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)

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Safehouse's opposition is more remarkable for what it omits than for what it says. Safehouse barely responds to the Government's criticism of the district court's statutory interpretation missteps. Even more remarkably, Safehouse fails altogether to mention the Supreme Court's recent decision in *Bostock v. Clayton County* that goes directly to the heart of the statutory interpretation question at the center of this case, reinforcing the long-standing principle that a statute's plain text governs its interpretation: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law[.]" *Bostock v. Clayton Cty., Ga.*, 140 S.Ct. 1731, 1737 (2020).

The written word of 21 U.S.C. § 856(a)(2) makes it unlawful to manage or control any place and knowingly and intentionally make it available for the purpose of illegal drug use. That is what Safehouse proposes to do. And that should be "the end of the analysis." *Bostock*, 140 S.Ct. at 1743 (citation omitted).

But in the district court, it was not. Believing that Congress could not have contemplated Safehouse's "Consumption Room" when enacting § 856, the district court abandoned meaningful analysis of the plain language—as

unanimously interpreted by five courts of appeals—and embarked on a quixotic search for "legislative evidence" to the contrary. In so doing, the court imported new requirements into the statute, such as the defendant needing a purpose to "facilitate" drug use on the property and a "predatory" motive. Appx067, 036. Congress imposed no such requirements in § 856. Had it so desired, it certainly "could have taken a more parsimonious approach." *Bostock*, 140 S.Ct. at 1739. Instead, it enacted broad statutory language, made even broader through subsequent amendments.

Safehouse theorizes that certain recent congressional action in the fight against opioid addiction—*e.g.*, loosening funding restrictions for organizations offering clean needles and promoting naloxone—suggests congressional approval of supervised injection facilities. This is wrong, and *Bostock* speaks precisely to that point: there is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Id*. at 1747. "Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id*.

Safehouse makes no attempt to distinguish *Bostock* or other Supreme Court precedent, or otherwise defend the district court's idiosyncratic approach to statutory interpretation. The premise of the court's analysis is

that injection sites were not within Congress's contemplation when it adopted § 856(a) in 1986, or when it amended the statute in 2003. As *Bostock* reinforces, that is irrelevant (even if it were true)—all that matters is the reach of the statutory text. In other words, the foundation of the district court's opinion is completely undermined by *Bostock*. Yet Safehouse says nothing about that case.

Safehouse must know that, in reemphasizing long-standing precedent about plain-language interpretation, *Bostock* destroys the underpinnings of the district court's opinion. This perhaps explains why Safehouse says so little in defense of the court's statutory interpretation. Safehouse has no choice but essentially to abandon the district court's opinion and come up with alternative theories about why § 856(a) supposedly does not prohibit Safehouse's proposed conduct. These alternative theories amount to nothing more than Hail Marys (*e.g.*, mischaracterizing the Government's interpretation as having "no viable limiting principle," misrepresenting that the Government's interpretation would allow prosecution "for simply knowing" of illegal drug use on the premises, or even pretending that the legality of Safehouse's Consumption Room should be determined by its supposed effectiveness).

This Court should hold, consistent with five other circuits and binding Supreme Court authority, that the plain language of § 856 prohibits Safehouse's proposed Consumption Room. It should find that Supreme Court precedent forecloses Safehouse's Commerce Clause challenge. And it should reject Safehouse's Religious Freedom Restoration Act ("RFRA") claim as a matter of law. The district court's judgment should be reversed and remanded with instructions to enter judgment in favor of the United States.

I. *Bostock v. Clayton County* Underscores the Invalidity of the District Court's Analysis.

Bostock refutes the district court's approach to statutory interpretation and mandates reversal. As the Supreme Court reiterated, "[o]urs is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about [congressional] intentions or guesswork about expectations." 140 S.Ct. at 1737. But guesswork about what Congress may (or may not) have anticipated when it enacted and amended § 856 guided the district court's analysis.

The district court expressly acknowledged that the language of § 856(a)(2), "taken to its broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site," Appx017, but then

refused to apply that plain language to bar Consumption Rooms. Instead, it premised its interpretation on whether supervised injection sites "were within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003." Appx016-017. It found that "[s]afe injection sites were not considered by Congress" because they had "not yet entered public discourse"; therefore, Congress could not have intended § 856 to prohibit a supervised injection facility. *See* Appx037; *see also* Appx029, 065. In its view, this was a "baseline reality" entitled to "substantive significance." Appx017.

