No. 20-1422

In the United States Court of Appeals for the Third Circuit

UNITED STATES OF AMERICA, *Appellant*,

v.

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

SAFEHOUSE, a Pennsylvania nonprofit corporation, *Appellee*,

v.

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*.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 19-cv-519
District Judge Gerald A. McHugh

BRIEF OF APPELLEES SAFEHOUSE AND JOSÉ BENITEZ

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INTRODUCTION

The opioid epidemic and opioid overdose crisis are devastating the Nation and particularly the City of Philadelphia. More than 3,500 Philadelphians have died in the last three years of this public health crisis. The risk of fatal overdose has become even more acute, as the COVID-19 pandemic has limited access to social services, drug treatment, housing, and medical care for those suffering from addiction.

To combat the opioid and overdose crisis, Safehouse seeks to offer supervised consumption services—an internationally recognized public-health intervention employed for more than thirty years in sites worldwide to prevent overdose death. Safehouse will "offer a variety of services aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment," including by providing critical, lifesaving care at the time of drug consumption, when the risk of overdose death is most acute. Appx018; Appx684 ¶ 9.

The District Court correctly found that the Controlled Substances Act ("CSA"), 21 U.S.C. § 856, does not criminalize Safehouse's proposed medical and public-health services. The District Court's decision is not only faithful to the statutory text, it is consistent with the statute's history and purpose, harmonizes the statute with federal law as a whole, and avoids grave constitutional and structural concerns arising from DOJ's misguided interpretation of federal law.

Section 856 does not broadly apply to any property where drug use occurs; rather, it contains an essential element limiting the statute to a property used, maintained, or opened "*for the purpose*" of unlawful drug activity. Safehouse's purpose is to save lives by preventing overdose death, not to facilitate drug use. Nothing in Section 856's text, history, or purpose suggests Congress intended to criminalize Safehouse's medical and public health intervention.

Recognizing the devastation of drug addition, Congress recently enacted legislation to mitigate the harms of the opioid epidemic, including support for sterile syringe exchange and funding for Naloxone access. Opioids, especially now-prevalent fentanyl, can cause an overdose in seconds after consumption. Without Naloxone or emergency respiratory support, serious injury or death can occur in minutes. Notwithstanding the federal funding that supports Naloxone access, the U.S. Department of Justice's ("DOJ") interpretation of Section 856 would impose a 20-year felony for providing a facility that makes Naloxone available when it is most urgently required, at the moment of consumption. Safehouse's interpretation, by contrast, harmonizes these provisions of federal law.

The rule of lenity and clear statement rule require any lingering ambiguity to be resolved in Safehouse's favor. Moreover, this Court should interpret Section 856 narrowly to avoid constitutional and federalism concerns raised by the exercise of

federal Commerce Clause authority to regulate a non-commercial, entirely local medical intervention.

This Court should affirm the judgment of the District Court.

STATEMENT OF THE ISSUE

Section 856(a) criminalizes making available a place "for the purpose of" unlawful use of controlled substances. Does that statute prohibit Safehouse from permitting individuals to remain in its facility, and under medical supervision, at the time of drug consumption for the purpose of providing potentially urgent medical care to prevent overdose death?

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 2201(a). The District Court had jurisdiction over DOJ's declaratory judgment action and Safehouse's counterclaims under 28 U.S.C. §§ 1331 and 1345. *See also* 21 U.S.C. §§ 843(f)(1), 856(e); 28 U.S.C. §§ 2201, 2202.

In response to DOJ's suit against it, Safehouse brought two counterclaims seeking declaratory relief. Appx115-60. The first sought a declaration that Section 856(a) *does not* apply to Safehouse, as a matter of statutory construction, and the second sought a declaration that Section 856(a) *cannot* lawfully apply to Safehouse under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and the U.S. Constitution. The District Court denied DOJ's motion for declaratory

relief, granted declaratory judgment in Safehouse's favor on the first counterclaim, and dismissed Safehouse's alternative request for relief under RFRA without-prejudice as moot. Appx005.

Safehouse agrees with DOJ that the District Court's judgment is final and appealable. *See* DOJ Br. 15-20. Safehouse was not required to stand on its complaint for that to be true. This Court has held that the stand-on-the-complaint requirement does not apply where a court grants judgment on one claim and then dismisses an alternative basis for the same relief without prejudice on justiciability grounds—as explained in Safehouse's Letter Brief. *Pennsylvania Family Inst., Inc. v. Black*, 489 F.3d 156, 162 (3d Cir. 2007); *see* Safehouse Ltr. Br. at 4-5 (Mar. 12, 2020), 3d Cir. Dkt. No. 18 (citing cases).

Dismissal without prejudice of Safehouse's alternative counterclaim under RFRA was proper in the context of this case and does not deprive this Court of appellate jurisdiction. By declaring that Section 856(a) does not apply to Safehouse and granting judgment in Safehouse's favor on its first counterclaim, the District Court granted Safehouse the relief it was seeking—a determination that it cannot be prosecuted for its proposed conduct—and had no need to decide whether Safehouse would be entitled to that same relief under RFRA. *See* Appx008 n.1. On this threshold issue, Safehouse and DOJ agree. DOJ Br. 15-19. This Court should accordingly exercise jurisdiction over this appeal and affirm.

STATEMENT OF THE CASE

A. The Opioid Epidemic

Philadelphia is in the midst of a severe public health emergency due to the opioid epidemic and the opioid overdose crisis. In 2018 and 2019 alone, while the government was pursuing this declaratory judgment action, more than 2,300 individuals died in Philadelphia from an opioid overdose.[1] *See* Appx129 ¶ 18 & n.15. That is three City residents each day.

B. Naloxone and Overdose Prevention

Every second counts when responding to an opioid overdose. That has become particularly true in light of the widespread proliferation in recent years of fentanyl—a powerful and fast-acting opioid that is 50-to-100 times more potent than heroin. *Id.* ¶ 22. In the event of a fentanyl overdose, a person may stop breathing within minutes of consumption. *Id.* Absent intervention, serious injury or death can occur as quickly as 3 to 5 minutes. *Id.* And since a person overdosing can lose respiratory function within minutes of consumption, time is of the essence when an overdose is occurring. The more time that elapses, the greater the risk of serious injury and death.

[1] City of Phila., Dep't of Pub. Health, *Philadelphia's Community Health Assessment: Health of the City 2018*, at 5 (Jan. 10, 2019), https://bit.ly/3gacLTZ (last visited June 28, 2020).

Reversal of an overdose is possible with timely medical intervention. In fact, if immediately available, the administration of Naloxone or similar opioid receptor antagonists provides lifesaving treatment that will resuscitate and keep a person alive with medical certainty. Appx130, 139 ¶¶ 23, 68.[2]

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. Appx139 ¶ 69. Thus, Naloxone can work only if someone is close by to administer it. *Id.* Ensuring proximity to medical care (and Naloxone) *at the time of consumption* is therefore a critical component of efforts to prevent fatal opioid overdose.

Medical supervision of opioid consumption ensures that an overdose will be effectively reversed using a variety of available interventions, including prompt administration of Naloxone and respiratory support. Supervised consumption allows those at high risk of overdose death to stay within immediate reach of urgent, lifesaving medical care at the critical moment of consumption.

[2] Naloxone has been widely dispensed as a proven means of combatting opioid deaths with the help of federal, state, and local legislation and funding, as discussed in more detail below. Demonstrating the efficacy of immediate Naloxone access, in a 30-year period involving millions of encounters, no person has died of a drug overdose in any of the supervised consumption site worldwide. Appx174. Given the centrality of Naloxone to Safehouse's public health intervention, DOJ's failure to mention it shows that it would prefer to ignore Safehouse's true purpose rather than engage with it.

For these reason, 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 scores of public health experts, physicians, and addiction researchers. *See* Dist. Ct. Dkt. Nos. 89, 90, 92, 95. 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. *See* Dist. Ct. Dkt. No. 101.

