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

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAFEHOUSE, a Pennsylvania nonprofit corporation;

JOSE A. BENITEZ, as President and Treasurer of Safehouse;

Defendants.

SAFEHOUSE, a Pennsylvania nonprofit corporation;

Counterclaim Plaintiff,

v.

UNITED STATES OF AMERICA,

Counterclaim Defendant,

and

U.S. DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; and JACQUELINE C. ROMERO, in her official capacity as U.S. Attorney for the Eastern District of Pennsylvania,

Third-Party Defendants.

Civil Action No. 19-0519

ORDER

Upon consideration of the Motion to Dismiss filed by Plaintiff/Counterclaim Defendant United States of America and Third-Party Defendants United States Department of Justice, United States Attorney General Merrick B. Garland, and United States Attorney for the Eastern District of Pennsylvania Jacqueline C. Romero (collectively, "the United States"), and any response thereto, it is this ____ day of ____________________________, 2023, ORDERED that:

1. Said motion is GRANTED;

2. Safehouse's Second Amended Counterclaims for Declaratory and Injunctive Relief (ECF No. 209) are hereby DISMISSED WITH PREJUDICE;

3. A final judgment is hereby ENTERED in favor of the United States and against Safehouse; and

4. The Clerk of Court is directed to CLOSE this case.

____
GERALD A. McHUGH
United States District Judge

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U.S. DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; and JACQUELINE C. ROMERO, in her official capacity as U.S. Attorney for the Eastern District of Pennsylvania,

Third-Party Defendants.

Civil Action No. 19-0519

MOTION TO DISMISS

Plaintiff/Counterclaim Defendant United States of America and Third-Party Defendants United States Department of Justice, United States Attorney General Merrick B. Garland, and United States Attorney for the Eastern District of Pennsylvania Jacqueline C. Romero (collectively, "the United States") move to dismiss Safehouse's Second Amended Counterclaims for Declaratory and Injunctive Relief pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth in the attached memorandum of law, which is incorporated herein by reference, *see* Local Rule 7.1(c), the United States requests that its motion be granted, and that Safehouse's Amended Counterclaims for Declaratory and Injunctive Relief be dismissed with prejudice.

Dated: July 21, 2023

Respectfully submitted,

Jacqueline C. Romero

JACQUELINE C. ROMERO
United States Attorney

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

/s/ Bryan C. Hughes
BRYAN C. HUGHES
ERIN E. LINDGREN
Assistant United States Attorneys
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476

Counsel for the United States

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

UNITED STATES OF AMERICA, Plaintiff, v. SAFEHOUSE, a Pennsylvania nonprofit corporation; JOSE A. BENITEZ, as President and Treasurer of Safehouse; Defendants. ___ SAFEHOUSE, a Pennsylvania nonprofit corporation; Counterclaim Plaintiff, v. UNITED STATES OF AMERICA, Counterclaim Defendant, and U.S. DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; and JACQUELINE C. ROMERO, in her official capacity as U.S. Attorney for the Eastern District of Pennsylvania, Third-Party Defendants.	:	Civil Action No. 19-0519

<u>MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS</u>

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The U.S. Court of Appeals for the Third Circuit has held that Safehouse's plan to open a supervised injection facility would fall within the proscription of 21 U.S.C. § 856(a)(2), which prohibits "mak[ing] available" a "place for the purpose of . . . using a controlled substance." *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021).

The Third Circuit remanded to this Court to consider Safehouse's claim that § 856(a)(2) cannot be enforced against it under the terms of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. Thereafter, Safehouse filed Amended Counterclaims (ECF No. 160), and Second Amended Counterclaims for Declaratory and Injunctive Relief (ECF No. 209), in which it reasserted its RFRA claim and added a new claim under the Free Exercise Clause of the First Amendment. On the basis of the varied religious beliefs of its board members, Safehouse contends it is entitled to an exemption from the Controlled Substances Act ("CSA") such that, despite the Third Circuit's ruling, it may open its proposed facility.

But Safehouse's pleading fails to state a claim upon which this Court may grant relief. Safehouse concedes that it is not, itself, a religious organization, and has failed to establish that it can assert the religious rights of its board members. Additionally, among the elements that must be pleaded to state a claim under RFRA is that the challenged provision substantially burdens religious exercise. Safehouse has not sufficiently alleged that here. There are many ways for Safehouse's board members to exercise their broadly stated religious beliefs that do

not involve maintaining a facility for individuals to consume drugs, including some that are specifically enumerated in Safehouse's pleading. In fact, the motivating belief Safehouse seeks to vindicate, that it must "take action to save lives in the current opioid crisis" (*id.* at ¶ 128) *by maintaining a place in which it will supervise drug injection by third parties*, is a moral imperative informed by Safehouse's socio-political opinion and belief about harm reduction policy. At base, it is not a "religious" belief at all; thus, it is not protected by RFRA or the First Amendment.

Safehouse's Free Exercise claim fares no better. As with its RFRA claim, Safehouse cannot assert a Free Exercise claim on behalf of its board members. And, because there are no exemptions to § 856, and the statute does not invite consideration of the reasons for prohibited conduct, it does not run afoul of the standard set by the Supreme Court in *Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868 (2021). And neither are the "secular exemptions" Safehouse cites under the CSA comparable under *Fulton* to the broad exemption Safehouse requests. For all these reasons, § 856 is neutral and generally applicable and Safehouse's Free Exercise claim fails. Accordingly, Safehouse's Second Amended Counterclaims should be dismissed, with prejudice.

PROCEDURAL AND FACTUAL BACKGROUND

On February 5, 2019, the United States filed a Complaint for Declaratory Judgment against Safehouse. (ECF No. 1). Subsequently, it filed an Amended Complaint naming Jose Benitez, Safehouse's president and treasurer, as a defendant. (ECF No. 35). The Amended Complaint seeks a declaration that

Safehouse's proposed supervised injection facility would violate § 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." *Id.*

Safehouse answered and filed counterclaims on its behalf, seeking a declaration under 28 U.S.C. § 2201 that its proposed supervised injection facility would not violate § 856 and a declaration that prohibiting its contemplated conduct would violate the Commerce Clause of the U.S. Constitution and RFRA. (ECF No. 45).

The United States moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). (ECF No. 47). The Court then conducted an evidentiary hearing and subsequently heard oral argument. On October 2, 2019, the Court issued a memorandum opinion and order denying the United States' Motion for Judgment on the Pleadings. (ECF Nos. 133, 134). This ruling addressed whether § 856(a)(2) prohibited Safehouse's proposed supervised injection facility 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 Court could enter a final declaratory judgment. (ECF No. 137). On February 25, 2020, the Court issued a memorandum opinion and order ruling on the parties' cross-motions, entering judgment in favor of Safehouse and against the

United States and holding that Safehouse's proposed supervised injection facility would not violate the CSA. (ECF Nos. 141, 142).

The United States appealed, and on January 12, 2021, the Third Circuit reversed, holding that Safehouse's proposed injection site would violate § 856(a)(2). *United States v. Safehouse*, 985 F.3d 225, 229-30 (3d Cir. 2021). The Third Circuit also rejected Safehouse's affirmative defense under the Commerce Clause. *Id.* at 239-43. Safehouse subsequently petitioned for rehearing *en banc*, which the Third Circuit denied. *United States v. Safehouse*, 991 F.3d 503 (3d Cir. 2021). The Supreme Court denied certiorari. *Safehouse v. Dep't of Justice*, 142 S. Ct. 345 (2021).