Bostock reinforces that this supposed baseline reality has no significance at all. *Bostock* evaluated whether the Civil Rights Act's prohibition on workplace discrimination "because of sex" encompassed a ban on discrimination because of sexual orientation or gender identity. In analyzing the statutory language, the Court rejected as "irrelevant" the argument that in 1964, few would have expected it to apply to discrimination against homosexual and transgender persons. *Bostock*, 140 S.Ct. at 1751. Instead, the Court reiterated that, "when the meaning of the statute's terms is plain, our job is at an end." *Id*. at 1749. It is error to further analyze the statute's "expected applications" that may have been "foreseen at the time of enactment." *Id*. at 1750. *See also Diamond v.*

Chakrabarty, 447 U.S. 303, 315 (1980); *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010).

Yet this is precisely what the district court did. It searched the congressional record and historical medical literature for references to "safe injection sites" before 2003, finding none. Appx058-062, Appx065-066. It also faulted the Government for supposedly failing to bring forth "legislative evidence" that supervised injection programs "were specifically considered by Congress." Appx065-066. This improperly "displace[d] plain meaning of the law in favor of something lying beyond it." *Bostock*, 140 S.Ct. at 1750. In fact, the district court actually used legislative history—not plain meaning—to define the statute's terms. *See* Appx026 (defining "ordinary meaning" as "consistent with the undisputed, prototypical examples...which legislators and members of the public would have expected the statute to apply at the time of enactment."). In short, the district court's conjecture about what Congress envisioned improperly displaced plain meaning analysis in favor of irrelevant considerations.

Because the plain language of § 856(a)(2) applies to Consumption Rooms, this Court should reject as immaterial the district court's lengthy consideration of what Congress may have considered when § 856 was enacted. "The people are entitled to rely on the law as it is written, without

fearing that courts might disregard its plain terms based on some extratextual consideration," even where a new application of a statute is "unexpected and important." *Bostock*, 140 S.Ct. at 1749. *See also Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998).

Finding application of § 856 to Consumption Rooms potentially "unexpected," the district court believed it best to "allow Congress to address the issue." Appx017. But a judge should not "merely point out the [new] question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime." *Bostock* at 1750. Indeed, this approach has been "long rejected." *Id.* It should be rejected here.

II. Safehouse Will Knowingly and Intentionally Make Available Its Consumption Room for the Purpose of Illegal Drug Use, in Violation of § 856(a)(2).

A. Section 856(a)(2) Refers to the Purpose of Those Using Illegal Drugs at Safehouse.

Safehouse contends that "for the purpose" in § 856(a)(2) refers to *Safehouse*'s mental state, not the mental state of persons injecting in its Consumption Room. Br. at 20-21. But the phrase unambiguously refers to the purpose of the persons using the property—the "participants" Safehouse will invite to its facility. *See United States v. Wilson*, 503 F.3d 195, 197-98 (2d Cir. 2007) ("The phrase 'for the purpose'...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"). "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 to address it. *United States v. Tebeau*, 713 F.3d 955, 961 (8th Cir. 2013).

The five circuits to consider the question rejected the district court's interpretation of § 856(a) because it collapses its subsections, making § 856(a)(2) superfluous.[1] Illogically, Safehouse contends such overlap is prevented because § 856(a)(1) supposedly targets the "operator of the property," whereas § 856(a)(2) supposedly targets the "landlord or manager." Br. at 22-23. Safehouse does not explain where this distinction comes from and cites nothing in the statute to support such a reading, nor does it explain why the words "lease" and "rent" should apply to an "operator" in one subsection and a "landlord" in another. The district court also did not embrace this imagined distinction.

[1] Citing *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014), Safehouse suggests there "is no rule against statutory overlap." Br. at 23. But partial overlap is distinct from reading a statute to render an entire subsection superfluous. *Loughrin* rejected such a reading because it "runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" 573 U.S. at 358 (citation omitted).