C. Safehouse and Its Overdose Prevention Site

Safehouse is a privately funded, non-profit corporation that seeks to open an overdose prevention site in Philadelphia, and Appellee José Benitez is Safehouse's president and treasurer. Appx018; Appx683-84 ¶¶ 1, 4. Safehouse's purpose is to provide lifesaving medical treatment, primary care, initiation of drug treatment, and

wraparound services to the vulnerable population at high risk of overdose death and complications from opioid use disorder.[3] *See* Appx683-84 ¶¶ 1, 9, 13, 14.

To achieve this purpose, Safehouse plans to open an overdose prevention site that will employ evidence-based public-health interventions, including medically supervised consumption, to mitigate the catastrophic losses associated with the opioid epidemic and overdose crisis in Philadelphia.[4] In particular, Safehouse "will offer a variety of services" to participants "aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment." Appx018.[5]

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[3] The Centers for Disease Control and Prevention define "Opioid Use Disorder" as "a problematic pattern of opioid use that causes significant impairment or distress." CDC, *Opioid Overdose*: *Prevent Opioid Use Disorder* (Oct. 11, 2017), https://bit.ly/31pRlOE.

[4] In public health parlance, Safehouse will employ harm reduction strategies to combat the opioid crisis. "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 seek to minimize harm for individuals who, for whatever reason, may not be ready, willing, or able to pursue full abstinence as a goal. At bottom, harm reduction takes into account the psychology of addiction and substance use disorder and seeks to help individuals engage in treatments to reduce, manage, and stop their substance use when appropriate.

[5] Safehouse, a not-for-profit organization, will not charge participants for its services, will not produce any revenue, and will not even permit the on-site exchange of currency for any purpose. *See, e.g.*, Appx150 ¶ 112.

"[W]hen a participant arrives at Safehouse, the first step is a registration process." Appx 684 ¶ 7. The participant will provide certain personal information and receive a physical and behavioral health assessment. *Id.* ¶ 8. "Safehouse intends to encourage every participant to enter drug treatment, which will include an offer to commence treatment immediately." *Id.* ¶ 9.

After registration, Safehouse will "offer each participant its services." *Id.* Those services include "wound care, on-site initiation of Medication Assisted Treatment,[6] recovery counseling, HIV and HCV [Hepatitis C] counseling, testing and treatment, referral to primary care, and referrals to social services, legal services and housing opportunities." *Id.* Safehouse will also provide participants with sterile syringes and fentanyl test strips "to test for the presence of fentanyl in their drugs" before consumption.[7] Appx685 ¶ 12. And Safehouse will allow for participants to use supervised drug consumption and observation rooms. Appx684 ¶ 9. Safehouse

[6] Medication-assisted treatment is "the use of medications, in combination with counseling and behavioral therapies, to provide a 'whole-patient' approach to the treatment of substance use disorders." SAMHSA, U.S. Dep't of Health & Human Servs., SAMHSA, *Medication and Counseling Treatment* (last updated April 29, 2020), https://bit.ly/2YIfZsh (last visited June 28, 2020) "The prescribed medication operates to normalize brain chemistry, block the euphoric effects of alcohol and opioids, relieve physiological cravings, and normalize body functions without the negative effects of the abused drug." *Id.*

[7] The provision of sterile consumption equipment will reduce of the risk of transmission of infectious diseases. Safehouse intends to ensure that participants safely dispose of used consumption equipment, such as syringes, before they leave the supervised consumption room. Appx685 ¶ 18.

participants may request access to all of these services. *Id.* ¶ 11. And Safehouse plans to offer the same services to each participant again at check out. Appx685 ¶ 21.

Upon request, "[e]ach Safehouse participant may be assigned to an individual station where they may consume self-obtained drugs, including by injection, under the supervision of Safehouse staff." *Id.* ¶ 13. But under no circumstance will Safehouse make available any illicit narcotic or opioid. *See id.* ¶ 14. Nor will Safehouse manufacture, sell, or administer unlawful drugs, or permit the distribution or sale of drugs on site. And Safehouse will not allow participants to share consumption equipment or help another person consume drugs. Appx150 ¶ 112.

Although Safehouse personnel will "be available to advise participants on sterile injection techniques," they "will be directed *not* to provide, administer, or dispense any controlled substances." Appx685 ¶¶ 15, 16 (emphasis added). Safehouse's trained medical professionals "will supervise participants' consumption and, if necessary, intervene with medical care, including respiratory support and the administration of overdose reversal agents, such as naloxone." *Id.* ¶ 17. Within the consumption stations themselves, Safehouse will engage in the "legal acts of providing sterile injection equipment and administering emergency medical care." Appx063. In practice and by design, the medically supervised consumption stations will ensure that each participant is within close proximity to medical care (including

Naloxone and respiratory support) during and immediately after the time of consumption—when the risk of overdose is most acute and Naloxone is most needed. *Id.*[8]

Based on first-hand experience and clinical evidence, "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." *Id.* ¶ 22. That is the role of supervised observation. After leaving a supervised consumption room, "Safehouse staff will direct participants to the medically supervised observation room," with the goals of monitoring participants for the signs of overdose and facilitating pathways to treatment. *Id.* ¶ 19. "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." *Id.* ¶ 21. Once again, in this room, "Safehouse intends to encourage" (but not force) "every

[8] Safehouse will encourage but not *require* that its participants commit to addiction treatment. That is consistent with basic principles of harm reduction. *See, e.g.*, M. Hawk, R.W.S Coulter, J.E. Egan, et al., *Harm Reduction Principles for Healthcare Settings*. 14 Harm Reduction J. 14, 70 (2017). A mandatory approach to drug treatment, seemingly urged by DOJ and "drug policy" *amici* (C.A. Dkt. 31), is widely recognized as ineffective compared to non-compulsory treatment approaches in terms of reducing drug use, and could deter those in need with serious use disorder from seeking out Safehouse's overdose prevention and other lifesaving medical services. *See* D. Werb, A. Kamarulzaman, M.C. Meacham, et al., *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, Int'l J. of Drug Policy 28: 1-9 (Feb. 2016).

participant to enter drug treatment," including immediate commencement of treatment. Appx684-85 ¶¶ 9, 23.

Thus, Safehouse "will offer all its participants treatment referrals and on-site initiation of medication-assisted treatment"—along with the many other services mentioned above—"during at least three stages of Safehouse's protocol." Appx063. The District Court properly recognized that Safehouse's overdose prevention site "ultimately seeks to reduce unlawful drug use." *Id.* Given the urgent need for these services—and the staggering number of overdose fatalities in Philadelphia—Safehouse "plans to open at least one facility in Philadelphia as soon as possible." Appx686 ¶ 24.[9]

D. The Crack House Statute, 21 U.S.C. § 856(a)

This appeal centers on whether Safehouse's proposed overdose prevention site would violate 21 U.S.C. § 856(a), a federal criminal law colloquially known as the "crack house statute." The statute provides as follows:

[9] 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. Appx684 ¶¶ 4-5. Safehouse's president and treasurer, Appellee José Benitez, is Prevention Point Philadelphia's executive director. *Id.*

> 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 21 U.S.C. § 856(a) (emphasis added). A violation of either subsection is a federal felony that carries with it several criminal and civil penalties, including fines of up to $2 million and imprisonment for up to twenty years. *See id.* § 856(b), (d).

Because it is undisputed that Safehouse will not manufacture, store, or distribute any controlled substance, the outcome of this appeal hinges on whether Safehouse will knowingly and intentionally make available for use its overdose prevention site "*for the purpose of*" unlawfully using a controlled substance.

E. This Declaratory Judgment Action

On February 5, 2019, DOJ filed a complaint for a declaratory judgment against Safehouse. Appx107-114. Advancing an erroneous interpretation of federal law, DOJ sought a declaration that Safehouse's medically supervised consumption room would violate 21 U.S.C. § 856(a)(2).

