No. 20–1422

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

v.

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

SAFEHOUSE, a Pennsylvania nonprofit corporation, *Appellee*,

v.

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

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

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

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

STATEMENT OF APPELLATE JURISDICTION

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

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

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

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

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

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

STATEMENT OF ISSUES

1. Appellate Jurisdiction.

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

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

2. The Legality of Safehouse's Consumption Room.

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

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

STATEMENT OF RELATED CASES

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

STATEMENT OF THE CASE

I. Relevant Material Facts and Background

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

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

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

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

Safehouse will provide access to the Consumption Room to participants who register and undergo a brief physical and behavioral health assessment. Appx684 (SOF ¶¶ 7-8). Once there, each Safehouse participant may be assigned an individual station and Safehouse will "offer[] supervised consumption of self-obtained drugs that have the potential to cause serious adverse medical events for people who continue to use these drugs despite their known risks." Appx648-85 (SOF ¶¶ 11, 13-14).

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

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

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

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

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

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

II. Procedural History and Rulings on Review

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

1. This Court Has Appellate Jurisdiction.

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. This Court Has Appellate Jurisdiction.

A. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

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

> (1) knowingly open...or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; [or]
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the

> place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is indisputably Safehouse's intention that people will use illegal drugs in its Consumption Room. As publicized on its website and asserted before the district court, Safehouse seeks to open the first "safe injection site" in the United States, Appx684 (SOF ¶ 1), which is an operation that includes drug use directly in its description. *See also* Appx685 (SOF ¶ 14) ("Safehouse [will] offer[] supervised consumption of self-obtained drugs that have the potential to cause serious adverse medical events for people who continue to use these drugs despite their known risks.") (quoting Safehouse Medical Protocol); *id*. (SOF ¶ 23) ("Safehouse imposes no limits on the number of times that participants may use the consumption room and does not require participants to enter treatment or accept a treatment referral as a condition of using the consumption room.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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CERTIFICATIONS

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

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

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CERTIFICATE OF SERVICE

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

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Dated: May 15, 2020