around purpose. I'd like to move to purpose under (a)(2) now and you argue at one point in your brief that it's the property's purpose that controls. And how can the property have a purpose? Isn't it the possessor or the owner that has to have the purpose? I'm having difficulty, again, conceptualizing how this inanimate object has the purpose.

MS. EISENSTEIN: Right. So look, I think that there is two facets to the statute. There's the mens rea which Your Honor was focused on with respect to both (a)(1) and (a)(2), which is knowingly with (a)(1) and knowingly intentionally with (a)(2). And then there's a place for the purpose of. And I'd argue that you're right that in some respects purpose

is something driven by people, but it's not exclusively driven by people. For example --

THE COURT: How so? How so?

MS. EISENSTEIN: For example, if you were to walk into this courtroom and there were no people in it, you would readily discern that this was a place for the purpose of holding court. You would know that because of the way it's set up and what it's designed to do. And in the same respect, if you were to walk into Safehouse you would see that it is a place designed for the purpose of providing medical care because you would see all of the medical equipment and the rows of Naloxone and the defibrillator and the oxygen resuscitation and --

THE COURT: Well, isn't that just a factor relevant to a determination of purpose than a technical statutory argument that the purpose only applies to the place? Because clearly if you have a rave, a rave is often in a warehouse and so to take a prototypical example from 2003, and during the day the warehouse may have one use and then at night it turns into a drug-infested party scene on a persistent basis, right? So there --

MS. EISENSTEIN: Right.

THE COURT: -- you would have a nondescript purpose

not tied uniquely to the use of narcotics.

MS. EISENSTEIN: Right, and I think the way that Your Honor put it when -- and some of the Courts have put it this way is what is the purpose to which the premises is put? And I think it's a good way to put it because it's not exclusively driven by the people who enter that property. It is also driven by the features of how the facility is set up itself. So I think that in that sense it is important to look at both factors.

And I think I would also point out that, you know, first of all, I, you know, was -- agree with Your Honor's analysis entirely that when you look at the same language in the statute, place for the purpose of, that it has the same meaning in both instances. And I think our reading, which is is the premises being put to criminal use is really the key question as to the purpose of PRAN (ph). And under the government's reading, the government would like us to read this statute, (a)(2) to criminalize any time someone manages or opens a property and knows that there's drug use going on. Knows that because every time there's drug use going on presumably the person using the drugs have the purpose of using it in that place.

Well, that reads for the purpose, place for the

purpose of directly out of the statute. So not only, you know, the other canon of statutory interpretation is you do have to give every piece meaning and the government's interpretation would make that piece, the purpose piece devoid of meaning. And I think purpose takes on particular importance when you're talking about a medical intervention, and I think it takes on particular significance when you're talking about personal consumption because the Court -- and I can just go through the Courts here because they are so strong on the fact that in Lancaster, for example, it said Section 856 cannot reasonably be construed to criminalize simple consumption of drugs in one's home.

Stetler (ph) said that you must have evidence beyond manufacture for personal use to sustain a conviction. And Russell (ph), which is 2010, which is a Sixth Circuit, each court to have addressed the issue has agreed that the casual user does not run afoul of 856 because he doesn't maintain his house for the purpose of drug use but rather for the purpose of a residence.

So they've made those distinctions. There's additional distinctions in terms of what for the purpose of in the context of use to create a limiting principle in the statue, one that is rationally applied and that can provide

notice to people who are operating -- who are trying to conform to the statute, but also to make clear that you're not going to have liability every time you simply know that someone who is using is simply using on the property. It is there.

THE COURT: But wouldn't the government say you're constructing a facility with a consumption room specifically designed to be a consumption room and that takes us beyond the casual use in a residence? What would your response be to that?

MS. EISENSTEIN: So I think that it is not a residency and it is not casual but it is personal consumption. And I think that the additional facet of having simply clean tables and sterile -- a sterile location isn't facilitating the use in any greater way than is already in existence in current programs. We're already providing all of the consumption equipment through federally endorsed syringe exchange programs. And right now we have to show people the door. The only difference between our proposal and what exists under federally endorsed scheme is that we're allowing people to stay within our facility.

So I dispute a little bit about the idea that we're inviting people for drug use. I think we are inviting people

to stay in order to be proximate even at the time of drug use.

THE COURT: Well, let me test the proposition that provision of medical support and resuscitation that takes it outside the statute. But we'll get back to the famous Wayne and Garth of Saturday Night Live, and every Friday they invite their friends over to shoot up and say and it's a good place to come because we've got the Naloxone right there. Regular event, and that's what they're doing. Statute apply?