Safehouse brought a two-count counterclaim against DOJ seeking declaratory and injunctive relief. Appx115-93. Safehouse's first counterclaim sought a

declaratory judgment that, as a matter of statutory interpretation, Section 856(a) does not apply to Safehouse's proposed overdose prevention site. Safehouse's second counterclaim sought a declaration that application of Section 856(a) to Safehouse would violate the Commerce Clause of the U.S. Constitution by criminalizing entirely local, noncommercial activities and would violate RFRA by subjecting Safehouse and its founders to criminal penalties for exercising their sincerely held religious beliefs. In other words, Safehouse argued that Section 856(a) *does not* apply to Safehouse, and that it *cannot* apply to Safehouse even if the court were to adopt the government's erroneous interpretation of the statute.

DOJ moved for judgment on the pleadings, and Safehouse opposed the motion. Appx203-344. The District Court denied DOJ's motion in a thorough, well-reasoned Memorandum Opinion, agreeing with Safehouse's interpretation of Section 856(a) and rejecting DOJ's. Appx015-070. As the court explained, Section 856(a) does not prohibit Safehouse's proposed conduct because "Safehouse does not plan to make its facility available 'for the purpose of' facilitating unlawful drug use." Appx029 (quoting 21 U.S.C. § 856(a)).

The District Court's order denying DOJ's motion for judgment on the pleadings was a non-final order that was not appealable as a matter of right. To facilitate a pathway to final judgment, the parties negotiated an agreed-upon stipulation of facts. Appx683-86. Each party cross-moved for judgment in their

favor as a matter of law, with Safehouse seeking relief under both Federal Rules of Civil Procedure 56 and 57.

The District Court reaffirmed its conclusion that Section 856(a) does not apply to Safehouse, adopting its prior analysis and reasoning for denying DOJ's motion for judgment on the pleadings. Appx004-12. The court entered judgment in Safehouse's favor on its first counterclaim, and declared as a matter of law "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 ¶ 4 (internal citation omitted).

STANDARD OF REVIEW

Since the Declaratory Judgment Act "confers discretionary, rather than compulsory, jurisdiction upon federal courts," this Court reviews the District Court's decision to exercise jurisdiction and grant a declaratory judgment for abuse of discretion. *Riefer v. Westport Ins. Corp.*, 751 F.3d 129, 138 (3d Cir. 2014); *see* 28 U.S.C. § 2201(a) (providing that district courts "may declare the rights and other legal relations of any interested party seeking such declaration"). In conducting this review, the Court examines the District Court's conclusions of law *de novo*. *See Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 30 (3d Cir. 1995).

SUMMARY OF ARGUMENT

I. Section 856(a) does not apply to Safehouse, because Safehouse will operate its overdose prevention site "for the purpose of" providing necessary, urgent, lifesaving medical care and treatment to people with opioid and substance use disorder, not to facilitate the unlawful use of drugs. Section 856(a)(2) makes it a federal crime to "manage or control any place" and "knowingly and intentionally . . . make available for use . . . the place *for the purpose of* unlawfully . . . using a controlled substance." (emphasis added). An essential element of Section 856(a) is that the defendant act to manage or control a place "*for the purpose of*" unlawful drug activity. Safehouse will not be such a place, and Safehouse does not have that purpose. The District Court found, based on the stipulated facts, that "Safehouse does not seek to administer prohibited drugs but rather to ameliorate the harm from their unlawful use" (Appx068), and "ultimately seeks to reduce unlawful drug use." Appx063. Because Safehouse does not plan to make its facility available 'for the purpose of' facilitating unlawful drug use," the District Court correctly "conclude[d] that § 856(a) does not criminalize Safehouse's proposed conduct." Appx029.

That result is further supported by Section 856(a)'s purpose and history: Congress enacted Section 856 to target crack houses, drug-fueled raves, and other predatory actors and promoters of drug activity—not to criminalize the services

proposed by Safehouse designed to prevent overdose death, stop drug use, and mitigate its harms.

DOJ's contrary position relies on the incorrect premise that Safehouse would violate the statute because Safehouse would know *its participants* unlawfully use controlled substances in its facility. DOJ conflates the potential criminal liability of drug users (who may come to Safehouse in possession of small quantities of drugs obtained before their arrival at Safehouse's facility), with the entirely legal, and indeed vital, medical services proposed by Safehouse and its staff.

II. The District Court's and Safehouse's interpretation of Section 856 is not only a correct application of its statutory terms, it also harmonizes other provisions of federal law; whereas DOJ's contrary argument would lead to unreasonable and discordant results. Safehouse's supervised consumption services will bridge the short, but critical gap between the provision of sterile syringes and the urgent need for Naloxone (and other overdose treatments)—interventions recognized, endorsed, and funded by other provisions of federal law. *See* Comprehensive Addiction and Recovery Act of 2016 ("CARA"), Pub. L. No. 114-198, § 101, 130 Stat. 697; Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 520, 129 Stat. 2652.

These federal statutes not only expressly permit, but also fund facilities that furnish clean and sterile consumption equipment and encourage them to be well-

stocked with Naloxone. Only seconds to minutes may elapse between the provision of sterile equipment and the urgent need for Naloxone, which will reverse an overdose *with medical certainty*. But under DOJ's unreasonable view of Section 856, Safehouse's medical staff (or, for that matter, loving parents and other family members, concerned roommates, dedicated social workers, or good Samaritans) would be prohibited from furnishing these crucial medical interventions at the time and place they are required—the moment of consumption; and must instead force those suffering from addiction into the street and out of their sight and care. DOJ's interpretation of Section 856 cannot be reconciled with the medical facts recognized by Congress and federal health law and policy.

III. To the extent any doubt remains that Section 856 applies to Safehouse, the rule of lenity, the clear statement rule, and the constitutional avoidance doctrine each requires interpreting the provision in Safehouse's favor. Any ambiguity in Section 856's scope must be resolved against criminalization of Safehouse's overdose prevention services.

Moreover, DOJ's expansive interpretation of Section 856 would exceed the constitutional limits on Congress's Commerce Clause authority, which does not permit Congress to adopt freestanding regulation of Safehouse's free medical and public health services—entirely local activities that would not increase the interstate market for controlled substances and which fall within the traditional province of

state and local police powers. This Court may avoid the serious constitutional question and federalism concerns raised by DOJ's broad interpretation of Section 856 by adopting the construction urged by Safehouse. *See, e.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020); *Bond v. United States*, 572 U.S. 844, 858-59 (2014); *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

* * * * *

For these reasons, Safehouse respectfully urges this Court to affirm the District Court's determination that Section 856 does not prohibit Safehouse from operating a medically supervised consumption site in the City of Philadelphia.

ARGUMENT

I. Section 856(a) Does Not Apply to Safehouse Because Safehouse's Overdose Prevention Site Would Not Be Made Available "for the Purpose of" Unlawfully Using Controlled Substances

The District Court properly concluded that Section 856(a) does not apply to Safehouse, because Safehouse will operate its facility for the purpose of providing critical medical services that prevent overdose death and other serious medical harms, not "*for the purpose of* . . . unlawfully . . . using" drugs. Appx062-68 (ellipses in original; emphasis added). As the court observed, the "use that will occur is subsidiary to the purpose of ensuring proximity to medical care while users are vulnerable to fatal overdose." Appx064.

This conclusion is dictated by the text, history, and structure of Section 856, and avoids conflicting and irrational results in light of other more recent congressional statutes that recognize the critical importance of sterile syringes, Naloxone, and harm reduction to combat the opioid crisis and to treat individuals suffering from opioid addiction.

A. Section 856 Requires that the Primary or Principal Purpose of the Property Is Unlawful Use

1. The statutory text establishes that an illicit "purpose" is an essential element of Section 856(a). 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. "Purpose" means "one's objective, goal, or end," as the District Court explained. Appx051; *see* Black's Law Dictionary (6th ed. 1984) ("That which one sets before him to accomplish or attain[.]"); Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "purpose" as "something set up as an object or end to be attained"). 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. *See Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020) (distinguishing between "the objective of the [deceitful] scheme" and the "byproduct of it").