The Third Circuit did not reach Safehouse's RFRA counterclaim, remanding it for this Court's consideration. After the remand, Safehouse filed Amended Counterclaims on September 21, 2021 (ECF No. 160), and on June 27, 2023, filed its Second Amended Counterclaims (ECF No. 209), which the United States now moves to dismiss.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the allegations set forth in the complaint. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 6738 (2009). Although federal courts ruling on a motion to dismiss "must take all of the factual allegations in the complaint as true, they are not bound to accept as true a legal conclusion

couched as a factual allegation." *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (cleaned up)).

ARGUMENT

I. Safehouse Cannot Assert RFRA or Free Exercise Claims Because It Is Not a Religious Organization, Nor Can It Assert the Religious Rights of Its Board Members.

Safehouse avers that it "is not itself a religious entity or organization[.]" Answer to Compl. and Second Am. Counterclaim, (ECF No. 209 at ¶ 126). At the outset, then, Safehouse's RFRA and free exercise claims must fail because Safehouse is not a religious entity, *id.*, and because it has not pleaded a basis to assert the religious rights of its board members. RFRA applies to a "person's" exercise of religion. 42 U.S.C. §§ 2000bb-1(a), (b); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014) (explaining that, under the Dictionary Act, 1 U.S.C. § 1, the word "'person' … includes corporations, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Because Safehouse as an entity does not claim to have a religious purpose or any religious beliefs, it cannot claim that *its* "exercise of religion" would be substantially burdened by the enforcement of federal law. Safehouse therefore cannot bring a RFRA claim. 42 U.S.C. § 2000bb-1(a).

Safehouse's pleadings and governing documents also make clear that it is a secular organization. Safehouse asserts that it was established "with the mission to save lives by providing a range of overdose services" as part of "a broader harm reduction strategy." (ECF No. 209 at ¶ 29). Safehouse does not assert that its

statement of purpose or certificate of incorporation includes an explicit statement of its faith or religious values. It also does not allege that its bylaws or other governing document contains a provision or obligation upon the entity to be managed or operated in a manner that is consistent or coextensive with its board members' various faiths. To the contrary, according to Safehouse's Articles of Incorporation, it is

> a nonprofit organization organized and operated exclusively for charitable purposes ... specifically for the purposes of reducing the harms associated with drug use by providing a range of public health and social services. [Safehouse] shall at all times be operated exclusively for charitable purposes and may take any and all actions necessary, proper, advisable, or convenient for the accomplishment of these purposes[.]

(*See* Articles of Incorporation, Ex. 1 at 3).[1] These Articles of Incorporation mention no religious purpose or motivation for Safehouse. Safehouse has thus failed to plead that it itself engages in religious exercise or can assert a religious right on its own behalf under RFRA or the First Amendment. *See, e.g., Leboon v. Lancaster Jewish Cmty. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (discussing significance of "whether the entity's articles of incorporation or other documents state a religious purpose"); *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993) (rejecting organization's Title VII claim that it was religious after finding that its operation was largely secular and its organizing documents did not provide that its purpose

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[1] In ruling on a motion to dismiss, the Court can take judicial notice of matters of public record or an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *See* Fed. R. Evid. 201(b); *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999) (citation omitted).

was religious in nature); *see also Hobby Lobby*, 573 U.S. at 719 (noting that courts could look to state corporate law and to a corporation's governing structure to resolve issues about whether a corporation held sincere religious beliefs).

Safehouse does not resemble the explicitly religious nonprofit organizations that the Supreme Court recognized have been permitted to bring RFRA and free-exercise claims on their own behalf, which are typically a church or other religious organization, or an arm of a religious organization. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (RFRA); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012) (Free Exercise); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).[2] Nor does Safehouse have an explicitly religious purpose that might give rise to protection under RFRA even despite its lack of affiliation with a specific religious group. *See, e.g., Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 655 F. Supp. 2d 1150, 1160 (D. Id. 2009) (noting that Idaho nonprofit corporation operating a homeless shelter was a "Christian-based religious organization" that was "created for the purpose of providing 'for the worship of God'" and to provide "spiritual guidance, Christian counseling, and Christian religious services").

[2] *O Centro* involved a "Christian Spiritist sect" of a church. *O Centro*, 546 U.S. at 425. The plaintiff in *Hosanna Tabor* was an Evangelical Lutheran church and school offering a "Christ-centered education" to students, and was a member congregation of the Lutheran Church-Missouri Synod. 565 U.S. at 177. The nonprofit in *Lukumi Babalu* was a Santeria church. 508 U.S. 526.

Safehouse also does not resemble the companies in *Hobby Lobby* that asserted RFRA claims. Citing *Hobby Lobby*, Safehouse argues that it may assert a RFRA claim based on the religious beliefs of its board members. (*See* ECF No. 209 at ¶ 126 (alleging that Safehouse's "founders' and leaders' beliefs are those of the corporation, and the pursuit of its mission and conduct of its business will implement those beliefs")). That argument fails for multiple reasons. First, as noted, Safehouse has not pleaded that, as an entity, it has religious "beliefs" or itself engages in any "exercise of religion," and Safehouse's Articles of Incorporation, bylaws, and other key corporate documents make no such statement. By contrast, the companies in *Hobby Lobby* incorporated explicit statements of faith in a "Vision and Values Statement" adopted by its board, or statement of purpose.

Second, the entities at issue in *Hobby Lobby* were closely held corporations owned and controlled by members of the same family, whose religious beliefs were central to the corporations' operations. Thus, for Hobby Lobby, the Court noted:

> Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior."

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 703 (2014) (internal record citations removed). A closely held corporation is a distinct corporate form in which the company's shareholders are typically much more active and involved in the

management of the entity.[3] Safehouse cannot show that its relationship with its board of directors is anything like the relationship between the family-member owners and the closely held corporations in *Hobby Lobby*. For example, it has not pleaded that its board has expressed its will that Safehouse be operated consistent with the board members' religious beliefs or that it has similarly entwined its board members' beliefs with Safehouse's operations.[4] Safehouse also does not contend that it is owned, affiliated with, or financially supported by a religious entity or that any religious entity participates in its management. *See, e.g., LeBoon*, 503 F.3d at 226 (discussing, in the Title VII context, factors that courts have considered to determine what constitutes a religious organization); *Kamehameha Sch.*, 990 F.2d

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[3] Closely held corporations have "certain, special characteristics" that differentiate them from publicly traded corporations. *Linde v. Linde*, 220 A.3d 1119, 1141 (Pa. Super. Ct. 2019). In a closely held corporation,

> there often is no separation of function between those who provide the capital and those who manage the enterprise. Closely held enterprises tend to entail more intimate and intense relationships among a smaller number of participants. Such an enterprise is not just a vehicle for investment of the participants' monetary capital but also serves as a vehicle for investment of their human capital by providing everyday employment. Shareholders in a close corporation usually expect both employment and a meaningful role in management. Further, they often have additional bonds, such as family or other personal relationships that are interwoven with business ties and influence what they hope and expect to derive from the enterprise.

Linde, 220 A.3d at 1141 (citing 2 O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS & LLC MEMBERS § 7:2).