MS. EISENSTEIN: So they invite their friends --

THE COURT: Right.

MS. EISENSTEIN: -- for the purpose of using drugs.

THE COURT: But they're there with the Naloxone. Does Naloxone change the mix or not?

MS. EISENSTEIN: No, and I think that actually brings us to the Safe Stock example and as the sort of stark contrast between safe stock, which was the Tubeau medical tent or the Naloxone at the drug party that Wayne and Garth host and what Safehouse is purporting to do. Safehouse is providing the type of medical services that would be available if someone showed up in the ER or if an EMS or if an emergency medical personnel showed up on the street corner in somebody's house in response to an overdose. But they're allowing the proximity to someone who's already planning to use. They've

accepted -- they've taken the consumption equipment from the syringe exchange program. There's someone who has been known and registered and suffering from existing addiction. And the reason that we're allowing them to do that is not to have a party, is not for recreational use, is for the simple reason of being there to provide urgent life-saving care in the event of an overdose rather than having to wait the critical minutes it would take if we had to run out behind a -- even behind a closed door and a runner into the street or blocks down to an apartment -- unknown apartment.

THE COURT: And the government, I think, is saying all right. To make the omelet you need to break some eggs. And breaking the eggs, in this instance consumption, is what violates the law. And so we agree we want to make an omelet but a necessary step in between is unlawful. And then they go on to cite cases that say another motive does not excuse the violation of the law. So how does Safehouse respond to that?

MS. EISENSTEIN: Yeah. Well, it's not a noble motive here. Purpose is an element of the statute so that's one of the critical differences. The cases they cite for purpose doesn't matter are, like, cases where a --

(simultaneous speaking)

THE COURT: They're heavy civil disobedience. I'll

grant you that.

MS. EISENSTEIN: Pardon?

THE COURT: They're heavily into civil disobedience line of cases.

MS. EISENSTEIN: Well, they're more than civil disobedience. One of the cases was a case that they cite where a war protestor goes in and destroys military equipment on a government facility for the purpose of saving lives. Well, that's nothing like what we're doing here. We're not engaging, in our view, in any illegal activity because if you look at what is -- what is Safehouse doing? What is the activities that Safehouse is offering and the services that Safehouse is offering. They are all directed at treatment, at life-saving care and at providing primary medical care and social services to a vulnerable population in need. It's nothing -- this isn't -- the activity that we're doing is not the -- we're not consuming drugs. We're not destroying property.

So I think that the motive there and the purpose, the aim and the objective are critically important in part because of what the statute -- in large part because it's an element of the statute itself. And the government -- an element that the government wants to read right out of the

statute. So I think here purpose is important and I think that if you look at some of the concerns that the government suggested, well, a crack dealer could just say, well, my purpose isn't really dealing drugs. It's to provide for my family and --

(simultaneous speaking)

THE COURT: Well, I sort of dismissed that as word play, but I don't dismiss the argument that an actual physical space which contemplates the use of drugs on a consistent basis could fall within the terms of the statute.

MS. EISENSTEIN: Right. And so I just want to point out that the concern that courts articulated with respect to these alternative purposes is that they -- someone would propose a legitimate cover as a potential excuse or immunity from liability under the statute, you know, if they had a nightclub or a bar or a car dealership that that should inoculate complaints against liability in the statute. But what we're offering here is very different. This is a -- this is -- they can't doubt, particularly given that this is on the judgment for a Pleadings, that this is, and as the facts is pleaded, that this is designed to be a medical and public health intervention. And so this is not some kind of cover story for actually trying to secretly promote drug use where,

you know, where we're claiming that it's really a medical use.

THE COURT: I think I've covered most of the question I wanted to cover, but are there other points that you want to make, counsel?

MS. EISENSTEIN: There is an important point that I think we should cover because it goes to how do you evaluate this statute, which is, you know, we've looked at the words of this statute and we've looked at the words and we've (inaudible) the (inaudible) Act and this also comes from the Gonzalez, the Roy and Gonzalez about Congress is explicit when it wants to regulate medical practice.

I think it's important of what Congress has done. So the U.S. Attorney described the CARA Act, which included federal funding for Naloxone. And it awards federal grant money for entities providing Naloxone treatment. It provides that they should, quote, "maximize the availability of opioid receptor antagonists, including Naloxone, to veterans." And it recognizes good Samaritan statutes that provide immunity for people who provide Naloxone.