Moreover, the District Court correctly held that the "'for the purpose of clause' refers to the mental state of the actor"—*i.e.*, the defendant. Appx033; *see*

Appx036 n.18. In other words, this element requires a showing that *Safehouse* knowingly and intentionally make its overdose prevention site available "for the proscribed purpose." Appx037.

Rather than apply that straightforward statutory text, DOJ contends (at 21-32) that Section 856(a)(2)—but not Section 856(a)(1)—depends on the purpose of the people who will use Safehouse's overdose prevention facility, rather than on Safehouse's own purpose. The District Court properly rejected that interpretation as contrary to the statutory text: "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." Appx034 n.14. Indeed, Section 856(a) is devoid of any reference to the purpose of any third party (*i.e.*, a Safehouse participant). Nor would it make sense for serious criminal liability to hinge on a third party's mental state and motivations.

DOJ's argument also rests on the counter-textual premise 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). As the District Court explained, "the text suggests no reason to read the requirement differently in (a)(2) than in (a)(1)." Appx034. Both Subsection 856(a)(1) and (a)(2) use the identical phrase "*for the purpose of*." Neither Safehouse, DOJ, nor any court disputes that a conviction *under Section 856(a)(1)* requires proof that *the defendant* acted to make

the property available "'for the purpose of' drug activity." Appx034 n.14. Yet DOJ urges this Court to read that same phrase to mean something entirely different when used in *Section 856(a)(2)*. *Id.*

DOJ's reading is inconsistent with 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) (observing 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). This "presumption of consistent usage" undermines DOJ's interpretation. Appx036 (citing *Si Min Cen v. Att'y Gen.*, 825 F.3d 177, 193 (3d Cir. 2016)).

Moreover, contrary to DOJ's arguments (at 25), there is no need to assign an entirely different meaning to the same phrase in Section 856(a)(1) and (a)(2) to prevent "overlap" between the two subsections. To the contrary, Section 856(a)(1) and 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. Appx034; *cf. United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990). Both subsections impose the same requirement, however, that the defendant act to make the property available "*for the purpose of*" unlawful manufacture, distribution, storage, or use.[10]

2. The same result follows from examining the purpose of Safehouse's *facility*, rather than only examining the purpose of its founders or its employees. Section 856(a)(2) prohibits knowingly and intentionally managing or controlling a "***place*** . . . *for the purpose of*" illicit drug activity. This focus on the purpose of the *place* flows naturally from the statutory text. The word "place" directly precedes, and therefore is modified by, the phrase "for the purpose of" in Section 856(a)(1) and (a)(2). Section 856's title, "Maintaining Drug Involved Premises," and its legislative history, *see* Part I.C, *infra*, further demonstrate Congress's particular focus on the use of property for illicit drug activity.

The purpose of a *place* may be discerned not only by its owner's purpose, but also by the operation of and physical functions within the facility. Here, for example, Safehouse's mission is to save lives otherwise at risk of overdose death; its activities and its facility will be directed at carrying out its lifesaving mission. Safehouse will be outfitted with Naloxone, emergency respiratory care, medical treatment bays, and

[10] Moreover, there is no rule against statutory overlap. Congress may provide for overlap to ensure comprehensive coverage, which is not uncommon in the context of criminal statutes. *Loughrin v. United States*, 573 U.S. 351, 358, n.4 (2014).

clean, sterile surfaces and consumption equipment designed to prevent disease transmission and infection. It will be staffed by medical professionals and trained drug counselors. Safehouse will be not only in word, but in deed, a place for receiving medical care, drug treatment, and social services—not a "place . . . for the purpose of" illicit drug use. The Safehouse facility thus will bear no resemblance to "crack houses," opium dens, or rave parties—the prototypical *places* targeted by Congress when it enacted Section 856.

A requirement that the *place* be made available "for the purpose of" illicit drug activity also distinguishes Safehouse from the out-of-circuit cases relied upon DOJ (at 23-27), *see* Part I.B., *infra*, in which courts found that owners of drug-infested properties may not escape Section 856(a)(2) liability by denying that they personally had the express purpose of using the property for drug activity. Unlike here, in each of those cases, the premises were undoubtedly "place[s] . . . for the purpose of" illegal drug activity—including a motel where the owner encouraged drug dealing to pay the rent and where the owner admitted cocaine and other drugs could be purchased in every room, *see Chen*, 913 F.2d at 185-86, 190-91; a campground where over $500,000 in illicit drugs were distributed at each music festival with the help of the defendant and his staff, *see United States v. Tebeau*, 713 F.3d 955, 958 (8th Cir. 2013), a car dealership used to distribute kilograms of cocaine *sourced by* the defendant (the dealership's owner), *see United States v.*

Tamez, 941 F.2d 770 (9th Cir. 1991), and an apartment where the evidence proved the owner "knowingly allowed others to use those residences for the manufacture, storage and distribution of narcotics," *United States v. Wilson*, 503 F.3d 195, 198 (2d Cir. 2007). Safehouse's medical and public health facility bears no analogy to those cases. On such facts, any comment in these cases distinguishing the purpose of the property owners from that of the drug dealers using the property was pure dictum.

3. DOJ's expansive and counter-textual view of the statute would allow for the prosecution of a property owner for simply *knowing* that any illegal drugs would be consumed by anyone they permit to enter or remain on their property. *See* DOJ Br. 21.

As a threshold matter, that interpretation ignores Section 856(a)(2)'s requirement that a defendant "knowingly *and intentionally*" make a property available for use with the proscribed *purpose*. Section 856(a)(1), by contrast, states that a defendant must only "knowingly" operate the property with the proscribed purpose. No reasonable argument exists that the defendant's knowledge of drug use is alone sufficient; rather, the statute criminalizes only those who act with the intent of making a property available for use "for the purpose of" unlawful drug use.[11]

[11] For the same reason, this Court may readily dismiss DOJ's attempt to reformulate the purpose element, by claiming the statute prohibits defendants who

DOJ's reliance on mere "knowledge" of drug use, rather than the "purpose" of Safehouse's operations, would also result in a dramatic and unbounded interpretation of Section 856 liability that is inconsistent with even its own proposed limits on the statute's scope. For example, DOJ concedes that Section 856(a)(2) *would not* apply to loving parents who invite their adult child to stay home, under their care and watchful eye, "then instruct the child to inject drugs there, in the parents' presence, to allow for resuscitation" with Naloxone.[12] DOJ Br. 45 n.11; Appx055; *see* Appx010, 35, 626-68. But criminalizing parental supervision of drug consumption would be the inevitable result of DOJ's claim that knowledge of drug use suffices.

DOJ attempts (at 45 n.11) to rationalize the inevitable result of their position by asserting that "the [hypothetical] parents do not *want* their child to inject drugs at all," but nonetheless allow drug consumption on their property to ensure they are in proximity to the child in the event of an overdose. *See* Appx035. That explanation

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act with the "conscious object" of unlawful drug use. DOJ Br. 32-40. It is first unclear whether any daylight exists between "purpose" and "conscious object," *see, e.g.*, Model Penal Code § 2.02 (Am. Law. Inst. 2018) (defining "purposely" as acting with the "conscious object" to bring about a particular result), but in application, DOJ reverts to reliance on *knowledge* of drug use alone to establish criminal liability, which plainly does not suffice under Section 856(a)'s clear terms.

[12] At oral argument before the District Court, U.S. Attorney McSwain agreed that the statute would *not* apply even though the parents explicitly said to their child, "[w]e 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 . . . . So shoot up but do it while we're here and do it while we can resuscitate you.*" Appx0626-27 (emphasis added).

offers no viable limiting principle. And it fails to distinguish this case: There is no basis to claim that Safehouse "wants" its participants to use drugs any more than the protective parent wants their child to continue to use drugs. Rather, Safehouse's purpose is to keep those it serves in immediate proximity to urgent medical care in the event of a drug overdose, while providing public-health informed pathways to drug treatment. Safehouse is no different than the parents in this example.