Incredibly, Safehouse characterizes "any comment" from *Chen*, *Tebeau*, and *Tamez*[2] "distinguishing the purpose of the property owners from that of the drug dealers using the property" as "pure dictum." Br. at 25. This is blatantly false. The criminal convictions in each case turned on that very distinction:

- *Tamez* affirmed a 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." 941 F.2d at 774.

- *Tebeau* considered "whether § 856(a)(2) criminalizes a defendant's knowing and intentional making available such a place 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 case held that "it is sufficient that Tebeau intended to make his property available to others who had that purpose." *Id.* at 961.

- *Chen* reversed a conviction under § 856(a)(1) because the jury instructions failed to address Chen's purpose. 913 F.2d at 189.

In each case, the defendant (like Safehouse here) asserted that he or she did not have the purpose that drug activity take place on the property. *See Tebeau*, 713 F.3d at 959; *Tamez*, 941 F.2d at 773; *Chen*, 913 F.2d at 186. But that is not what matters under § 856(a)(2).

[2] *See United States v. Chen*, 913 F.2d 183 (5th Cir. 1990); *United States v. Tebeau*, 713 F.3d 955, 958 (8th Cir. 2013); *United States v. Tamez*, 941 F.2d 770, 773 (9th Cir. 1991).

Running down another bizarre path, Safehouse proposes this Court embrace an interpretation of § 856 that *no court* has articulated: that the relevant purpose belongs to the "facility" itself. Br. at 23-25. Safehouse suggests 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." *Id*. But the *person* who maintains property, not the place itself, faces liability under § 856. Safehouse's argument is thus inconsistent with the reach of the statute, and mistakenly presumes that a place can have "an inherent purpose separate from a person's intentions for its use," an unsound argument that the district court properly rejected. Appx036 n.18.

B. The History of § 856(a) Prosecutions Is Irrelevant.

Safehouse wrongly suggests this Court should derive meaning from the Government's history of § 856(a) prosecutions. Br. at 29. No principle bars the Government from applying a criminal statute to conduct that has never before occurred. Indeed, Safehouse touts its Consumption Room as the "first" in the nation, so it is unsurprising that there is no precedent.

Safehouse claims the Government "cannot point to a single § 856(a) case predicated solely on use" and suggests this somehow matters by citing *Small v. United States*, 544 U.S. 385, 393-94 (2005). Aside from being

factually incorrect about the history of prosecutions,[3] Safehouse is wrong to rely upon *Small*; the question there was whether the felon-in-possession statute included a foreign conviction within the phrase "any court." 544 U.S. at 387. Interpreting the word "any," the Court found it unlikely Congress intended foreign convictions to serve as a predicate for prosecution, including because "there [had] probably been no more than '10 to a dozen' instances" of such prosecutions. *Id*. at 394. The prosecutorial history thus only helped define the word "any." Here, there is no need to guess what Congress intended because § 856 expressly prohibits making a place available "for the purpose of unlawfully...using a controlled substance." 21 U.S.C. § 856(a)(2).

C. The District Court Wrongly Read the Word "Facilitate" into § 856(a)(2).

Defending the district court's atextual "read[ing] [of] the word 'facilitate' into the text of the statute," Safehouse claims that, "[w]hether or not conduct had the effect of facilitating drug activity is highly probative of whether it was undertaken with an illicit 'purpose.'" Br. at 30. But all the courts that Safehouse cites that purportedly "look at facilitation as a critical

[3] *See, e.g.*, *United States v. Plotka*, 438 F.Supp.3d 1310, 1313 (N.D. Ala. 2020) (defendant indicted "for making his house available to others for the purpose of using controlled substances," under § 856(a)(2)).

marker of whether the purpose requirement is satisfied" interpreted § 856(a)(1), not (a)(2). *Id*. at 31. Moreover, "facilitate" makes but one appearance in these cases, and not how Safehouse suggests. *See United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) ("'[O]ne way to tell whether a defendant had the requisite mental purpose under (a)(1) is to decide whether he acted as a supervisor, manager, or entrepreneur' in the drug enterprise, as opposed to someone who merely '*facilitated* the crime.'") (emphasis added and citation omitted)).

More importantly, Safehouse fails to address the Government's argument that courts are not permitted to use extratextual sources to alter a statute's plain language. "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock*, 140 S.Ct. at 1737.