[4] Under Pennsylvania law, Safehouse as a nonprofit corporation is a distinct legal entity from its board of directors, *see* 42 Pa. C.S. § 8332.5(a), 15 Pa. C.S. §§ 5713, 5733.

at 460-464 (weighing all significant religious and secular characteristics to determine whether the corporation's purpose and character are primarily religious).

Because Safehouse does not assert an injury on its own behalf or claim that it as an entity engages in any exercise of religion, Safehouse has failed to state a claim for relief under RFRA or the First Amendment and these claims must be dismissed.

II. Safehouse's RFRA Claim Fails Because the CSA Does Not Impose a Substantial Burden on Safehouse and Safehouse Is Motivated by Socio-Political or Philosophical Beliefs, Not Religious Ones.

Safehouse asserts that the "Judeo-Christian" beliefs of its board members "obligate them to take action to save lives in the current overdose crisis, and thus to establish and run Safehouse in accordance with those tenets." (ECF No. 209, at ¶¶ 124, 129). Safehouse does not contend that its board members' multiple faiths each explicitly directs that they organize to manage or operate supervised injection facilities (while other medical professionals actually *supervise* the drug use). Instead, it asserts that "the provisions of overdose prevention service *effectuates* [its board members'] religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick." (*Id*. at ¶ 129 (emphasis added)). Safehouse therefore seeks a declaration that any prohibition on its operation of a supervised injection facility would violate the RFRA rights of its board members.

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). To invoke RFRA, a claimant must make out a *prima facie* case that (1) it possesses a sincerely held belief that (2) is religious in nature, and (3) application of the challenged law would substantially burden the litigant's religious belief. *See United States v. Stimler*, 864 F.3d 253, 267-68 (3d Cir. 2017), *vacated on other grounds by United States v. Goldstein*, 902 F.3d 411 (3d Cir. 2018).

Safehouse asserts that § 856's application "burdens [it] by forcing it to choose between the exercise of its founders' and directors' religious beliefs" and conformity with the law. (ECF No. 209, at ¶ 130). But even if it could press this RFRA claim on behalf of its board members, it fails to state a claim as a matter of law. Safehouse cannot show that application of § 856(a) substantially burdens its board members' religious exercise because Safehouse's board members have multiple legal alternatives for effectuating their religious beliefs that they must "preserve life, provide shelter to [their] neighbors, and [ ] do everything possible to care for the sick." (*See, e.g.*, ECF No. 209 at ¶¶ 33, 129). Furthermore, even accepting as true the well-pleaded allegations of the Second Amended Counterclaims, Safehouse continually asserts that its true motivation is socio-political, scientific, or philosophical in nature, not religious, and therefore not protected by RFRA.

A. Application of § 856(a) to Safehouse Does Not Substantially Burden Its Claimed Religious Belief.

Whether the government has imposed a "substantial burden" under RFRA is a question of law, not a question of fact. *Real Alts., Inc. v. Sec'y of HHS*, 867 F.3d 338, 356 (3d Cir. 2017) (internal citations omitted); *see also Little Sisters of the Poor*

Home for the Aged v. Burwell, 794 F.3d 1151, 1176 (10th Cir. 2015) ("[C]ourts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise"). A court need not accept as true conclusory allegations of substantial burden. *Real Alts.*, 867 F.3d at 357; *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (not "accepting as true" the legal conclusion regarding substantial burden in reviewing a district court's dismissal of a RFRA claim). "To the contrary, [courts] have not hesitated to examine whether an alleged burden is sufficiently 'substantial' under RFRA." *Real Alts.*, 867 F.3d at 357.

Government action does not constitute a substantial burden if it "does not coerce the individuals to violate their religious beliefs or deny them the 'rights, benefits, and privileges enjoyed by other citizens.'" *Geneva College v. Sec'y United States HHC*, 778 F.3d 422, 442 (3d Cir. 2015) (quoting *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)). A substantial burden exists only if: "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the Government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Real Alts.*, 867 F.3d at 356 (quoting *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016)) (emphasis in original).

The government's enforcement of § 856 does not coerce Safehouse's board members to act. There is no affirmative obligation on Safehouse's board members to take any action at all, or to act in a way that violates their religious beliefs. *See*

Lyng, 485 U.S. at 450-51; *cf. Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995) (no substantial burden where plaintiffs were neither compelled to engage in conduct proscribed by their religious beliefs nor forced to abstain from any action which their religion mandates that they take).

Instead, Safehouse contends that enforcement of § 856 interferes with its board members' religious exercise by not permitting them to take a discrete action[5] that *effectuates* their general Judeo-Christian religious beliefs that they must "preserve life, provide shelter to [ ] neighbors, and do everything possible to care for the sick." (ECF No. 209, at ¶ 129). Because there are myriad other methods by which Safehouse can effectuate its board members' broad religious beliefs, Safehouse has not alleged a substantial burden here on the exercise of its religion.[6] Enforcement of § 856 does not require Safehouse to abandon its founders' core tenets of preserving life, providing shelter to neighbors, or helping the sick. At most, it restricts "one of a multitude of means," which does not constitute a substantial burden. *Henderson v. Kennedy*, 253 F.3d 12, 15 (D.C. Cir. 2001).

In determining whether any asserted burden is substantial, this Court can consider whether Safehouse's board members have acceptable alternative legal

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[5] Safehouse does not contend that its board members have or are maintaining a place to supervise use of illegal drugs. Instead, Safehouse asserts its desire to do so.

[6] It is also important to bear in mind what § 856 does *not* limit. For example, it does not prevent Safehouse's board members from medically supervising illegal drug use in a public space. It also does not prevent them from doing so in many private spaces. Rather, § 856 prohibits Safehouse from "own[ing] or maintain[ing] a 'drug-involved premises': a place for using, sharing, or producing drugs." *Safehouse*, 985 F.3d at 230.

means to practice their religion that do not involve violating the CSA. *See Stimler*, 864 F.3d at 268; *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (no substantial burden in law restricting access to abortion clinics where plaintiffs did not allege that their religion required them to physically obstruct clinic areas and the plaintiffs otherwise had "ample avenues open" by which they could express their deeply held beliefs); *Planned Parenthood Ass'n v. Walton*, 949 F. Supp. 290, 296 (E.D. Pa. 1996) (same).

Thus, in *Stimler*, the Third Circuit affirmed the denial of a motion to dismiss a criminal indictment against defendants who claimed that their conduct was protected by RFRA. The defendants were three rabbis who were charged with various kidnapping-related offenses in connection with their religiously inspired attempts to forcibly help women obtain religious divorces from their recalcitrant husbands. *Stimler*, 864 F.3d at 259. In weighing whether the criminal prosecution imposed a substantial burden, the district court considered that, when a husband refuses to consent to divorce, it is considered a religious commandment or a "mitzvah" in Orthodox Judaism to assist a woman in obtaining consent, and that Jewish law authorizes "certain forms of force" in providing such assistance. *United States v. Epstein*, 91 F. Supp. 3d 573, 580 (D. N.J. 2015).