Similarly, under DOJ's interpretation, a homeless shelter could be criminally liable for knowingly providing housing for people currently addicted to and using controlled substances within the facility. Yet, this would be entirely inconsistent with federally funded programs and guidance by the U.S. Department of Housing and Urban Development ("HUD"), which administers the "Housing First" program that establishes grants to fund housing for current substance users. The program guidance states that "program policies consistent with a Housing First approach *do not consider . . . drug use* in and of itself to be lease violations" and advises that people using drugs in such locations should *not* be evicted "unless such use results in disturbances to neighbors or is associated with illegal activity (e.g. *selling* illegal substance)."[13] The federal government's own programs thus establish that the government does not believe *on-site drug use* to be a basis for eviction even *from a*

[13] *See* HUD, *Housing First in Permanent Supportive Housing* (July 2014), https://bit.ly/3ievCzs (emphasis added).

federally funded facility. DOJ does not even attempt to reconcile its interpretation of Section 856(a) with the HUD's Housing First federal program guidance, which requires grantees to keep its beneficiaries sheltered and within reach of critical social services even if they *know* their residents are using unlawful drugs on-site.

If those examples are not criminal, under Section 856(a)(2), neither is Safehouse's proposed conduct. That is because "[t]he use that will occur is subsidiary to the purpose of ensuring proximity to medical care while users are vulnerable to fatal overdose." Appx064. The only way the government can distinguish the two scenarios is by ignoring or misconstruing Safehouse's purpose.[14]

The DOJ's interpretation also fails to account for the uniform view of circuit courts that knowledge or participation in "casual" or "personal" consumption of drugs is insufficient to establish Section 856 liability; rather, the prohibited purpose must be the primary purpose (or "significant purpose," as the District Court concluded) to which the property is put. Appx053-55 (discussing the case law); *see, e.g.*, *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995); *United States v.*

[14] Even though it stipulated to facts that demonstrate the opposite conclusion, DOJ has stubbornly refused to acknowledge that Safehouse seeks to provide medical care, including access to Naloxone and respiratory support, and pathways to treatment. For instance, in the District Court, DOJ "seemingly rejected *any* therapeutic purpose" of Safehouse, "derided it as 'Bizarro World,'" and "urged the Court to 'be real'" because it claims Safehouse's "whole purpose here is for people to use drugs," not to provide any medical treatment to its participants. Appx065 n.46 (emphasis added). As the District Court observed, however, there is no support for "such a caricature of what Safehouse proposes." *Id.*

Russell, 595 F.3d 633, 642-43 (6th Cir. 2010) (noting uniformity of circuit law); *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. Church*, 970 F.2d 401, 406 (7th Cir. 1992) (assuming that "casual drug users" do not risk violating 856"); *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992) (Section 856 "cannot reasonably be construed . . . to criminalize simple consumption of drugs in one's home."). The DOJ's opening brief conspicuously fails to grapple with the core holdings of these cases.

It is thus unsurprising that DOJ cites no case that applies Section 856(a) solely based on simple possession or unlawful use in a property. Indeed, although DOJ harps on the illegality of heroin use, it cannot point to "*a single § 856(a) case predicated solely on use*" since the statute's inception. Appx054 n.39 (emphasis added). A ruling in favor of Safehouse thus will have no effect on the government's enforcement of federal drug laws. That prosecution history is an "empirical fact" that demonstrates the important limitation that "purpose" places on Section 856(a)'s scope, and that undercuts DOJ's expansive and unprecedented interpretation of Section 856. *See Small v. United States*, 544 U.S. 385, 393-94 (2005).[15]

[15] Notably, DOJ also rarely prosecutes simple possession of controlled substances. In 2018 and 2019, there was not a single federal prosecution for drug possession in the Eastern District of Pennsylvania. *See* U.S. Sentencing Comm'n, 2019 Federal Sentencing Statistics for the Eastern District of Pennsylvania, at 3; U.S.

3. DOJ is further incorrect in arguing that Safehouse's and the District Court's application of the purpose requirement improperly reads the word "facilitate" into the text of the statute. DOJ Br. 53-54. That misses the point. The concept of facilitation illustrates the practical significance of the "purpose" requirement under Section 856. Whether or not conduct had the effect of facilitating drug activity is highly probative of whether it was undertaken with an illicit "purpose."[16]

For that reason, the courts have looked at facilitation as a critical marker of whether the purpose requirement is satisfied and as a means of delineating the boundary between simple drug possession (at most, a mere misdemeanor under federal law) and the serious 20-year felony established by Section 856. That distinction is important because Congress plainly did not intend Section 856 to apply to any owner who knows that drug use occurs on her property, as DOJ itself acknowledges. *See* DOJ Br. 45 n.11 (conceding there is no violation of Section 856 where "property owner may know" drug activity "occurs within his property, but

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Sentencing Comm'n, 2018 Federal Sentencing Statistics for the Eastern District of Pennsylvania.

[16] Safehouse's services will not facilitate unlawful drug use—anything consumed on the premises must have been obtained elsewhere, before a participant's arrival. Appx685 ¶ 13. Safehouse provides a sterile environment and equipment, access to medical care, drug treatment, and social services. Appx684 ¶ 9.

where the drug use is "too insignificant[] to trigger liability"); *see also Verners*, 53 F.3d at 296; *Church*, 970 F.2d at 406; *Lancaster*, 968 F.2d at 1253.

DOJ's other contrary arguments are simply variations on its effort to excise the purpose element from Section 856. For example, DOJ argues (at 29) that "Section 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." *See also* Appx034. Of course, any criminal defendant may "assert" that she lacked the requisite *mens rea* for a crime—but that possible factual defense does not abolish the requisite mental state as an essential element of a criminal provision. As discussed above (and as is the case in any dispute over mental states), numerous objective and subjective factors—well beyond a person's say-so—provide probative evidence of "purpose."

B. The Non-Binding Case Law on which DOJ Relies Does Not Illuminate the Legal Standard for When a Property Is Used "For the Purpose Of" Prohibited Activities

DOJ relies heavily on non-binding authority to support its erroneous position that the only relevant purpose under Section 856(a)(2) is that of Safehouse's participants. Because those cases rely on an unpersuasive and erroneous interpretation of Section 856(a), and involve utterly distinguishable facts, the District Court properly rejected them. Appx338-40.

As a threshold matter, "the Third Circuit has not yet considered the proper construction of 21 U.S.C. § 856(a)," and the District Court was the first in the country to address the application of that statute to a medically supervised consumption site. Appx021; *see* Appx047 (reading *United States v. Coles*, 558 F. App'x 173, 181 (3d Cir. 2014) (non-precedential) as supporting the view that Section 856(a) focused on the *defendant's* purpose). Moreover, as described below, none of those cases involved remotely analogous facts, much less addressed the legality of a medical and public health intervention akin to Safehouse.

In any event, DOJ exaggerates the supposed consensus among other circuits regarding the purpose element of Section 856(a)(2).[17] First, as the District Court recognized, the number of federal appellate decisions alone means little since "all of those decisions rest upon *United States v. Chen*, 913 F.2d 183 (5th Cir. 1991), adopting its conclusion without critical analysis." Appx038; Appx046. Second, 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

[17] DOJ implies that this Court should blindly follow these other circuits. But "judges must not shirk from their responsibility to follow where reason and logic take them" (Appx038), and this Court has not hesitated to depart, when appropriate, from the erroneous decisions of its sister circuits. For instance, in *Orozoco-Velasquez v. Attorney General*, 817 F.3d 78, 81-82 (3d Cir. 2016), this Court rejected the holdings of at least *six* circuits on an issue of statutory interpretation, and two years later the Supreme Court vindicated the Third Circuit by agreeing that those holdings were wrong. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

be used for prohibited drug activity. Each case undisputedly involved properties rife with drug dealing activity from which the defendant reaped substantial financial benefits. Certainly no case dealt with facts remotely informative to resolution of the issue in this case. The District Court properly found *Chen* and its progeny neither persuasive nor analogous to the question presented here. Appx040-47.