Unsatisfied with the outcome of "taking each of a statute's words literally," the district court used "legislative evidence" to "confirm[ ] that the reach of § 856(a)(2) is limited to purposes to facilitate drug use." Appx058. In doing so, the district court improperly used *post*-enactment

legislative history to "override the plain meaning of [the] statute." *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 259 (3d Cir. 2013).

III. Section 856(a) Has a Viable, Well-Established Limiting Principle: Incidental Purposes Are Not within Its Reach.

Safehouse caricatures the Government's position as containing no limiting principle—that a property owner who merely knows of any drug use, no matter how limited, faces liability. To the contrary, the Government follows the substantial case law that "purpose" is satisfied where drug activity is not merely "incidental" or "collateral."

The district court found that § 856 requires "the actor have a significant, but not sole, purpose" of drug activity. Appx054. The visitors to Safehouse's Consumption Room will easily satisfy this test. To the extent that Safehouse's purpose is relevant, it will make its property available knowing and intending that concentrated, high volume, and repeated illegal drug use will occur.

Safehouse inaccurately suggests its Consumption Room would involve only "casual" or "personal" drug consumption, which courts have held is insufficient for § 856 liability. *See* Br. at 28. But Safehouse intends to open to the public a facility that will invite repeated drug consumption on the premises. The cases Safehouse cites in support, by contrast, all involve drug use within a *residence*. "Each court to have addressed this

issue" agrees that "the 'casual' drug user does not run afoul of § 856[(a)(1)] 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) (internal marks omitted; emphasis added). Unlike a Consumption Room, "where the property in question is the defendant's own home—and is devoted principally to the ordinary actions of residential living—evidence beyond drug [activity] for personal use is necessary to sustain a conviction under § 856(a)(1)." *United States v. Shetler*, 665 F.3d 1150, 1161 (9th Cir. 2011).[4]

Safehouse does not even attempt to explain how operating a Consumption Room in which drug users are invited to inject heroin at any time is comparable to "personal" or "casual" use within a residence. *Cf. United States v. Church*, 970 F.2d 401, 406 (7th Cir. 1992) (crack distribution in one's home was *not* "casual" where the evidence established "significant" drug activity).

[4] The other cases Safehouse cites similarly address incidental drug use within a private home. *See Verners*, 53 F.3d at 296; *United States v. Johnson*, 737 F.3d 444, 449 (6th Cir. 2013); *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992).

This "incidental" use limitation also resolves Safehouse's hypotheticals about children who may use drugs while residing in their parents' homes or those who may use drugs in shelters. Br. at 26-27. A shelter operator does not "knowingly and intentionally" make a shelter available for the purpose of illegal drug use just because there is a risk that the persons who stay there—who have housing as their primary purpose—may use drugs.[5] Here, the purpose at issue belongs to those who visit the Consumption Room—people that Safehouse knows and intends will use illegal drugs inside. This makes drug use a necessary prerequisite of the Consumption Room and the very reason it exists. It is, after all, a "Consumption Room."

IV. Safehouse Will Violate § 856(a)(2) Even if the "Purpose" at Issue Is Safehouse's Purpose.

Even were Safehouse's purposes relevant under § 856(a)(2), Safehouse will nonetheless violate the statute. While Safehouse contends its overall purpose in maintaining a Consumption Room is to respond to

[5] The Department of Housing and Urban Development (HUD) guidance regarding drug use on HUD properties is inapposite for the same reason; it aims to connect homeless individuals to housing "without preconditions and barriers to entry." *See* https://files.hudexchange.info/resources/documents/Housing-First-Permanent-Supportive-Housing-Brief.pdf. Thus, it falls within the framework of the residential examples where any drug use is incidental.

opioid overdoses and offer treatment and services, a defendant violating § 856(a)(2) may, and usually does, have more than one purpose in maintaining the property; illegal drug activity need not be the sole purpose. *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995).

In operating its Consumption Room, Safehouse will know, intend, and have as a significant purpose that illegal drug use occur.[6] This purpose is much more than incidental, and can be divined from Safehouse's own statements, in which Safehouse contends that it will offer "medically supervised [drug] consumption." Br. at 8. Although it characterizes this service as one of many offerings, it does not dispute that it would be the first facility in the nation to offer supervised injection, or that its Consumption Room is the distinguishing feature from its sister organization, Prevention Point Philadelphia.