But here's the crux. Naloxone only works if there's somebody else there to administer it, somebody who is right there. Without Safehouse, if Naloxone is administered only by happenstance, if a first responder or a good Samaritan or a

Prevention point staff member can run fast enough, is the first -- can find the person quickly enough, is just by chance close by --

THE COURT: All right, so let's take CARA and let's go back to the government's argument and they would say agreed. Why don't you then say to Congress let's amend CARA to deal with what we propose to do? What would your response to that be?

MS. EISENSTEIN: My response would be that there's no need to amend the statute to do what Congress has not prohibited. We have -- we are -- we are permitted to administer Naloxone. We're permitted to provide critical medical care to people suffering from opioid use disorder and Congress has recognized that opioid use disorder is a disease that needs treatment and intervention, particularly this intervention, which is Naloxone. What we are doing is exactly what Congress has asked -- has provided funding for, which is allowing individuals at high risk of overdose death to be in close proximity to the Naloxone that it is funding. It would be ineffectual and it is ineffectual, unfortunately, under the current system where we wait and respond. That's why, unfortunately, we have lost so many people in this crisis.

What Safehouse has purported to do is to close that

gap, and it's really not a gap in the statute, Your Honor. It is a gap in care. It is a gap in care in the current model based on the fear of prosecution that has prevented us from closing that gap and providing Naloxone when it is most urgently required.

THE COURT: All right, thank you, counsel.

MS. EISENSTEIN: Thank you, Your Honor.

THE COURT: Mr. McSwain, I think I've channeled many of the government's arguments in my questions to counsel for Safehouse, but by all means if you want to -- and then I'll grant the same right to Safehouse.

MR. MCSWAIN: Just very briefly, Your Honor?

THE COURT: Certainly.

MR. MCSWAIN: I think when you're looking at the statute it's really important for us to be clear about how the statute here is not silent about the important points having to do with supposed medical use of heroin. Similar to, again, the open cannabis case, here what Safehouse is purporting to do has been explicitly prohibited again, based on the citations that I talked about in my first presentation, our Congress has said there is no medical use for marijuana. When Congress says no, it means no. So we're not in an implied situation. We're not in a situation where you have to try to

guess at what Congress is saying. There's an explicit prohibition.

Similarly, there's an explicit prohibition about using your place for the purpose of drugs. When they talk about, you know, this is the same as EMS, I mean, it's not the same as an EMS intervention. All that's different here is that you're actually using a place which means in other words all that's different is you're actually violating a criminal statute. So it is an important additional step, a distinction that matters. That is the illegality.

And then lastly I would just say it seems like Safehouse is starting to try to change sort of on the fly what they're actually doing. I mean, let's be real. What they are doing is they're inviting people onto their property to use drugs. They're not inviting people onto their property just to get treatment or whatever other services they're offering. The whole purpose here is for people to use drugs.

And what's going to get people to come to Safehouse as opposed to Prevention Point and other places? They can get all that other stuff at Prevention Point. The marketing, the important additional aspect to Safehouse is come here and use the drugs. So when they say that they're not inviting people to use drugs, they're not facilitating drug use, and talking

about the purpose of the users is not necessarily to use drugs, I mean, that's just bizarro world. That's not reality.

If this opens up, the whole point of it existing is for addicts to come and use drugs. So I don't think that we can obscure that fact by pointing to the other services that they will be providing. That's all I had, Your Honor, unless you had any questions for me.

THE COURT: You really were brief, Mr. McSwain, thank you.

MR. MCSWAIN: Thank you.

(Laughter)

THE COURT: Ms. Eisenstein, anything you wish to say in response?

MS. EISENSTEIN: No, Your Honor.

THE COURT: All right. I thank counsel for their briefing and presentation today. And as the saying goes, we'll take this case under advisement.

MR. MCSWAIN: Thank you, Your Honor.

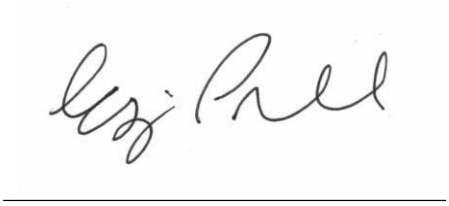
UNKNOWN PARTICIPANT: Thank you, Your Honor.

THE DEPUTY: All rise.

* * * * *

C E R T I F I C A T I O N

We, ASC SERVICES, LLC, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.



DATE: September 6, 2019

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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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*.	