In *Chen*, the owner of a motel was accused of knowingly making the property available for overt and notorious drug distribution, in violation of both Section 856(a)(1) and (a)(2). The Fifth Circuit first 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. *Chen* took a misstep, however, when it concluded 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 in *Chen* incorrectly found Section 856(a)(2) applies if the defendant had only "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 in *Chen* believed it must tie liability under Section 856(a)(2) to the third-party's illicit purpose and apply a lesser standard of "knowledge," rather than

purpose, to the property owner, on the incorrect assumption that Section 856(a)(1) and (a)(2) otherwise would be redundant. As the District Court observed, the *Chen* "court unnecessarily applied the rule against surplusage to address" a non-existent redundancy, while at the same time failing to give any independent meaning to the term "intentionally" when reading the statute. Appx040-41. And, as discussed below, there are many reasons to reject the notion that Section 856 turns on proving the "purpose" of a third party to a prosecution.

The court in *Chen* was not only wrong as a matter of statutory interpretation, its holding also has minimal application to Safehouse given the starkly distinguishable facts. At trial, the government amassed "overwhelming evidence" that the *Chen* motel was being used for the purpose of "drug related activities." 913 F.2d at 191. In particular, the owner/defendant told an undercover officer that the officer 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 the tenants to make drug sales so that their rent could be paid." *Id.* at 185-86. There no doubt the *Chen* drug motel was a "place . . . for the purpose of" illicit drug activity.

The other cases relied on by DOJ are similarly distinguishable and shed little additional light on Section 856(a)'s application to Safehouse. In each case, the property in question was used for rampant and extensive drug distribution activity at

the owner's behest. In *United States v. Tebeau*, for example, the defendant used his campground to host music festivals and admitted that he intended for his property to be used for drug-related activities. *See* 713 F.3d 955, 958 (8th Cir. 2013). 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. As in *Chen*, the defendant's purpose was not necessary to the sufficiency of the evidence in *Tebeau* because, notwithstanding his attempt to disavow his "purpose" on appeal, the evidence established the campground owner made his property available for the purpose of, and amply profited from, the widespread drug distribution activity that occurred there.

Likewise, the car dealership at issue in *United States v. Tamez* was the location of repeated drug sales. 941 F.2d 770, 772-73 (9th Cir. 1991). In fact, the owner of the car dealership (the defendant) *was the source of the drugs used* on the property and thus 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 property could be charged under the statute, it did so based solely "on the logic of *Chen*," with little additional analysis. *Id.* at 774. The *Tamez* case lends no assistance to the very different question presented here.

The application of Section 856(a)(2) to the drug motel in *Chen*, the drug-fueled music festival in *Tebeau*, and the cocaine-and-car dealership in *Tamez* accordingly says nothing about the legality of Safehouse's overdose prevention services.

C. Legislative Evidence Further Confirms that Section 856(a) Does Not Criminalize Safehouse's Proposed Overdose Prevention Site

The legislative evidence confirms that Congress intended Section 856(a) to impose liability on landlords or property-owners who make their properties available for unlawful purposes, and never contemplated its application to an overdose prevention site—or any similar public health facility. Appx066; *see* Appx017. As the District Court observed, "[t]he impetus for § 856(a) initially was a concern about crack houses, and a similar concern about drug-fueled raves motivated the 2003 amendment." Appx028; *see* 132 Cong. Rec. 26474 (1986) (Statement of Senator Chiles) (explaining that 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"); 149 Cong. Rec. S1677 (daily ed. Jan. 28, 2003). Although this "focus on making places available for such illicit purposes does not limit the provision's applicability to only crack houses and raves"—as the District

Court recognized—"it does caution against extending the statute too far beyond similar circumstances." Appx062.[18]

When 2003 Amendment to Section 856 was being debated, Senator Biden described the reasons he proposed changes to the statute: "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. S1678 (daily ed. Jan. 28, 2003) (emphasis added)). During the debates over the 2003 Amendment, Senator Grassley stressed that the target of the legislation was events where drugs are sold, but pointed specifically "to drug reduction efforts as an example of conduct that would be *inconsistent* with criminal intent." Appx060 (citing 149 Cong. Rec. 1849 (2003)) (emphasis added). Those statements quelled concerns "about the Government using the existing crack house statue, or any expanded version, to pursue legitimate business owners." Appx044 & n.29.

As the District Court explained, a "common denominator among the actions" Congress sought to criminalize is the property owner's goal of "enabling drug use and supporting the market for unlawful drugs." Appx062. Accordingly, the court

[18] Although DOJ argues legislative history is *per se* off limits, there is no requirement that a court interpret statutory text without consideration of the statutory intent and purpose. *See, e.g.*, *Pellegrino v. U.S. Transp. Sec. Admin.*, 937 F.3d 164, 179 (3d Cir. 2019).

was correct that the legislative evidence 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. "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." *Id.*

D. Safehouse's Interpretation of Section 856(a) Harmonizes Federal Law, While DOJ's Leads to Absurd Results

1. Safehouse's comprehensive overdose prevention model is consistent with the federal government's response to the opioid crisis and other provisions of federal law, including federally endorsed syringe exchange initiatives. The services Safehouse will offer—clean injection equipment, Naloxone access, comprehensive medical services (primary and 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.

In particular, 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 sterile 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. CDC, *Program Guidance for Implementing Certain Components of Syringe*

Services Programs (2016), https://bit.ly/31qjDIM. Congress and federal agencies likewise affirmatively have promoted the availability of Naloxone and other opioid receptor antagonists. CARA, § 107, 130 Stat. 703 (42 U.S.C. § 290dd-3).

DOJ's brief makes no mention of these federal laws and policies affirming the need for harm-reduction approaches to opioid addiction, including ready Naloxone access. In fact, in a case about the legality of overdose prevention services, DOJ's brief strikingly does not discuss Naloxone access or prevention of overdose death at all, much less acknowledge the thousands of lives lost to the opioid crisis and Safehouse's mission to prevent such losses in the future. Instead, DOJ unhelpfully points out that heroin is unsafe, illegal, and designated a "Schedule I" substance under the CSA, 21 U.S.C. § 812(b)(1)(B). DOJ Br. 45-46. As the District Court observed, however, Safehouse is not "in any respect . . . contradict[ing] 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." Appx020.

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. DOJ does not dispute that Safehouse may provide a person with syringes and consumption equipment and may have Naloxone at the ready. It cannot be 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.

In fact, DOJ acknowledges that Safehouse's services, including supervised consumption, would be legal if offered out of a "mobile van," as long as participants injected illegal drugs outdoors, in public. DOJ Br. 54-55. Yet, according to DOJ, the "statutory language" of Section 856(a) criminalizes these same services if Safehouse offered them indoors, where medical staff would greater access to necessary equipment, resources, and space to provide emergency medical interventions, and where its participants would remained within a sheltered, clean, and supervised environment, rather than on the street or in other public places. *Id.* Fidelity to the statutory language does not require such absurd results: Safehouse offers a reasoned interpretation of Section 856(a) that is faithful to its text and avoids the irrational consequences of DOJ's arguments.

2. DOJ also disregards the U.S. Supreme Court's determination that federal drug laws are not designed to regulate legitimate medical practice. *See*

Gonzales v. Oregon, 546 U.S. 243, 270 (2006). In *Oregon*, the Supreme Court observed, "Congress [through the CSA] 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." *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)). The CSA thus affords registered medical practitioners wide discretion to use reasonable clinical judgment in the regulated practice of prescribing, administering, or distributing controlled substances.