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[6] Safehouse wrongly suggests the district court made a factual finding that Safehouse seeks to "ameliorate the harm" of drug use and therefore does not have illegal drug use as a significant purpose. Br. at 43. The court expressly did not make findings of fact, but accepted the parties' factual stipulations. Appx007, Appx009-011, Appx020 n.4.

Safehouse also claims the Government stipulated that Safehouse's mission is to save lives. Br. at 42. The Government did no such thing. Instead, the United States merely stipulated that Safehouse's website asserts this as Safehouse's ultimate motive.

Safehouse suggests its overlap with Prevention Point is unimportant, but the *sole* differentiating factor—a Consumption Room—clearly illuminates Safehouse's purpose: to provide a place for the use of drugs that Prevention Point does not. Safehouse also acknowledges that, in its view, the act of drug consumption itself facilitates treatment, Br. at 43, thus further illustrating Safehouse's purpose to maintain its Consumption Room for the use of drugs.

Safehouse contends its professed beneficent motive should preclude liability under § 856(a)(2). It cites *United States v. Cullen* for the principle that, where a defendant's ultimate objective is an element of a crime, a defendant may defend by showing evidence of good motive. 454 F.2d 386, 391-92 (7th Cir. 1971). But § 856(a)(2) is nothing like the treason or malicious mischief charges *Cullen* cites, in which the Government must prove adherence to an enemy cause, an "evil" mind, or a spirit of cruelty, hostility or revenge. *See* 454 F.2d at 391-92, n.13 & 15. Instead, only a purpose that illegal drug use occur is necessary.

Safehouse's knowledge and intent that its "participants" will use illegal drugs in its Consumption Room, established for the purpose of drug use, satisfies all essential elements of § 856(a)(2). Whether Safehouse's motive for setting up the Consumption Room is in pursuit of a lofty end is

immaterial. *See United States v. Kabat*, 797 F.2d 580, 587 (8th Cir. 1986) (citing *Cullen*, 454 F.2d at 391); *accord United States v. Romano*, 849 F.2d 812, 816 n.7 (3d Cir. 1988).

V. Congress Alone Can Decide Whether § 856(a) Should Be Amended to Exclude Consumption Rooms.

In seeking to prop up its statutory interpretation argument, Safehouse invokes its goal of "harm reduction," thereby raising "the last line of defense for all failing statutory interpretation arguments: naked policy appeals." *Bostock*, 140 S.Ct. at 1753. But whether Consumption Rooms are socially beneficial (and should therefore be exempted from § 856(a)) is a question of public policy and legislative judgment that only Congress can answer. *See Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001). The policy arguments raised by Safehouse and its amici are thus irrelevant to this appeal.

It is worth noting, however, that Safehouse overstates its policy arguments and ignores the competing considerations Congress would face in deliberating whether Consumption Rooms should be exempted from § 856(a). There is no scientific or evidence-based consensus that Safehouse would be effective at reducing overdose deaths. For example, the studies touted as gospel by Safehouse and its amici are hampered by material

scientific weaknesses and cannot be relied upon to predict the consequences of opening Consumption Rooms in Philadelphia.

In a comprehensive review of the available studies, the RAND Corporation found that "[o]verall, the scientific evidence about the effectiveness of [supervised consumption sites] is limited in quality and the number of locations evaluated," and identified weaknesses in the available literature. *See* Beau Kilmer *et al.*, *Considering Heroin-Assisted Treatment & Supervised Drug Consumption Sites in the U.S.* at 8 (2018).[7] Just two sites account for 80% of the reported literature; no randomized controlled studies are reported; most studies "inadequately control for unobserved factors that may bias results" and "employ methodologies that do not allow for making causal inferences"; and some showed "somewhat inconsistent" results. *Id*. at 31-35; *see also* Br. of Drug Policy Scholars & Former Gov't Officials at 5-10.

If Congress were to consider the question, it could also weigh competing evidence about the range of impacts that Consumption Rooms could have on local communities. Safehouse apparently believes that neighborhoods hosting such sites would only benefit, as evidenced by its surprise—and disastrous—announcement that it would open the first

[7] Available at www.rand.org/pubs/research_reports/RR2693.html.