While the district court accepted that helping a woman to obtain a religious divorce was authorized by Jewish law, and therefore part of the defendants' legitimate religious exercise, it held that "there is also no dispute that there are alternative means of coercion to perform this mitzvah," including secular legal

methods. *Id.* at 582. The court held that "[t]hese alternative and meaningful means . . . do not violate the criminal laws of the United States, yet still permit Orthodox Jews to participate in the mitzvah[.]" *Id.* at 582. Because "acceptable alternative means of religious practice . . . remained available to the defendants," the Third Circuit affirmed the district court's determination that indictment for kidnapping did not substantially burden the defendant's religious exercise. *Stimler*, 864 F.3d at 268, *affirming Epstein*, 91 F. Supp. 3d 573.

Similarly, in *Henderson v. Kennedy*, the D.C. Circuit considered a RFRA claim challenging a ban on t-shirt sales on the National Mall. 253 F.3d 12 (D.C. Cir. 2001). There, the claimants argued that, as Christians, they were obligated to preach the gospel "to the whole world . . . by all available means," including by offering religious t-shirts for sale. *Id.* at 15. The D.C. Circuit held the claimants could not show a substantial burden because they could not show that a ban on certain commercial activity on the National Mall either forced them to engage in conduct forbidden by their religion or prevented them from engaging in conduct their religion required. *Id.* at 16. Furthermore, the claimants' broad religious conviction that they must spread the gospel by "all available means" was not substantially burdened by a restriction on the sale of t-shirts because the claimants had other means to satisfy their religious requirement, including distributing t-shirts for free or selling them in surrounding areas. *Id.* at 17; *cf. Archdiocese of Wash. v. Wash. Metro Area Transit Auth.*, 897 F.3d 314, 333 (D.C. Cir. 2018) (Archdiocese not substantially burdened by restrictions on religious advertising on

public transit where it never alleged that its religion required displaying advertisements on WMATA property and had "many other ways to pursue its evangelization efforts: in newspapers, through social media, and even on D.C. bus shelters").

Like the RFRA claimants in *Stimler* and *Henderson*, Safehouse, too, has multiple legal ways in which its board members may satisfy their broad religious beliefs that they must shelter their neighbors, care for the sick, and preserve life. In fact, Safehouse's Second Amended Counterclaims detail many of them. Safehouse plans to offer services to assess the physical and behavioral health status of drug-addicted persons in Philadelphia, to provide sterile drug consumption equipment, drug testing strips, wound care, primary care services, on-site education and counseling, on-site medication-assisted treatment and recovery counseling, distribution of Naloxone, and access to social services such as housing, public benefits, and legal services. (ECF No. 209, at ¶ 33).

Assuming compliance with applicable statutory and regulatory requirements (*e.g.*, 21 U.S.C. §§ 822, 823(g), and 21 C.F.R. § 1301.12), none of these measures would run afoul of the CSA, and all align with the asserted religious beliefs of Safehouse's board members. The government does not seek to stop those lawful activities. Accordingly, Safehouse's board members remain able to follow the precepts of their religions through methods other than maintaining a place for others to use and medical providers to supervise the use of illegal drugs. Given the many ways in which these board members can act to help those who suffer from

opioid use disorder within the bounds of the law, Safehouse cannot show that its board members' religious beliefs to "preserve life, provide shoulder to [their] neighbors, and to do everything possible to care for the sick" is substantially burdened by enforcement of the CSA's prohibition on maintaining a place for illegal drug use.

In response to prior briefing, Safehouse suggested that *Stimler* "did not consider . . . subsequent Supreme Court precedent in *Holt*." (ECF No. 48, at 53). But *Holt v. Hobbs*, 574 U.S. 352 (2015) was decided two years before *Stimler*, and the Third Circuit panel was clearly aware of *Holt*, as evidenced by its citation to that decision. *See Stimler*, 864 F.3d at 268 n. 61. Nevertheless, the court still held that, "[w]hile the government's decision to prosecute the defendants undoubtedly constituted a burden on their sincerely held religious beliefs, *the District Court properly analyzed whether the burden was 'substantial' by looking to acceptable alternative means of religious practice that remained available to the defendants*." 864 F.3d at 268 (emphasis added) (citing *Washington v. Klem*, 497 F.3d 272, 282-83 (3d Cir. 2007), in support of the alternative means analysis).

In any event, *Holt* is readily distinguishable. In that case, the district court held that a prison did not substantially burden a prisoner's religious exercise by refusing to let him grow a religiously required beard because the prison facilitated other ways in which the prisoner could observed his Muslim faith, including by providing a prayer rug, allowing him to follow a religious diet, and permitting his observance of religious holidays. *See Holt*, 574 U.S. at 360. The Supreme Court

rejected this analysis, stating that "whether [a claimant] is able to engage in other forms of religious exercise" is not a consideration under the substantial burden test. *Id*. at 361-62.

The alternative means analysis employed by the Third Circuit in *Stimler* does not conflict with *Holt* because it involves a narrower question. Rather than consider whether the defendants could engage in other, separate forms of religious exercise, the *Stimler* court considered whether the *specific religious exercise* in which the defendants sought to engage, specifically, helping women obtain divorces from recalcitrant husbands, could be satisfied through other means. *See Stimler*, 864 F.3d at 268. In other words, the court did not suggest that the defendants ignore what they viewed as a religious obligation, as the district court erroneously did in *Holt*; rather, it looked to whether there were alternative ways the same obligation could be fulfilled without violating the law.

Similarly, the government does not here contend that the religious exercise of Safehouse's board members is not substantially burdened merely because the board members may still engage in other acts of faith, such as attending church or synagogue, keeping Kosher, reading holy texts, or praying. Instead, the government argues—and Safehouse acknowledges in its counterclaim—that there are other means by which its board members can effectuate their specific professed religious obligations to preserve life, provide shelter, and care for the sick, including the myriad additional ways they have proposed on their website and in their pleadings. Those board members can travel to areas of the City where drug use is prevalent,

remaining in close proximity while drug users inject heroin and fentanyl, and offering care and medical assistance in the event of an overdose.

Because Safehouse cannot show a substantial burden on its board members' religious practice, this Court should hold that it has failed to make out a *prima facie* case under RFRA. *See Stimler*, 864 F.3d at 268; *]*, 55 F.3d at 1522-23 (where there is no substantial burden on religion, the court need not reach the question of whether the challenged act was the least restrictive means to further a compelling state interest); *see also Adams v. Comm'r*, 170 F.3d 173, 176 (3d Cir. 1999) (before the government must prove that enforcement of a law is the least restrictive means of advancing a compelling interest, a plaintiff first must "demonstrate a substantial burden on [its] exercise of [ ] religious beliefs"). As Safehouse has not pleaded a *prima facie* RFRA violation, this Court should dismiss its RFRA counterclaim. *See* Fed. R. Civ. P. 12(b)(6).

B. Safehouse Acknowledges that It Seeks to Engage in Activity that Is Motivated by Socio-Political, Scientific, or Philosophical Beliefs, not Religious Ones.

Repeated allegations in its pleading reveal that Safehouse additionally cannot meet the second requirement of a *prima facie* RFRA claim: that the asserted belief motivating the proposed conduct is religious in nature. *See Stimler*, 864 F.3d at 267-68.