The CSA has even less application to Safehouse's medical and public health services, because Safehouse's personnel will not engage in any of the activities regulated by the CSA—it will not store, prescribe, distribute, or administer any controlled substances. *See Oregon*, 546 U.S. at 271-72 (describing the limited and clearly enumerated areas of medical practice regulated by the CSA). Section 856 therefore should not be interpreted to override the medical and public health judgment about how and where Safehouse's 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.

E. Section 856(a) Does Not Apply to Safehouse

1. Safehouse's proposed overdose prevention services would not violate Section 856(a). The undisputed facts show that the purpose of Safehouse 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. DOJ *stipulated* that Safehouse's stated "mission is to save lives by providing a range of overdose prevention services," and that "the overdose prevention services [Safehouse] intends to offer are aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment." Appx010; Appx683-84 ¶¶ 1, 9. DOJ further agreed that Safehouse will not "provide, administer, or dispense any controlled substances" and rather, any drugs consumed would have been obtained elsewhere and before arrival at Safehouse. Appx685 ¶ 15.

As part of its comprehensive, public-health driven approach to overdose prevention, Safehouse "will offer all its participants treatment referrals and on-site initiation of medication-assisted treatment" at various stages of the process, including before, after, and ideally in lieu of supervised consumption. Appx063; Appx684-85. Even after on-site consumption, any participant will go to the "medically supervised observation room," where there will be "peer specialists, recovery specialists, social workers, and case managers who will specifically

encourage treatment." Appx063; Appx684-85. This approach increases the likelihood that participants will seek drug treatment. Appx685 ¶ 22.

These facts provide ample support for the District Court's determinations that "Safehouse does not seek to administer prohibited drugs but rather to ameliorate the harm from their unlawful use" and that its overdose prevention site "ultimately seeks to reduce unlawful drug use." Appx063. As a result, Safehouse's operation will not have "unlawful drug use" as a significant, much less primary purpose. Appx054, 62-63.[19] DOJ's brief falls fall short of demonstrating this finding to be clearly erroneous. Section 856(a) accordingly does not apply to Safehouse.

2. Rather than deal with those stipulated and undisputed facts, DOJ disregards them in favor of irrelevant assertions and mischaracterizations of the record. DOJ primarily proceeds by contending that "illegal drug use . . . is a necessary prerequisite . . . to the treatment Safehouse proposes," and therefore asserts it is Safehouse's "motivating purpose." DOJ Br. 44. DOJ goes so far as to say that, "without the purpose of making its Consumption Room available for illegal drug use, Safehouse simply would not exist." *Id.* at 44-45.

[19] Although DOJ, at one point, argues that Safehouse violates the statute because drug use "is not a mere 'incidental' purpose," it later states that a reasonable interpretation of Section 856 is to require "a compelling or significant illicit purpose" or "motivating purpose" to "satisfy the mens rea requirement." DOJ Br. 42-44. The District Court applied the "significant purpose" standard and correctly found Safehouse will not be a place with the "significant purpose" of unlawful drug use. Appx054, 62-63.

DOJ's argument disregards Safehouse's proposed model, which seeks to bring emergency medical services into immediate proximity to those at high risk of overdose death—facts to which DOJ stipulated. *See* Appx683-85 ¶¶ 1, 3, 9, 14-17. No one would believe an emergency room existed "*for the purpose of*" catastrophic injuries or medical crises on the theory that, without such urgent medical needs, the emergency room would not need to exist. For the same reason, Safehouse does not require, much less desire, "illegal drug use"; rather, "illegal drug use," particularly the increased prevalence of powerful and dangerous opioids like fentanyl, have made Safehouse's extraordinary interventions necessary to prevent the tragic and preventable loss of life that results from opioid consumption.

DOJ also argues that Safehouse must have a prohibited purpose because another organization, Prevention Point Philadelphia, provides similar harm reduction services (but not supervised consumption and observation). DOJ Br. 44. But that says nothing about whether it is unlawful for Safehouse to open a facility that provides those services.

DOJ is further incorrect in asserting that the legality of Safehouse hinges on proof of efficacy of its medical and public health interventions. This argument conflates the concept of "purpose" and "outcome" by focusing on whether Safehouse will or will not reduce drug use. Appx009-10; Appx064-65. Section 856(a) focuses on the purpose of Safehouse's public health intervention, not whether

that intervention will be successful in achieving its goal of reducing overdose deaths and drug use (based on evidence of efficacy that can only be definitively established once Safehouse becomes operational).[20]

3. DOJ constructs a chimera in suggesting that Safehouse seeks immunity for criminal conduct based "benevolent motives." DOJ Br. 36-39. Safehouse is not proposing that this Court endorse civil disobedience; it seeks to engage lawful conduct under the terms of the statute.[21] Appx049. For that reason, the

[20] The DOJ's focus on Safehouse's potential efficacy in preventing overdose death and reducing drug use are baffling given its steadfast objections in the District Court to consideration of Safehouse's efficacy to resolve the declaratory judgment suit. By contrast, Safehouse welcomed the opportunity to demonstrate through public health and medical experts that its overdose prevention services were supported by the available empirical evidence and the opinions of the leading experts in the field. Appx020 n.4.

In its recent ruling on DOJ's stay motion, the District Court carefully evaluated the empirical evidence and found Safehouse cited "meaningful body of research" demonstrating the potential of supervised consumption sites to yield favorable outcomes for individual drug users, positive impacts on the surrounding community, and a lack of evidence that it promotes riskier drug use. Dist. Ct. Dkt. No. 156 at 16-21 (June 24, 2020).

[21] This by no means diminishes the force of Safehouse's alternative RFRA counterclaim, which asserted that application of Section 856 to Safehouse would substantially burden Safehouse's sincerely held religious beliefs that call it to provide shelter and lifesaving care to individuals suffering from opioid and substance use disorder. Appx156-57. Safehouse, José Benitez, and Safehouse's board hold the sincere religious conviction that preservation of human life is paramount—a belief deeply rooted in both Jewish and Christian traditions. The statutorily guaranteed rights under RFRA constitute separate claims for relief that are presently moot in light of the District Court's conclusion that Section 856 does not apply to Safehouse. Appx070.

conscientious objector cases relied upon by DOJ are inapposite; nor is this a case where "ends justify the means." DOJ Br. 34-39.

In *United States v. Romano*, 849 F.2d 812 (3d Cir. 1988), and *United States v. Kabat*, 797 F.2d 580, 582 (8th Cir. 1986), for example, the defendants deliberately violated a law—in both cases by breaking into military establishments to damage property—to achieve some higher moral purpose (by preventing death by military action). A similar scenario was posed in *United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971) (burning draft registration cards). Unlike the statutes at issue in those cases, Section 856 makes the purpose of Safehouse a necessary element of the offense: it is not illegal for Safehouse to operate an overdose prevention site because that site is not a "place" made available "for the purpose of" unlawfully using drugs.

Indeed, then-Judge Stevens drew precisely that distinction in *Cullen* (in a portion of the opinion not mentioned in DOJ's otherwise extensive excerpts from the opinion, DOJ Br. 37-38), writing:

> ***In some situations the defendant's ultimate objective may be an element of the particular offense charged.*** Thus, to prove treason, a purpose to give aid and comfort to the enemy must be established; to prove a criminal attempt an analysis of the defendant's purpose beyond the overt act actually completed is necessary; and to establish some forms of malice, the reasons why the defendant acted as he did may be critical. ***In such cases, the prosecution has the burden of proving improper motive and it would, therefore, be entirely proper for a defendant to respond with evidence of good motive***.

454 F.2d at 391-92 (emphasis added). Section 856 is precisely such a statute which makes "purpose" a statutory element of the offense—and therefore Safehouse's aim to provide lifesaving care to prevent overdose death is surely essential to determining whether Section 856 applies.[22]

II. 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 Section 856(a) to conclude that Safehouse's overdose prevention model would not violate Section 856. But even if DOJ's strained interpretation of Section 856(a)(2) were plausible (and it is not), any ambiguity triggers canons of statutory interpretation—the rule of lenity and the clear statement rule—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) (applying each in similar context); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001).