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]

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[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
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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *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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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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	:	

ORDER

AND NOW, this ____ day of _____, 2020, upon consideration of the Motion for Final Declaratory Judgment filed by Safehouse and Jose Benitez (together, "Safehouse")

(ECF No. 137), and the Motion for Summary Judgment and the Opposition to Safehouse's Motion for Final Declaratory Judgment filed by 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 (collectively, "the United States"), it is hereby ORDERED that:

1. The United States' motion is GRANTED;

2. Safehouse's motion is DENIED;

3. Declaratory Judgment is ENTERED in favor of the United States and against Safehouse;

4. It is DECLARED that the establishment and operation of a "Consumption Room," in which Safehouse knowingly and intentionally would provide a place for drug users to use illegal controlled substances, including heroin and fentanyl, violates 21 U.S.C. § 856(a)(2);

5. Safehouse's Counterclaims and Third-Party Complaint are DISMISSED with prejudice; and

6. The clerk is directed to CLOSE this case.

IT IS SO ORDERED.

BY THE COURT:

_____
GERALD A. McHUGH
United States District Judge

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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	:	

THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO SAFEHOUSE'S MOTION FOR DECLARATORY JUDGMENT

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 (collectively, "the United States"), hereby move the Court to enter a declaratory judgment under Federal Rule of Civil Procedure 56 and to deny Safehouse's Motion for Declaratory Judgment. The basis for this motion is fully set forth in the accompanying memorandum of law, which is incorporated herein.

WHEREFORE, the United States respectfully requests that the Court enter an order in the form attached hereto.

Respectfully submitted,

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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. 19-0519
SAFEHOUSE, a Pennsylvania nonprofit corporation, *Counterclaim Plaintiff*, v. UNITED STATES OF AMERICA, *Counterclaim Defendant*, and 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, *Third-Party Defendants*.	:	

THE UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO SAFEHOUSE'S MOTION FOR DECLARATORY JUDGMENT

Safehouse seeks to open the United States' first "safe" injection site in the City of Philadelphia. This radical public health experiment will invite thousands of people onto its property who indisputably have the purpose of injecting illegal drugs. Furthermore, it violates the plain language of 21 U.S.C. § 856(a)(2), which makes it a crime to manage or control any place and "knowingly and intentionally" make the place available for unlawfully using a controlled substance. Because Safehouse's conduct is barred by statute, the United States moves under Federal Rule of Civil Procedure 56 for a judgment declaring as a matter of law that the establishment and operation of a "Consumption Room," in which Safehouse knowingly and intentionally provides a place to use illegal controlled substances such as heroin and illegally obtained fentanyl, violates 21 U.S.C. § 856(a)(2).

On October 2, 2019, the Court denied the United States' Motion for Judgment on the Pleadings. *See* ECF No. 133 and 134. Even though the Court addressed the core legal issue in the case (*i.e.*, whether § 856 permits the operation of a Consumption Room), the Order was not appealable as of right. *See* Fed. R. App. P. 4. In order to arrive at a final appealable order in an efficient and expeditious manner, the parties cooperated to reach a stipulated set of facts upon which the Court could enter final declaratory judgment. That stipulation is attached as Exhibit A.

The United States has set forth its position regarding the law that governs this case. *See* ECF No. 47 (Motion for Judgment on the Pleadings) and No. 115 (Reply in Support of the Motion). The plain language of the statute and the analyses of five circuit courts support the conclusion that Safehouse's proposed conduct is illegal. *See id.* The United States incorporates those legal memoranda herein and, for the reasons set forth in those memoranda and below, the

Court should grant the United States' Motion and deny Safehouse's Motion for Declaratory Judgment.

I. PROCEDURAL AND FACTUAL BACKGROUND

The United States commenced this action on February 5, 2019, by filing a Complaint for Declaratory Judgment against Safehouse. ECF No. 1. An Amended Complaint was filed on May 28, 2019, naming Safehouse and its President and Treasurer, Jose Benitez, as defendants. ECF No. 35. According to its website, Safehouse "seeks to open the first" supervised injection site in the country. Ex. A, Stipulation of Facts No. 1. Safehouse will maintain a "Consumption Room," where participants can use illegal drugs including heroin and illegal fentanyl[1] under the supervision of Safehouse's staff. *Id*. Nos. 2-3. Safehouse intends to offer *the same* social services that are already provided by Prevention Point Philadelphia. *Id.* No. 5-6. The only difference between what Prevention Point currently offers and what Safehouse would offer is that Safehouse will allow drug users to use its supervised consumption and observation rooms, in which users may engage in supervised illegal drug consumption. *Id.* No. 6.[2]

The Government's core contention is that Safehouse's Consumption Rooms violate § 856(a)(2). That section, in relevant part, makes it a felony for persons to "manage or control any place" that they "knowingly and intentionally . . . make available for use, with or without compensation . . . for the purpose of unlawfully . . . using a controlled substance." Asserting that

[1] Under § 844(a), it is illegal to possess fentanyl without a valid prescription or order issued by a licensed practitioner.