Although courts may not question the *bona fides* of an asserted belief, Third Circuit and Supreme Court precedent requires courts to identify with particularity the belief motivating a RFRA claimant's activity and to assess whether the belief is

religious or secular in nature. *See Sutton v. Rasheed*, 323 F.3d 236, 250-51 (3d Cir. 2003) (evaluating whether a proffered viewpoint was religious or secular in nature); *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 725 n. 13 (2005) (in a case under Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), inquiry into the truth of an asserted belief is impermissible, but inquiry into the religiosity of a belief is not).

Not all sincerely held beliefs are religious in nature and therefore eligible for constitutional protection. *See Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (noting that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation [ ] if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief"); *see also United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (government action must substantially burden "a religious belief rather than a philosophy or way of life").

Safehouse asserts that its board members believe they must provide a place where other individuals can supervise drug use as an exercise of the board members' various faiths. This Court can evaluate whether this specific asserted belief is religious or secular. *See Mason v. General Brown Cent. Sch. Dist.*, 851 F.2d 47, 51 (2d Cir. 1988) (conducting threshold inquiry into whether belief is religious or based on secular or scientific principles);[7] *cf. Caviezel v. Great Neck Pub. Sch.*, 701

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[7] *But see Wiggins v. Sargent*, 753 F.2d 663, 666-67 (8th Cir. 1985) (belief that is both religious and secular can qualify for constitutional protection); *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981).

F. Supp. 2d 414, 430 (E.D.N.Y. 2010) (construing the applicability of a New York state law exemption to vaccination, and finding that plaintiff's "reluctance to have her daughter vaccinated did not arise from a religious belief, but from a personal, moral, or cultural feeling against vaccination"); *Check ex rel. MC v. New York City Dep't of Educ.*, Civ. No. 13-0791, 2013 WL 2181045, at *3 (E.D.N.Y. 2013) (finding the plaintiff's "aversion to immunization" was based on a secular conviction, not a religious belief); *Geerlings v. Tredyffrin/Easttown Sch. Dist.*, Civ. No. 21-4024, 2021 WL 4399672, at *6 (E.D. Pa. Sept. 27, 2021) (interpreting First Amendment religious freedom claim and concluding that, while each plaintiff had "a passionate objection" to wearing masks, none of these beliefs were religious in nature so as to warrant First Amendment protection).

As this Court recently noted, "[r]eligious adherents often profess that faith inspires much of their secular lives, but those activities are still secular." *Geerlings*, 2021 WL 4399672, at *7 (Goldberg, J.) (quoting *Yoder*, 406 U.S. at 215-16). Secular activity inspired by an individual moral imperative or a philosophical disagreement with the law is not protected by RFRA. *See Real Alts.*, 867 F.3d at 350 (noting the country's "vast history of legislative protections that single out and safeguard religious freedom but not moral philosophy"). The government does not challenge the sincerity of Safehouse's board members' asserted religious beliefs in the value of human life, which Safehouse contends arises from the teachings and scriptures of Christianity and Judaism and the religious upbringings of its founders and board members. (*See* ECF No. 209, at ¶¶ 125-27). But where Safehouse seeks to open a

supervised injection facility based on secular concerns about the current state of the opioid crisis in Philadelphia, as it repeatedly states throughout its pleading, it asserts a social or moral philosophy grounded in secular views about the best methods of reducing harm for drug users.

Geerlings is particularly instructive on this point. The court in that case evaluated a claim that the plaintiffs' religious beliefs prevented them from sending their children to school wearing masks, as required by a school district during the COVID-19 pandemic. After taking testimony about each plaintiff's religious beliefs,[8] the Court denied all claims. With respect to one plaintiff, the court explained:

> [S]he has not demonstrated that she practices keeping her face uncovered the way followers of Catholicism practice communion or those of Jewish faith practice eating unleavened bread on Passover. Her decision to eschew masks corresponds to no teaching of her community, upbringing, or other 'comprehensive . . . belief-system,' nor does she practice it through 'formal and external signs' such as holidays, ceremonies, or clergy. *Africa*, 662 F.2d at 1032. It is, rather, an "isolated moral teaching" that reflects the circumstances of the ongoing pandemic and seems to be more associated with health restrictions.

2021 WL 4399672, at *7. As in *Geerlings*, this Court can identify with particularity the beliefs actually motivating Safehouse's plans to operate a supervised injection site and determine that they are secular in nature. *See Yoder*, 406 U.S. at 216 (noting that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief," rather than being "based on purely secular considerations").

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[8] The *Geerlings* court ruled after an evidentiary hearing. Here, this Court has sufficient factual information, from Safehouse's pleading, to rule on this Motion.

Safehouse's Second Amended Counterclaims are replete with allegations demonstrating that the driving rationale for its proposal to maintain a site for the supervised use of drugs is socio-political, medical, and philosophical. Safehouse contends that it seeks to engage in a "harm reduction strategy" with the purpose of "reduc[ing] harm for individuals 'who, for whatever reason, may not be ready, willing, or able to pursue full abstinence as a goal.'" (ECF No. 209, at ¶¶ 31-32). Safehouse categorizes its proposed action as a "modest extension of already-endorsed harm reduction measures" and states that supervised injection has been endorsed by authorities in the medical community. (*Id.* at ¶¶ 65, 88). Safehouse contends that "compassionate and conscientious medical providers"[9] should be permitted to operate a location for the medically supervised use of drugs, and that this is supported by "medical facts recognized by Congress, the CDC, and federal health policy." (*Id.* at ¶¶ 63-64).

Safehouse's view is an individual, medical, and public health-based judgment, informed by an admittedly ongoing and serious public health crisis, but it is not a religious belief. *See Fallon*, 877 F.3d at 492 (plaintiff's underlying belief that the flu vaccine may do more harm than good was a medical belief, not a religious one); *Finkbeiner v. Geisinger Clinic*, 623 F. Supp. 3d 458, 465-66 (M.D. Pa. 2022) (finding the plaintiff's belief that she has a "'God given right to make [her] own choices'" is "fungible enough to cover anything that [she] trains it on" and would

[9] Notably, Safehouse does not claim that the medical providers who would staff its proposed supervised injection facility would also be acting in exercise of their individual religious beliefs.

therefore amount to "a blanket privilege" and a "limitless excuse for avoiding all unwanted . . . obligations" (internal marks and citation omitted)); *Blackwell v. Lehigh Valley Health Network*, Civ. No. 22-3360, 2023 WL 362392, at *7 (E.D. Pa. Jan. 23, 2023) (rejecting claim for religious exemption from nasal swab COVID testing, noting that, while the plaintiff was religious and her belief against "the insertion of unwanted foreign objects into her body" was sincerely held, this belief was not religious where evidence showed that she "challenge[d] the factual and scientific basis" for the testing requirement).