Consumption Room in the nation in South Philadelphia "without meaningful dialogue with the surrounding neighborhood[.]" Doc. 156 at 2. Residents, local businesses, and elected officials all immediately sprang into action, vigorously opposed the site, and quickly prevented it from opening.[8] *Id.*; *see also* Br. of 20 Neighborhood Civic Assocs. & the Fraternal Order of Police Lodge 5 at 16-21.

[8] Too often, the "science" cited by proponents of injections sites reads like advocacy masquerading as science. For example, in one "study" by an amicus party in support of Safehouse, "neighborhoods hit hard by the opioid epidemic overwhelmingly support overdose prevention sites in their neighborhoods," to the tune of 90% of residents in favor. *See* Br. of Roth, Lankenau and 5th Square at 1. This is, to put it mildly, preposterous. Upon examination, this "study" was nothing more than a survey of nearly 450 people that the survey-takers approached on the streets of Kensington in the middle of several days–nearly a quarter of whom were homeless and over half of whom were unemployed. There was nothing scientific about the selection of these participants or the method of this "study." The participants were read a one-sided description of "overdose prevention sites," asked a few questions, and then given public transportation tokens or a $4.50 gift card to a local restaurant for their trouble. While this "study" is perhaps an extreme example, it does serve as a cautionary tale about the supposed scientific consensus regarding injection sites that Safehouse and its amici like to claim exists.

Indeed, Alberta health officials recently reported adverse impacts on neighborhoods hosting the province's seven Consumption Rooms,[9] finding Consumption Rooms "exacerbate existing social problems and encourage a higher concentration of drug users and trafficking within those areas."[10]

Congress might also question whether the resources to fund and regulate Consumption Rooms might be better directed to programs with proven records of success in the United States. For example, Congress might determine taxpayer dollars would be better spent expanding the availability of medically assisted addiction treatment, needle exchange, homeless services, naloxone distribution, and other services like those already provided by Prevention Point. But again, this policy debate is for

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[9] Alberta Health, *Impact: A socio-economic review of supervised consumption sites in Alberta* (Mar. 2020), https://open.alberta.ca/dataset/dfd35cf7-9955-4d6b-a9c6-60d353ea87c3/resource/11815009-5243-4fe4-8884-11ffa1123631/download/health-socio-economic-review-supervised-consumption-sites.pdf. Judicial notice of published reports of governmental bodies is appropriate. *PBGC v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993).

[10] Alberta noted increased reports of crime and needle debris and "open defecation and urination in public spaces" near Consumption Rooms. *Impact* at iii, 12, 25-27, 38. Increased crime included drug traffickers who "appear to be openly conducting their business unabated near the [sites] due to a burgeoning client base" and theft, prostitution, and breaking and entering by users. *Id*. at 35.

Congress to decide, and does not impact the statutory interpretation question before this Court.

Finally, Congress might decide against excluding consumption rooms from § 856, because, as explained in the Government's opening brief, an obvious and compelling purpose of the statute is not just to deter the use of illegal drugs, but to protect communities from the ravages attending areas where illegal consumption is concentrated. Amici make this point eloquently: "The purpose of this provision is plain: to protect citizens, families, and their property by preventing the scourge of illegal drug activity and its ill effects from taking root in their neighborhoods and communities." Br. of Members of Congress at 2; *see also* Br. of Republican Caucus of the Pa. House of Reps. & Senate at 21; Br. of 20 Neighborhood Civic Assocs. For its part, Safehouse has no response regarding this clear purpose of the statute, and the manner in which a consumption site could conflict.

VI. Safehouse's Remaining Defenses All Fail.

A. Safehouse's Position Does Not "Harmonize" Federal Law.

In Safehouse's view, recent congressional action permitting syringe-exchange programs to receive federal funding for other services, and promoting the availability of naloxone, supports the idea that its

Consumption Room is legal. More specifically, Safehouse claims it will "harmonize[ ] federal law" by "bridg[ing]" what it views as a gap between the provision of a sterile syringe and administration of medical care after an overdose. Br. at 38-40. But *Bostock* rejects this theory, explaining:

> Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.