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

[22] DOJ also cites the dissenting opinions of then-Judge Blackmun in *In re Weitzman*, 426 F.2d 439, 452 (8th Cir. 1970), in a tenuous effort to analogize Safehouse's overdose prevention services to "the Robin Hood tradition." DOJ Br. 36 n.9. Putting aside the many ways in which *Weitzman* is inapposite, the majority in that case found conscientious objection excused the petitioner from an oath that was otherwise required to qualify for citizenship. *Id.* at 453 (per curiam). DOJ's citation to *United States v. Stimler*, 864 F.3d 253 (3d Cir. 2017)—a case rejecting a RFRA defense to kidnapping—is similarly puzzling and irrelevant.

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, 269 (3d Cir. 2010); *see 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) (Scalia, J.) (plurality opinion) (emphasis added); *see, e.g.*, *Burrage v. United States*, 571 U.S. 204, 216 (2014); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978). The District Court acknowledged these principles, reasoning that "[t]o 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.'" Appx066 n.48 (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

Similarly, under the clear statement rule "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. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *United States v. Santos*, 553 U.S. 507, 514 (2008). As the District Court recognized, it is a "core tenet of federal law" that "[b]lurred

signposts to criminality will not suffice to create it." Appx068 (quoting *United States v. C.I.O.*, 335 U.S. 106, 142 (1968) (Rutledge, J., concurring)).

If ambiguity exists, it is the government (not Safehouse) that must resort to "the legislative process," should it want to prohibit supervised consumption sites. DOJ Br. 62. Safehouse does not need prior *approval* from Congress to engage in lawful conduct. The law neither "default[s] to criminalization" nor requires "Congress to clarify when it wishes *not* to incarcerate citizens." Appx067 (citing cases) (emphasis added). And conduct certainly does not become criminal merely because the Executive Branch says so. Because "legislatures and not courts should define criminal activity," the District Court properly deferred to the legislative process by ruling in Safehouse's favor. *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).

III. DOJ's Interpretation of Section 856(a) Raises Grave Constitutional Concerns and Conflicts with Principles of Federalism

The doctrine of constitutional avoidance undercuts DOJ's interpretation of Section 856, which seeks to criminalize entirely local, non-commercial use of property, asserting a policy power not granted to the Federal Government under the Commerce Clause of the U.S. Constitution. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

United States ex. rel. Att'y Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909); *see Jones*, 526 U.S. at 239.

1. As the Supreme Court has explained, where Congress enacts criminal law that touches on areas traditionally falling within the authority of the states, such as public health, 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*, 526 U.S. at 239 (internal quotation marks omitted); *see also Bond v. United States*, 572 U.S. 844, 858-59 (2014).

Here, DOJ's interpretation of Section 856 would raise significant federalism concerns as it would criminalize every local property owner who has "knowledge" that drugs are used on her premises, as well as rendering felonious the provision of local medical services to prevent overdoses. Principles of federalism weigh against interpreting Congress's Commerce Clause authority in a manner that converts it into a "general police power of the sort retained by the states." *United States v. Lopez*, 514 U.S. 549, 567 (1995); *see United States v. Morrison*, 529 U.S. 598, 618-19 (2000). 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*, 572 U.S. at 854; *see Oregon*, 546 U.S. at 270. "[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); *see Oregon*, 546 U.S. at 271-72.

2. Section 856, as interpreted by DOJ, would exceed Congress' authority under the Commerce Clause. Section 856 lacks any "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) (citation omitted); *see United States v. Kukafka*, 478 F.3d 531, 535-36 (3d Cir. 2007). Making a property available on an entirely local, non-commercial basis for drug "use" is not part of an economic class of activities that have a substantial effect on interstate commerce—even when viewed in the aggregate. Any "link between" that conduct and "interstate commerce" (*Morrison*, 529 U.S. at 612), can be imagined only by creating a speculative chain of contingencies and "pil[ing] inference upon inference." *Lopez*, 514 U.S. at 567.

Congress has never found that unlawful drug *use* within a property substantially affects interstate commerce. When Congress adopted the CSA in 1970 it found that illegal importation, manufacture, distribution, and possession had an effect on interstate commerce, but that finding notably did not include improper "use." 21 U.S.C. § 801(3)–(6) ("Congressional findings and declarations: controlled substances"); *see Jones*, 529 U.S. at 855 (adopting a narrow reading of the statutory term "use[d]," to require "active employment for commercial purposes, and not

merely a passive, passing, or past connection to commerce" to avoid Commerce Clause concerns); *see also Kelly*, 140 S. Ct. at 1574 (limiting the federal wire fraud statute to schemes with the *objective* of depriving the victim of property, to avoid the "a sweeping expansion of federal criminal jurisdiction" that would result "[i]f U.S. Attorneys could prosecute as property fraud every lie . . . by pointing to the . . . incidental costs"). 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.

The Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), does not foreclose this Court's consideration of these substantial Commerce Clause concerns. 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. The Supreme 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); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560–61 (2012) (Roberts, C.J.).

By contrast, 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. As applied here, the operation of Safehouse will not facilitate or increase the interstate market for controlled substances. Whether drug use takes place under 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.

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. DOJ has not identified a single prior prosecution under Section 856 of owners who make their property available with knowledge that "use" will occur on the premises. It is therefore difficult to conclude that such a construction is "an essential part" of the CSA. Were this Court "to adopt the Government's expansive interpretation" of Section 856(a), "hardly a building in the land would fall outside the federal statute's domain." *Jones*, 526 U.S. at 241.

In sum, DOJ's threatened prosecution of Safehouse would be unconstitutional, but this Court can and should avoid these constitutional doubts by

concluding that Section 856 does not prohibit Safehouse from operating an overdose prevention site.

CONCLUSION

For the foregoing reasons, Safehouse and José Benitez respectfully request this Court to exercise jurisdiction and affirm.[23]

[23] After holding that Section 856(a) "does not criminalize Safehouse's proposed actions," the District Court properly determined that "the RFRA claim is now moot." Appx070. In so ruling, however, the District Court explicitly deemed those alternative claims preserved in the event this Court were to reverse and remand for further proceedings. *Id.* Accordingly, if this Court endorses DOJ's position on appeal, remand to the District Court would be necessary.

Yet DOJ now appears to suggest that in such a scenario the Court should not remand, but rather resolve the merits of Safehouse's novel, fact-bound RFRA counterclaim based solely on the parties' briefing below. DOJ Br. 62 n.13. If DOJ wanted this Court to address the merits of those counterclaims on appeal, it was incumbent on DOJ to raise those issues in its appeals brief. It chose not to do so. This Court should decline the invitation to review these issues in the first instance, without first hearing from the District Court. At the very least, Safehouse objects to any resolution of its RFRA counterclaims that does not afford it the opportunity to fully brief those issues.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local R. 28.3(d) and Local R. 46.1(e), I hereby certify that I, Ilana H. Eisenstein, am admitted as an attorney and member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: June 29, 2020 By: */s/ Ilana H. Eisenstein*

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), Fed R. App. P. 28(a)(10), and Local R. 31.1, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2016.

3. This brief complies with the electronic filing requirements of Local R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies and because Windows Defender Antivirus Version 1.285.1418.0 was run on the file containing the electronic version of this brief and no viruses were detected.

Dated: June 29, 2020 By: */s/ Ilana H. Eisenstein*

CERTIFICATE OF SERVICE

I, Ilana H. Eisenstein, hereby certify that on June 29, 2020, the foregoing Brief of Appellees Safehouse and Jose Benitez was filed with the Clerk of the Court of the United States Court of Appeals for the Third Circuit using the appellate CM/ECF System. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF System.

Dated: June 29, 2020 By: */s/ Ilana H. Eisenstein*