A number of courts have recently decided these issues on Rule 12 motions. *See Ulrich v. Lancaster Gen. Health*, Civ. No. 22-4945, 2023 WL 2939485, at *5 (E.D. Pa. Apr. 13, 2023) (granting Rule 12 motion and dismissing complaint with prejudice after rejecting Christian plaintiff's concerns about COVID testing as "medical concerns which she attempts to cloak with religious significance" (internal mark and citation omitted)); *Detwiler v. Mid-Columbia Med. Ctr.*, Civ. No. 22-1306, 2022 WL 19977290, at *4 n. 4 (D. Or. Dec. 20, 2022) (granting Rule 12 motion and dismissing Title VII religious discrimination claim after ruling that Christian plaintiff failed to establish that her opposition to COVID testing was religious: "[a]lthough she couches it in religious terms, the complaint makes clear that plaintiff's request for alternate accommodation stems from her belief that nasal swab testing contains hazardous materials," a secular belief).[10]

[10] *But see Leeck v. Lehigh Valley Health Network*, Civ. No. 5:22-4634, 2023 WL 4147223 (E.D. Pa. June 23, 2023) (holding, in a Title VII case, that plaintiff pleaded

Here, Safehouse believes that maintaining a supervised injection site for unlawful users of heroin, fentanyl, and other opioids would, in essence, do more *good* than *harm*. As Safehouse has emphasized throughout its pleading, this conclusion is not religious, but is a judgment based on Safehouse's opinions about social circumstances and medical policy. Safehouse's board members have asserted a general religious belief and desire to "preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick." (ECF 209, at ¶ 129). But, as Safehouse implicitly acknowledges, the application of these religious beliefs to its plan to maintain a supervised injection facility is driven by its concerns about the current opioid crisis and its review of literature supporting harm reduction efforts. Safehouse's admissions in this regard should guide this Court's determination about the secular nature of its proposal. RFRA does not protect such beliefs. Because Safehouse's secular motivation is evident from the pleading, this Court should rule, as a matter of law, that Safehouse's board members' beliefs that they should operate a supervised injection facility is a secular belief not entitled to protection under RFRA.

enough about her religious beliefs about vaccination, even where mixed with secular beliefs, to survive a motion to dismiss).

III. Because § 856 Does Not Contain a Mechanism for Individualized Exemptions and Does Not Authorize Comparable Secular Conduct in the Manner Proscribed by *Fulton*, Its Enforcement Would Not Violate Safehouse's Board Members' Free Exercise Rights.

Safehouse has also failed to plead a claim for relief under the Free Exercise clause of the First Amendment.[11] It is well-established that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton*, 141 S. Ct. at 1876. In *Fulton*, the Supreme Court clarified that "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interest in a similar way." *Id*. at 1877. Safehouse seizes upon this language in support of its newly asserted Free Exercise claim, arguing that

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[11] Just as RFRA requires a threshold inquiry into whether the plaintiff's religious exercise has been substantially burdened, so too must a plaintiff in the First Amendment context demonstrate burden to warrant strict scrutiny. *Fulton*, 141 S. Ct. at 1876 (finding "[a]s an initial matter" that Catholic Social Services' exercise of religion has been "burdened" because the City of Philadelphia "put[ ] it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny"); *see also* Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1762 (2022) (The practice of applying heightened scrutiny only to laws that "*burden* the Second Amendment right *substantially*" is . . . broadly consistent with our approach to other fundamental constitutional rights, including those protected by the First and Fourteenth Amendments. . . . [In implementing the Second Amendment] we readily "consult principles from other areas of constitutional law, including the First Amendment") (emphasis in original). Thus, for the same reasons Safehouse cannot demonstrate RFRA's required substantial burden, it cannot meet the First Amendment's threshold burden test.

§ 856 contains "exemptions from a law for those engaged in *non-religious activity*" in a manner that requires this Court to apply strict scrutiny to the application of the statute to Safehouse. (ECF No. 209, at ¶ 135 (emphasis in original)).

But measured against *Fulton*'s standard, § 856 is generally applicable, and Safehouse's argument that strict scrutiny applies should be rejected. Unlike the provision at issue in *Fulton*, § 856 does not contain a mechanism for individualized exceptions that invites the government to consider the *reasons* for the otherwise prohibited conduct. Indeed, by its terms, § 856 contains no exceptions at all. Nor has Safehouse identified any other exception in the CSA that would undermine the government's interests in minimizing the harm to public health posed by concentrated illegal drug use. While it does identify four exemptions found in unrelated portions of the broader statutory scheme, none of these relates to the *use* of specific facilities for illegal drug activity, and thus none calls that interest into question. Accordingly, the enforcement of § 856 against Safehouse need only be rationally related to a legitimate government interest. And because the Third Circuit has already found that it is, Safehouse's Free Exercise claim should be dismissed.

A. By Its Terms, Section 856 Is Generally Applicable and Does Not Contain Mechanisms for Individual Exemptions.

At the outset, Safehouse is wrong when it posits that § 856 provides for "a mechanism for individualized exemptions" in the manner contemplated by *Fulton*. 141 S. Ct. at 1877. As this Court is aware, § 856 prohibits making available a place "for the purpose of unlawfully manufacturing, storing, distributing, or using a

controlled substance." 21 U.S.C. § 856(a)(2). The Third Circuit explicitly held that § 856(a)(2) applies to Safehouse's proposed activities. *United States v. Safehouse*, 985 F.3d 225 (2021).

Key to *Fulton*, and the cases it relied upon, *Sherbert v. Verner*, 374 U.S. 398 (1968) and *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), was the existence of the type of "mechanism for individualized exemptions" that defeats general applicability because it "invites the government to consider the particular reasons for a person's conduct." *Fulton*, 141 S. Ct. at 1877 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)); *see also id*. (noting that a law is not generally applicable if the government could "grant exemptions based on the circumstances underlying each application" (citing *Smith*, 4949 U.S. at 884)).

In *Fulton*, the plaintiffs challenged a specific provision of a foster care contract that limited the rejection of a foster child or foster parents based on their sexual orientation "unless an exemption is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." 141 S. Ct. at 1878. In *Sherbert*, the challenged law "prohibited eligibility to [unemployment] claimants who had failed, without good cause . . . to accept suitable work." *Id*. at 1877 (citing *Sherbert*, 374 U.S. at 401). And in *Lukumi*, the Court struck down "ordinances prohibiting animal sacrifices," which did "not regulate hunters' disposal of their kills or improper garbage disposed by restaurants, both of which posed a similar hazard." *Id*. (citing *Lukumi*, 508 U.S. at 544-45). Such provisions, the Court held in *Lukumi*

and reemphasized in *Fulton*, would "prohibit religious conduct while permitting secular interests in a similar way." *Id.* (citing *Lukumi*, 508 U.S.at 545-46).

Central to *Fulton*, *Sherbert*, and *Lukumi* were the existence of specific provisions empowering government actors to grant or deny exemptions in a manner that could constitute "religious practice . . . being singled out for discriminatory treatment." *Lukumi*, 508 U.S. at 538. And in those cases, a government actor had nearly unfettered discretion to grant exemptions in a way that could discriminate against religious practice.

Section 856 resembles none of these provisions. It provides no statutory exemption, nor does it vest discretion in a government actor to make a place available for illegal conduct for secular (but not religious) purpose. Section 856 does not care about the underlying motivation for making a place available "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. § 856(a)(2). Regardless of motive, the conduct is prohibited without a provision for discretionary exemption. *See Safehouse*, 985 F.3d at 232 ("The text of the statute focuses on the third party's purpose, not the defendant's"). Under such circumstances, this provision is classically generally applicable, and therefore not subject to strict scrutiny.

B. The CSA Does Not Otherwise Authorize Secular Conduct in a Manner Comparable to the Conduct Prohibited in Section 856.

Perhaps recognizing that the text of § 856 itself does not contain the type of "mechanism for individualized exemptions" that *Fulton* contemplates, Safehouse looks more broadly to other provisions of the CSA. *See* 21 U.S.C. § 856(a)(2) (stating

that "[e]xcept as authorized by this subchapter, it shall be unlawful to" maintain drug-involved premises). But none of the four exemptions it identifies provides an exemption from the requirements of § 856.