[2] Indeed, the entities are directly connected in that defendant Jose Benitez is Safehouse's president and treasurer and Prevention Point Philadelphia's executive director. Ex. A, Stipulated Facts No. 4. It even appears that the City of Philadelphia has urged Safehouse to open within the walls of Prevention Point Philadelphia. *See* "Supervised injection at Prevention Point?" available at https://whyy.org/articles/supervised-injection-at-prevention-point-ahead-of-major-ruling-safehouse-lacks-location-and-funding/?utm_medium=email &utm_source=engagingnetworks &utm_campaign=newsletter&utm_content=WHYY+News+Daily+01/17/19.

Safehouse's "operation of Consumption Rooms would do exactly that," ECF No. 35 ¶ 15, the United States seeks a declaratory judgment that Safehouse's "establishment and operation of any Consumption Room . . . will violate 21 U.S.C. § 856(a)(2)." *Id*. at 8. Safehouse answered and filed counterclaims, seeking a declaration under 28 U.S.C. § 2201 that its proposed model does 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. After full briefing, the Court heard oral argument on September 5, 2019. ECF No. 129.

On October 2, 2019, the Court issued a memorandum opinion and order denying the United States' Motion for Judgment on the Pleadings. ECF Nos. 133 and 134. The Court's ruling addressed the issue of whether § 856(a)(2) prohibited Safehouse's proposed Consumption Room. The Court did not consider the application of § 856(a)(1) to Safehouse and did not reach the issue of Safehouse's affirmative defenses asserted pursuant to the Commerce Clause and the Religious Freedom Restoration Act.

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material issue of fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, the parties have stipulated to the facts material to the issue of whether Safehouse's proposed

Consumption Rooms violate § 856 for the purpose of the present cross-motions.[3] *See* Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to . . . stipulations (including those made for purposes of the motion only)[.]"). Given the parties' stipulation, there is no genuine issue as to any material fact in this case bearing on the question of statutory interpretation. In the January 6, 2020 Stipulated Scheduling Order, the parties reserved the right to conduct further discovery in this case and to further develop the evidentiary record in the event that the matter is remanded to the Court following any appeal. ECF No. 138. As set forth below, the United States is entitled to judgment as a matter of law.

B. The Court Should Enter Judgment in Favor of the United States.

The Court should enter a final judgment in favor of the United States for the reasons set forth in this motion and in the government's previous pleadings. ECF No. 47 (Motion for Judgment on the Pleadings) and No. 115 (Reply in Support of the Motion). As the government has explained, Safehouse's plan violates § 856(a)(2) because: (1) Safehouse would manage and control a place as either an owner or lessee, that (2) it would knowingly and intentionally make available, (3) for the purpose of unlawfully using a controlled substance. *See* ECF No. 47 at 5.

[3] Safehouse's Motion should be construed as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. That is because a motion for declaratory judgment under Federal Rule of Civil Procedure 57 would be procedurally improper. *Arizona v. City of Tucson*, 761 F.3d 1005, 1010 (9th Cir. 2014) ("Requests for declaratory judgment are not properly before the court if raised . . . by motion."); *I.E.C. ex rel. J.R. v. Minneapolis Pub. Schs., SSD No. 1*, 970 F. Supp. 2d 917, 925 (D. Minn. 2013) ("[A] motion for declaratory judgment . . . is not a proper procedural vehicle. While Federal Rule of Civil Procedure 57 provides for a declaratory judgment action, which is considered a civil suit subject to the Federal Rules of Civil Procedure, Rule 57 does not—nor does any other provision of the Federal Rules of Civil Procedure of which the Court is aware—provide for a motion for declaratory judgment."); *Centrifugal Acquisition Corp., Inc. v. Moon*, 2010 WL 152074, *1 (E.D. Wisc. 2010) ("[T]here is no such thing as a motion for declaratory relief."); *Johnson v. Ryan*, 2018 WL 6573228, at *5 (D. Ariz. Dec. 13. 2018) (same) (quoting *Moon*).