140 S.Ct. at 1746.

Like Safehouse, the employers in *Bostock* argued that "postenactment legislative history"—including proposed amendments to add sexual orientation to Title VII's expressly protected characteristics—"should tell us something." *Id*. But "no authoritative evidence explain[ed] why later Congresses adopted other laws referencing sexual orientation but didn't amend" Title VII, perhaps believing it already covered sexual orientation. *Id*. "All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law[.]" *Id*. (citation omitted).

Here, § 856(a)(2) broadly prohibits making a place available to others, knowing and intending they will use illegal drugs inside. Safehouse

suggests Congress would not have approved funding for organizations that provided clean needles and promoted naloxone distribution, while intending to criminalize one of many places in which needles and naloxone may be used.[11] Like the employers in *Bostock*, Safehouse urges that this post-enactment congressional action must tell us something. Just as in *Bostock*, it does not.

Further, Safehouse points to no proposed bills or amendments to legalize Consumption Rooms, despite recently enacted measures to combat the opioid crisis. In any event, without a change in the law there is no basis to infer Safehouse's suggested meaning from other possibilities (*e.g.*, that some legislators understood Consumption Rooms were already barred by § 856). All that is certain is this: if Congress wished to permit Consumption Rooms, it would do so explicitly. But Congress has not authorized

[11] Safehouse's position is further undermined by the reality that sterile syringes and widely available naloxone have proved useful in reducing the spread of communicable diseases and preventing overdose deaths without opening Consumption Rooms.

Consumption Rooms,[12] and has left unchanged a broad statute that plainly includes Consumption Rooms within its scope.[13]

B. The Rule of Lenity and the Clear Statement Rule Do Not Apply Because § 856(a) Is Unambiguous.

The rule of lenity, the clear statement rule, and constitutional avoidance apply only when a statute is reasonably susceptible to more than one interpretation. *See Salinas v. United States*, 522 U.S. 52, 60 (1997); *Reno v. Koray*, 515 U.S. 50, 64-65 (1995). The Court need not resort to these principles because the plain language of § 856(a) is unambiguous.

The rule of lenity applies only in cases of such "grievous ambiguity" where, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Koray*, 515 U.S. at 64-65; *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *see also United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992); Appx231 n.9. That is obviously not the case here.

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[12] The Government has also carefully reviewed the submissions of amici supporting Safehouse. All suffer from the same flaw as Safehouse's position: they focus on what they wish the law to be, not what it actually, plainly states. As the Government has repeatedly said, their possible recourse lies in legislative action, not in this Court.

[13] Safehouse's argument that applying § 856(a)(2) to it would interfere with "legitimate medical practice" is unsupported, and its reliance on *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), is misplaced. This argument was rejected by the district court, Appx030-031, and should be rejected here.

As for the clear statement rule, Congress has already spoken in clear and definitive language in § 856(a). Moreover, application of this rule is most appropriate where a statute will alter the existing balance of federal and state powers. *See Salinas*, 522 U.S. at 60. That is not the situation here. Section 856(a) is an unambiguous statement of congressional intent that does not affect the balance between federal and state powers because it has no conflict with Pennsylvania law.

C. Section 856(a) Does Not Violate the Commerce Clause.

Gonzales v. Raich forecloses Safehouse's and amici's Commerce Clause argument. 545 U.S. 1 (2005). *Raich* held that the CSA "regulates the production, distribution, and *consumption* of commodities [heroin and other drugs] for which there is an established, and lucrative interstate market." *Raich*, 545 U.S. at 26 (emphasis added). Congress' decision not to create an exemption for "entirely local" and non-commercial Consumption Rooms "is a rational (and commonly utilized) means of regulating commerce in [heroin and other controlled substances]." *Id.*

Safehouse wrongly contends § 856 exceeds congressional authority because it lacks a "jurisdictional element" limiting application of the law to activities affecting interstate commerce. Br. at 51. This is not required. Because § 856 is "an essential part of the [CSA's] larger regulatory scheme,"

Raich, 545 U.S. at 27, which itself "directly regulates economic, commercial activity," 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); *United States v. Forrest*, 429 F.3d 73, 77 n.1 (4th Cir. 2005).