As a threshold matter it is important to recognize that Safehouse's proposed activities are markedly different than those authorized under other provisions of the CSA. Along with educational and counseling activities, "Safehouse will also feature a drug consumption room. Drug users may go there to inject themselves with illegal drugs, including heroin and fentanyl." *Safehouse*, 985 F.3d at 231. Safehouse will "not provide, dispense, or administer any controlled drugs"; rather, "[t]he drugs [the user] consumes will be his own," *id*. at 237, and "Safehouse itself has a significant purpose that its visitors use heroin, fentanyl, and the like," *id*. at 238. Thus, by design, Safehouse seeks to create a site to allow third parties to use illegal drugs in an unregulated environment. Such activities find no analogy in existing exemptions under the CSA, much less those that "undermine the government's asserted interest" in discouraging the establishment of facilities where illegal drugs are consumed. *See Fulton*, 141 S. Ct. at 1877.

None of the four provisions that Safehouse identifies meets the Supreme Court's standard of providing "a mechanism for individualized exemptions" *for the behavior regulated by § 856* or otherwise "permitting secular conduct that undermines the government's asserted interest [*i.e.*, the basis of § 856] in a similar way." *Fulton*, 141 S. Ct. at 1877. None of the exemptions would authorize the actions Safehouse seeks to undertake (*i.e.*, making available a place for the use of

illegal drugs). And none of the exemptions calls into question the government's interest in preventing facilities that permit unregulated drug use and distribution.

1. The Research Exemption – 21 U.S.C. § 872(e)

The first exemption Safehouse identifies is the research exemption, which provides that the Attorney General "may authorize the possession, distribution, and dispensing of controlled substances for persons engaged in research." 21 U.S.C. § 872(e); *see also* 21 C.F.R. § 1316.24 (implementing regulations). (*See* ECF No. 209, at ¶¶ 137-39). But the research exemption is in no way comparable to the religious exemption to § 856 that Safehouse seeks.

Insofar as Safehouse suggests the narrow research exemption "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton*, 141 S. Ct. at 1877, its argument fails. The Attorney General's interest in carrying out "educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs"[12] is not the interest furthered by § 856, which concerns preventing sites where users congregate for illegal drug activity.

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[12] Examples of these exempted research programs make clear that the research exemption is designed to *aid* the government in its law enforcement efforts under the CSA. *See* 21 U.S.C. § 872(a)(1)-(6) (discussing examples, including "educational and training programs on drug use and controlled substances" for law enforcement; studies "designed to compare the deterrent effects of various enforcement strategies on drug use and abuse;" "assess[ing] and detect[ing] accurately the presence in the human body of drugs or other [controlled substances];" or "develop[ing] more effective methods to prevent diversion of controlled substances into illegal channels").

The research exemption balances that "[t]here is a legitimate need for conducting research with controlled substances" with the fact that "the diversion and abuse of pharmaceutical controlled substances remains a public health concern in the United States." *See* https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-057)(EO-DEA217)_Researchers_Manual_Final_signed.pdf (hereinafter, "DEA Researcher's Manual"), at 7. It is therefore heavily regulated, unlike the conduct proposed by Safehouse.

Any applicant for a research exemption must comply with significant regulatory requirements and reviews, including a detailed review by the Secretary of the Department of Health and Human Services on the merit of the research protocol, the qualifications and competencies of the applicant, and whether there are "effective procedures to safeguard adequately against diversion of such controlled substances from legitimate medical or scientific use." 21 C.F.R. § 1301.32(a).

The research must also have the "[a]pproval of a Human Research Committee for human studies," 21 C.F.R. § 1301.18(a)(3)(ii), and the requisite "state authority to handle controlled substances for the state of the researcher's registered business/office address." DEA Researcher's Manual, at 15. The applicant must identify "the risks posed to the research subjects by the research procedures and what protection will be afforded to the research subjects," as well as the "risks posed to society in general by the research procedures and what measures will be taken to protect the interests of society" from those risks. 21 C.F.R. § 1316.24(b)(6), (7). The

applicant must also maintain numerous records to "provide accountability of all controlled substances to help reduce the potential for diversion." DEA Researcher's Manual, at 15; 21 C.F.R. § 1304.21(a). And, finally, the research exemption is explicitly time-bound; it expires upon "completion of the research project or until the registration of the researcher is either revoked or suspended or his renewal of registration is denied." *Id.* at § 1316.24(d)(6).

In short, the research exemption recognizes a need for research, but also that it must be tempered by extensive scientific and regulatory controls to prevent harm to third parties. These purposes are entirely consistent with the general ban on a facilities that would allow—indeed, that are designed to promote—the *unregulated* use of illegal drugs without proper scientific or medical guardrails.

Moreover, the research exemption would not authorize the conduct that Safehouse intends. The exemption provides that the Attorney General "may authorize the possession, distribution, and dispensing of controlled substances *by person engaged in research*." 21 U.S.C. § 872(e) (emphasis added); *see also id.* ("Persons who obtain this authorization shall be exempt from State or Federal prosecution for possession, distribution, and dispensing of controlled substances to the extent authorized by the Attorney General"). The entire premise of Safehouse's proposed operation is that Safehouse will *not* possess, distribute, or dispense such substances—third parties will. *See Safehouse*, 985 F.3d at 231. The research exemption does not apply under those circumstances. It is not a categorical exemption from all provisions of the CSA; it applies to specific actions that

Safehouse does *not* propose to do, and it therefore does not constitute a "mechanism for individualized exemptions" from § 856.

Safehouse's proposal to operate a site where illegal drugs would be used by third parties would accord with none of the regulatory controls that apply to the research exemption. Safehouse would not be required to secure approval of a Human Research Committee, to satisfy state legal requirements, or be subject to regulatory review of the adequacy of its protocols or the competency of its employees. Nor would it be required to maintain records or otherwise design its processes to limit third party harms. The limited, highly regulated processes authorized by the research exemption are fundamentally different than authorizing supervised injection sites that are unbound in time, unlimited by any requirement to mediate, or even identify, risks to third parties, and divorced from a specific research purpose.

2. The Registration Exemption—21 U.S.C. § 822(d)

Next, as Safehouse observes, federal law requires that "every person who manufactures or distributes any controlled substance" must obtain a registration from the Attorney General, 21 U.S.C. § 822(a)(1), but that "[t]he Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with public health and safety," *id*. at 822(d); *see also* 21 C.F.R. § 1307.03 (providing a process for applying "for an extension of any provision of this chapter"). (ECF No. 209, at ¶ 137).

But, as with the research exemption, the registration exemption limits only the requirement *to register*, or waives certain registration restrictions, and thus, by extension, to *legally* manufacture, distribute, or dispense a controlled substance. *See* 21 U.S.C. § 822(b).[13] Safehouse does not seek to manufacture, distribute, or dispense controlled substances. Thus, its proposed activities fall outside the scope of the registration exemption.