The first two prongs have never been disputed. *See e.g.*, ECF No. 133 (Court's Memorandum Opinion) at 14; Ex. A, Statement of Undisputed Facts Nos. 1, 3, 6, 11, 12-14, 24.

As to the third prong, the Court held that § 856's "purpose" requirement was not satisfied. *See* ECF No. 133 at 56. The Government disagrees. As set forth previously, Safehouse indisputably will maintain its Consumption Rooms "for the purpose of" illegal drug use. *See* ECF No. 47 at 8-13; ECF No. 115 at 3-9. Safehouse will offer – and "participants" can request – access to Safehouse's Consumption Rooms. Those participants will have the purpose of unlawfully using a controlled substance – they would have no other reason to request access to the Consumption Room. *See* Ex. A, Stipulation of Facts Nos. 1, 3, 6, 10-11, 13-14, 16, 23.

In reaching its conclusion to the contrary, the Court first held that Safehouse is the actor that must have the requisite "purpose" to violate the statute. *See* ECF No. 133 at 19. The Court held that the purpose of those who would use illegal drugs in the Consumption Room is irrelevant under § 856(a)(2). ECF No. 133 at 15, 19. In so holding, the Court wrongly departed from all five circuit courts that have examined the question of whose purpose matters under § 856(a)(2). *See* ECF. No. 47 5-13; ECF No.115 at 3-6. The Court disagreed with the reasoning in *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990), and dismissed the weight of the other circuit courts who supposedly "adopt[ed] [*Chen's*] conclusion without critical analysis." ECF No. 133 at 24. The government respectfully contends that this conclusion was erroneous.

Consistent with those five circuit courts' holdings, the purpose of those who would use illegal drugs in the Consumption Room satisfies the "purpose" requirement under § 856(a)(2). *See* ECF. No. 47 5-13; ECF 115 at 3-6. The five circuit courts to have considered this issue correctly interpreted the statute. *See Chen*, 913 F.2d 183; *United States v. Tamez*, 941 F.2d 770 (9th Cir. 1991); *United States v. Wilson*, 503 F.3d 195 (2d Cir. 2007); *United States v. Ramsey*,

406 F.3d 426 (7th Cir. 2005); *United States v. Harrison*, 133 F.3d 1084 (8th Cir. 1998); *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013). Indeed, contrary to the Court's comment that "the cases before [the circuit courts] did not require rigorous analysis of *Chen*," the validity of a criminal conviction turned on the interpretation of whose "purpose" mattered in each case. *See supra.* Furthermore, if accepted, the Court's interpretation of § 856(a)(2) would render it superfluous. Under the Court's reading of § 856(a), any conduct that subsection (a)(2) would prohibit would also fall under the auspices of subsection (a)(1). While (a)(2) makes reference to "mak[ing] available for use," the language of (a)(1) would equally prohibit any such scenario where a person makes a place available for illegal drug activity. The Court's interpretation functionally collapses the two subsections, a result properly rejected by *Chen* and every other circuit court to have considered the issue.

Next, operating under the assumption that Safehouse's "purpose" is what matters under § 856(a)(2), the Court held that Safehouse does not have a significant purpose to make its place available for "facilitating" drug use. ECF No. 133 at 49. Rather, it held that Safehouse's only significant purposes are "reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services." *Id.*[4] But even if Safehouse's purpose were the relevant "purpose" under § 856(a)(2), Safehouse knows and intends that illegal drug use will occur on its premises. ECF No. 115 at 6-9.

Although Safehouse contends its sole motive in maintaining the Consumption Room is medical treatment, inviting illegal drug use on its premises is a significant purpose of Safehouse.

[4] In evaluating Safehouse's purpose, the Court also "construe[d] the pleadings as describing a program that ultimately seeks to reduce unlawful drug use." ECF No. 133 at 49. However, Safehouse itself never said in its pleadings that it would reduce unlawful drug use, nor do the Stipulated Facts so state. *See* Ex. A. In evaluating Safehouse's Motion under the summary judgment standard, the Court cannot make this factual inference in Safehouse's favor.