Safehouse also contends § 856 is invalid as applied to Safehouse because Congress supposedly has not found that drug use within a property affects interstate commerce. Br. at 51-52. But the absence of particularized congressional findings regarding § 856 does not invalidate it, either. The Supreme Court 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 it "has never required Congress to make particularized findings in order to legislate," absent special concerns. *Raich*, 545 U.S. at 21. Thus, "the absence of particularized findings does not call into question Congress's authority to legislate." *Id.*

In any event, Congress' findings in connection with the CSA's enactment apply equally to § 856, including: its findings "regarding the effects of intrastate drug activity on interstate commerce," *Raich*, 545 U.S. at 21 n.32; its observation that "controlled substances possessed commonly flow through interstate commerce immediately prior to...possession"; and

its 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 21 U.S.C. §§ 801(3)(C), 801(4)).

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." *Raich*, 545 U.S. at 12, 13 (citing 21 U.S.C. §§ 841(a)(1), 844(a)). Section 856's prohibition against maintaining a drug-involved premises will apply here to Safehouse's facility, where individuals will possess and use Schedule I drugs such as heroin. This is not a "single-subject statutory provision with a non-economic objective," *see* Br. at 53, but rather "an essential part of the [CSA's] larger regulatory scheme" to control trafficking in controlled substances, *Raich*, 545 U.S. at 27.

D. Safehouse's RFRA Claim Fails as a Matter of Law.

If this Court finds that Safehouse's conduct violates § 856(a), it can and should reject Safehouse's RFRA defense as a matter of law and instruct the district court to enter judgment for the United States. This Court has everything it needs to do this: the defense has already been briefed below,

Appx235-248, Appx305-315, Appx339-343; the question does not require additional fact finding; and whether the Government has imposed a "substantial burden" under RFRA is a legal conclusion, not an issue of fact.

Safehouse's religious belief is not that people should be able to inject illegal drugs under supervision; it instead phrases its belief broadly as preserving life, sheltering neighbors, and helping the sick. But enforcement of § 856 as to Safehouse would not substantially burden these beliefs because there are myriad ways for Safehouse to do this. At most, enforcement of § 856 would restrict "one of a multitude of means" of doing so, which does not constitute a substantial burden. *Henderson v. Kennedy*, 253 F.3d 12, 15 (D.C. Cir. 2001); *see also United States v. Stimler*, 864 F.3d 253, 268 (3d Cir. 2017) (court "properly analyzed" whether a claimed burden was "'substantial' by looking to acceptable alternative means of religious practice that remained available")[14], *vacated on other grounds, United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018).

It would be a waste of time and judicial resources to remand this case to the district court to evaluate Safehouse's RFRA claim. No matter which

[14] The alternative means analysis employed by *Stimler* does not conflict with *Holt v. Hobbs*, 574 U.S. 352 (2015). Appx313-314. *Stimler* involves a narrower question than *Holt*: whether a specific religious exercise can be satisfied through other means. 864 F.3d at 268. *See also* Appx339-340.

way the district court were to rule on that question, it would necessitate another time-consuming and expensive appeal that would leave the parties, the City of Philadelphia (and indeed, the nation) in unnecessary legal limbo. This case should now come to an end.

CONCLUSION

In one sense, this is a complicated case with diligent counsel on both sides making intricate legal arguments that must be evaluated by this sophisticated appellate court. But in another sense, this case is as simple as it gets. Literally everything that Safehouse proposes already exists at Prevention Point (and could exist in other locations in the City) except for one thing and one thing only: the consumption of illegal drugs in an aptly-named Consumption Room. Without the consumption, Safehouse would not exist and neither would this case.

If that doesn't mean that "the purpose" of Safehouse and its participants is illegal drug use, then we should just go ahead and abandon all pretense of words having any discernable meaning. We might as well just throw in the towel on this whole rule of law thing and accept anarchy. But that's why we have law enforcement, and prosecutors, and laws – and

courts. We have those things because the rule of law is supposed to mean something. And without it, we are doomed.

What Safehouse proposes is plainly illegal. This Court can now step in and say so and thereby uphold the rule of law, which is the foundation of our republic.

Respectfully submitted,

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Dated: August 3, 2020

CERTIFICATIONS

1. I certify that this brief contains 6,489 words, exclusive of the table of contents, table of authorities, 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 2016 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 6.0.0.204, 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 paper copies of the brief filed with the Court should the Court require paper copies.

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CERTIFICATE OF SERVICE

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

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Dated: August 3, 2020