Nor does allowing waiver of certain registration requirements in certain circumstances undermine the purposes of § 856. The registration exemption ensures that the federal government is aware of, and can regulate, those involved in the manufacturing, distributing, and dispensing of controlled substances. *See* 21 U.S.C. § 822. It also provides a pathway to determine whether the applicant is taking actions that are "inconsistent with the public interest." 21 U.S.C. § 823(b). And it imposes strict rules on those who distribute or dispense those substances, *id.* at 823(d), and permits waiver only where "consistent with the public health and safety," *id.* at § 822(d).

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[13] For example, DEA regulations require a practitioner to obtain a separate DEA registration in each state in which he or she dispenses a controlled substance. This requirement was recently waived under 21 C.F.R. § 1307.03 in response to the exigencies of the COVID-19 pandemic; consequently, many states permitted practitioners to dispense drugs in both their home states and states with which their home states had reciprocity. *See* DEA067, Letter to Registrants from Assistant Administrator of Diversion Control Division William T. McDermott, March 25, 2020, available at https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-018)(DEA067)%20DEA%20state%20reciprocity%20(final)(Signed).pdf. Significantly, this exception still required practitioners to be registered in their home state, thus retaining a robust regulatory scheme for those who manufacture, distribute, or dispense controlled substances.

In short, the registration exemption ensures federal oversight over the activities of those authorized to distribute or dispense controlled substances to ensure that the interests of public health and safety are served. But § 856 serves a different purpose: that of preventing facilities where illegal drugs are distributed or used *without* any such authorization or regulation, and where "[illegal] drug activities are likely to flourish." *Safehouse*, 985 F.3d at 241. Regulating the legal distribution of controlled substances in a manner that serves public health, and with close supervision to prevent third-party externalities, is fundamentally different than permitting a place that allows use of illegal street drugs without any such supervision.

3. The Peyote Exemption—21 C.F.R. § 1307.31

Safehouse also invokes the peyote exemption, found at 21 C.F.R. § 1307.31, which provides that "[t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration." (ECF No. 209, at ¶ 141). But this exemption, which is not "secular" in nature, is also different in kind from the exemption Safehouse seeks such that it does not constitute the type of individualized exemption scheme identified in *Fulton*.

The peyote exemption applies to a specific type of controlled substance (peyote), used in a specific way ("nondrug use"), in a specific context ("bona fide religious ceremonies of the Native American Church"), and by specific persons

("members of the Native American Church"). 21 C.F.R. § 1307.31. None of these limitations applies to Safehouse, which does not seek to exempt the non-drug use of a specific type of controlled substance, but rather to permit the use of *any* controlled substance. Making a place available for the purpose of illegal drug use is fundamentally different in kind from permitting the religious use of one drug solely for use in a controlled religious setting.

Safehouse does not propose allowing controlled substances to be used in its facility for "nondrug use." Rather, as the Third Circuit observed, Safehouse specifically recognizes that its "visitors will have a significant purpose of drug activity." *Safehouse*, 985 F.3d at 237; *see also id*. at 238 ("One of Safehouse's significant purposes is to allow drug use"). Moreover, Safehouse does not itself seek to use controlled substances in specific religious ways. Instead, it seeks to operate a facility, purportedly motivated by its *board members'* religious beliefs, where *other* people will use drugs. (*See* ECF No. 209, at ¶¶ 125-129). And Safehouse does not propose to limit the class of persons who would use substances to those who are *themselves* motivated by religious purposes, nor does it even purport to serve such a class.

Ultimately, the peyote exemption is not analogous to § 856. Safehouse proposes to allow third parties, not the founders themselves, to engage in drug use, not "nondrug use" as permitted by the peyote exemption, for any purpose, not a religious purpose. This does not satisfy *Fulton*'s standard.

Nor does the peyote exemption undermine the purpose of § 856. Again, that provision limits *places* where illegal drugs can be consumed. The limited allowance of the use of one type of drug for *non-drug* purposes in the context of a specific religious ceremony does not demonstrate the type of "underinclusiveness" that the Supreme Court has held suspect. *See Lukumi*, 508 U.S. at 538.

4. The Civil Penalty Exemption—21 U.S.C. § 844a

Next, Safehouse identifies an "exemption" under § 844a by which, as to possession offenses, the "Attorney General [may] decide in his discretion to 'compromise, modify, or remit, with or without conditions, any civil penalty' imposed for simple possession." (*See* ECF No. 209, at ¶¶ 137, 144 (citing 21 U.S.C. § 844a)). This provision does not create an exemption for illegal possession. Stated more broadly, nearly any enforcement scheme includes penalties, and it cannot be the case that anytime the government forebears a penalty, in some context, for some reason, it is thereby prohibited from taking enforcement action in a different context, for a different reason.

Finally, Safehouse wrongly argues that Free Exercise Clause strict scrutiny applies here merely because the federal government has discretion to determine whether to prosecute under the CSA, including Section 856. (*See* ECF No. 160, at ⁋⁋ 141-45.) Prosecutorial decisions of the Attorney General and United States attorneys are entitled to a "'presumption of regularity.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Foundation, Inc.*, 272

U.S. 1, 14-15 (1926)). Accordingly, "'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Id.*

That rule applies to constitutional challenges, *see Armstrong*, 517 U.S. at 464-465, including equal protection challenges, *see id.*, which closely resemble a claim that the government is unconstitutionally targeting religion for adverse treatment. *See Lukumi*, 508 U.S. at 540 (noting that "[i]n determining whether the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases"); *see also United States v. Christie*, 825 F.3d 1048, 1060 (9th Cir. 2016) (noting that "[i]t is not wise for us to decide whether prosecuting the Christies represents the best exercise of prosecutorial discretion, or the wisest allocation of the Executive's finite resources"); *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (deferring to the government's decision to prosecute illegal taking of eagle feathers by Native American tribe for religious purposes "in light of the executive's vested and exclusive authority over criminal prosecution") (citing, e.g., *Morrison v. Olson*, 487 U.S. 654, 692-96 (1988)). Here, Safehouse has failed to identify any evidence, much less the "clear" evidence *Armstrong* requires, that the United States has in any way unconstitutionally targeted religion in exercising its prosecutorial discretion in Controlled Substances Act matters.

In sum, § 856 does not contain a mechanism for individualized exemptions and is a neutral law of general applicability under *Fulton*. The CSA exemptions cited by Safehouse are not secular activities comparable to the conduct that

Safehouse proposes. Thus, strict scrutiny does not apply,[14] and because enforcement of § 856 against Safehouse is rationally related to a legitimate government interest, Safehouse's Free Exercise claim should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the United States requests that its motion be granted, and that Safehouse's Second Amended Counterclaims be dismissed with prejudice.

Dated: July 21, 2023

Respectfully submitted,

Jacqueline C. Romero

JACQUELINE C. ROMERO
United States Attorney

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

/s/ Bryan C. Hughes
BRYAN C. HUGHES
ERIN E. LINDGREN
Assistant United States Attorneys
Eastern District of Pennsylvania
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476

Counsel for the United States

[14] If the Court determines that strict scrutiny review is appropriate here, the government reserves all defenses, including that it has a compelling interest, that § 856 is the least restrict means of furthering that compelling government interest, and that the statute otherwise satisfies strict scrutiny.

CERTIFICATE OF SERVICE

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

/s/Bryan C. Hughes ___________
BRYAN C. HUGHES
Assistant United States Attorney

Dated: July 21, 2023