Safehouse has repeatedly told the public that the reason it was created is to provide the first Consumption Room in the country. *Id*.; *see also* Ex. A, Statement of Undisputed Facts No. 1 (holding itself out on its website as seeking to "open the first 'safe injection site'"). The only distinguishing feature between Safehouse and its partner organization, Prevention Point Philadelphia, is Safehouse's Consumption Room, providing for onsite use of illegal drugs and observation. *See id*. No. 6. Additionally, Safehouse's asserted "medical treatment" purpose is undermined by its policies. Safehouse will permit participants to use illegal drugs in its Consumption Rooms indefinitely and as frequently as the participants like, without ever requiring that the participants commit to addiction treatment. *Id*. No. 10, 23 (will permit illegal drug use without limitation or requirement of treatment).[5]

Because Safehouse holds itself out to the world as an organization that will explicitly provide a place for the use of heroin, illegal fentanyl, and other illegal drugs, one of Safehouse's purposes is indisputably to maintain a place for the use of illegal drugs. Even if its ultimate aim is overdose prevention, a necessary precondition to this goal, and therefore a significant purpose of Safehouse, is that individuals use drugs within its facility. *See* ECF No. 115 at 6-9. Additionally, the government respectfully contends that this Court erred by inserting the word "facilitate" into § 856(a)(2) and ruling that "purpose" under the statute must be interpreted as "a purpose to facilitate drug use."

[5] Other courts interpreting "purpose" in § 856(a)(1) have not uniformly embraced the "significant purpose" standard that the Court employs. A defendant may have more than one purpose in maintaining the property and illegal drug activity need not be the sole or even significant purpose to violate § 856(a)(1). *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995) ("Liability under the statute does not require the drug related use to be the sole or even the primary purpose of maintaining the property."); *United States v. Church*, 970 F.2d 401, 406 (7th Cir. 1992) (rejecting the proposition that the government cannot sustain a conviction under § 856 if drug distribution is "but one of several uses of a residence").

Safehouse also contends that illegal drug use in its Consumption Rooms will *aid* potential treatments it would offer inasmuch as participants are more likely to engage in counseling and accept offers of medical care after they have consumed drugs. *See* Ex. A, No. 22. Thus, drug use by Safehouse invitees is a necessary prerequisite to the treatment Safehouse proposes. While Safehouse believes that illegal drug use on its premises "aids potential treatment," *id*. at No. 22, the use of heroin in a medical setting is illegal. Congress has determined that heroin has "no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B); *see* ECF No. 47 at 6. Accordingly, Congress prohibits Safehouse's purported benign motive of using consumption to serve an addiction treatment model, *id.*, and Safehouse indisputably has the significant purpose that drug use will occur within the Consumption Rooms it maintains. *See* ECF No. 47 at 6 (stating that section 856's prohibition of Consumption Rooms aligns with the CSA's overall structure, including making possession illegal and determining that heroin has no accepted medical use in treatment). Simply put, if heroin use is illegal, it cannot be permissible to make a place available for heroin use.[6]

In making these holdings, the Court determined that § 856(a) is ambiguous at least as to the meaning of the phrase "for the purpose," and accordingly considered the statute's legislative history. But this phrase is not ambiguous. The plain language of the statute is clear. And, as the government previously explained, the five circuit courts to have examined this statute have also

[6] More broadly, the Government's view that Section 856 prohibits Consumption Rooms aligns with the CSA's overall structure. *See* ECF No. 47 at 6. Section 856's prohibition of Consumption Rooms is consistent with the CSA's prohibition of illegal possession of heroin and illegal fentanyl in the first place. *See* 21 U.S.C. § 844. Also, Congress placed heroin on Schedule I of the CSA after determining that heroin has "no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B), and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision," *id*. § 812(b)(1)(C). Accordingly, physicians cannot prescribe Schedule I drugs (with exceptions that do not apply here). *Id*. § 829 (allowing prescriptions for only Schedule II-V drugs).

found it is unambiguous. *See* ECF. No. 47 5-13; ECF No. 115 at 3-6. Accordingly, the Court's consideration of legislative history is inappropriate because only "[w]hen the language of a statute is ambiguous, [should courts] look to its legislative history to deduce its purpose." *United States v. Hodge*, 321 F.3d 429, 437 (3d Cir. 2003).

Even if it were appropriate to consider the legislative history of § 856 here, which it is not, the Court's ruling runs contrary to legislative history demonstrating that Congress made an intentional determination to make illegal "places where users congregate to purchase and use" illegal drugs. ECF No. 115 at 15 (citing 132 Cong. Rec. 26447 (1986) (statement of Sen. Chiles)). The statute is intended to prohibit places where drug users congregate to use drugs because, among other reasons, these places negatively affect neighborhoods where drug activity takes place. *Id*. As Congress found in related legislation, "90 percent of heroin users rely upon criminal activity as a means of income" and "[m]uch of the drug trafficking . . . results in increased violence and criminal activity because of the competitive struggle for control of the domestic drug market." National Narcotics Act of 1984, Pub. L. No. 98-473, 98 Stat. 2168.[7] Additionally, the government's interpretation of the statute is consistent with Congress' legislative intent to closely regulate controlled substances and with its determination that heroin use (and use of fentanyl procured without a prescription) is illegal and is not safe under any circumstances. 21 U.S.C. §§ 812(b)(1)(B), (C) and 844.

[7] Additionally, Congress was concerned that permitting illegal drug use in public would give the veneer of public acceptance for such acts. *See* 132 Cong. Rec. S13741-01, 1986 WL 793417 (statement of Sen. Moynihan) ("The fact that drug sales and use are taking place more frequently in public, and on our streets, is the most appalling single thing of the present crisis. A public act of an illegal nature is in effect a condoned act. And the children, and most early users of drugs are no more than children, see this going on in public and assume there is public approbation for these illegal acts. And, indeed, toleration is a form or approbation.").

When the statute was amended in 2003, then-Senator Biden provided an explanation of his proposal, the Reducing America's Vulnerability to Ecstasy ("RAVE") Act, that illuminates the reach of § 856(a)(2). Biden explained that the statute does not apply to places, like stadiums, arenas, and other venues, where people brought drugs and used them "without the knowledge or permission of" the owner or event promoter. 148 Cong. Rec. S10218-02, 2002 WL 31259565. Biden explained that "incidental" drug use at a location did not fall within § 856's prohibition, which targets those who *know* that drug use is occurring and also maintain a place *for the purpose of illegal drug use*. *Id.* This legislative evidence is instructive, inasmuch as Safehouse clearly does not fall within the safe harbor Biden described. Rather than hosting a place where "incidental" drug use *may* occur without Safehouse's knowledge or permission, Safehouse will intentionally provide a place where users will be invited and permitted to use drugs.

In addition, Congress debated for years whether to authorize funding for organizations that also provided sterile syringe services, 155 Cong. Rec. H8727-01 (2009) (noting that, as of that time, Congress had "repeatedly, over and over, banned needle exchange programs, when given the opportunity"), and has recently enacted various measures to combat the opioid crisis, *see* Comprehensive Addiction and Recovery Act, Pub. L. No. 114-198, 130 Stat. 695 (2016); SUPPORT for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (2018). Despite all of this careful attention to problems of opioid drug abuse, Congress has not enacted legislation authorizing facilities like Safehouse.

Safehouse's Motion for Declaratory Judgment abandons its claim under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*, asking the Court to dismiss it without prejudice as moot. *See* ECF. No. 137, Proposed Order. The United States does not

oppose this dismissal.[8] Likewise, Safehouse appears to have abandoned the request in its Counterclaims and Third-Party Complaint for a permanent injunction set forth in paragraph 140 of its Third Party Complaint. Neither its motion, supporting memorandum, nor proposed order seeks this relief. Safehouse likely does not seek the relief because such a request would fail as a matter of law. *Stolt-Nielsen v. United States*, 442 F. 3d 177 (3d Cir. 2006) (holding that a court cannot enjoin a criminal prosecution unless the prosecution will chill a constitutional right and the litigation and defense of the criminal prosecution will not "assure ample vindication of constitutional rights").

[8] Safehouse's RFRA affirmative defense asserted in its Answer presumably remains. *See* ECF No. 45, Answer to Amended Complaint, Affirmative Defense No. 3 at p. 12. To grant the Government's Motion, the Court should reject Safehouse's affirmative defenses including RFRA and its argument under the Commerce Clause as a matter of law for the reasons set forth in the Government's prior briefing. *See* ECF No. 47 at 18-35; ECF No. 115 at 16-25.

III. CONCLUSION

For these reasons and the reasons set forth in the United States' Motion for Judgment on the Pleadings and Reply in support thereof, ECF Nos. 47 and 115, the United States respectfully requests that the Court enter judgment in favor of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused a true and correct copy of The United States' Motion for Summary Judgment and Opposition to Safehouse's Motion for Declaratory Judgment, which was filed electronically and is available for viewing and download from the court's CM/ECF system, to be served upon all counsel of record.

/s/Gregory B. David
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Dated: January 17, 2020

CERTIFICATE OF SERVICE

I certify that on this date this Joint Appendix was filed via the Court's Electronic Case Filing (ECF) system and served electronically on counsel for all parties.

/s/ Gregory B. David
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Dated: May 15, 2020