No. 21-____

In the Supreme Court of the United States

SAFEHOUSE,
Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Ronda B. Goldfein
Yolanda French Lollis
Adrian M. Lowe
Jacob M. Eden
AIDS LAW PROJECT OF PENNSYLVANIA
1211 Chestnut St.,
Ste. 600
Philadelphia, PA 19107
(215) 587-9377

Seth F. Kreimer
3501 Sansom St.
Philadelphia, PA 19104
(215) 898-7447

Counsel for Petitioner

Ilana H. Eisenstein
Counsel of Record
Courtney G. Saleski
Ben C. Fabens-Lassen
DLA PIPER LLP (US)
1650 Market St.,
Ste. 5000
Philadelphia, PA 19103
(215) 656-3300
Ilana.Eisenstein
@dlapiper.com

Peter Goldberger
LAW OFFICE OF PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

QUESTION PRESENTED

In the midst of the opioid and overdose crises ravaging the nation and causing the death of more than 3,214 people over the last three years in the City of Philadelphia, petitioner Safehouse, a Philadelphia non-profit organization, seeks to establish an overdose prevention site that will offer medically supervised consumption services—a public-health intervention employed to prevent overdose deaths by providing immediate access to opioid reversal agents and urgently needed medical care at the time and place they are required, which is at the moment of consumption.

A divided panel of the Third Circuit reversed the grant of a declaratory judgment in favor of Safehouse and held that the proposed facility would violate 21 U.S.C. § 856(a)(2)—a provision of the Controlled Substances Act (CSA) that Congress passed to target "crack houses" and "rave parties." Section 856(a)(2) makes it unlawful (in relevant part) to "manage or control any place, whether permanently or temporarily, . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."

The question presented is:

Does 21 U.S.C. § 856(a) make it a felony to offer medically supervised consumption services for the purpose of preventing opioid overdose deaths?

PARTIES TO THE PROCEEDINGS

Petitioner Safehouse, a non-profit corporation, was the Defendant and Counterclaim-Plaintiff in a civil declaratory action brought by the United States Department of Justice (DOJ) in the United States District Court for the Eastern District of Pennsylvania. Safehouse's co-founder and president of its board of directors, José Benitez, was also named as a Defendant in the declaratory action brought by DOJ.

Respondents are DOJ; Merrick Garland, in his official capacity as the Attorney General of the United States; and Jennifer Arbittier Williams, in her official capacity as the Acting United States Attorney for the Eastern District of Pennsylvania.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES--CONTINUED

Cases—continued:

Statutes and Regulations:

TABLE OF AUTHORITIES--CONTINUED

Statutes and Regulations--Continued:

Legislative Material:

Other Sources:

IN THE
Supreme Court of the United States

No. 21-

SAFEHOUSE,
Petitioner,

v.

U.S. DEPARTMENT OF JUSTICE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Safehouse respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 985 F.3d. 225 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-52a. The order of the court of appeals denying rehearing en banc and the accompanying dissent from denial of rehearing en banc are reported at 991 F.3d 503 and reprinted at Pet. App. 53a-67a.

The order of the District Court on the motion for judgment on the pleadings is reported at 408 F. Supp. 3d 583 and reprinted at Pet. App. 79a-151a. The order of the District Court on the parties' cross-motions for summary judgment is not published in the Federal Supplement but is available at 2020 WL 906997, and reprinted at Pet. App. 68a-75a.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2021. Safehouse's timely petition for rehearing was denied on March 24, 2021. Pet. App. 54a. This Court's March 19, 2020 order extended the deadline to file any petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This petition centers on whether Safehouse's proposed overdose prevention site would violate 21 U.S.C. § 856(a), which provides as follows:

> Except as authorized by this subchapter, it shall be unlawful to—
>
> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place

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

INTRODUCTION

This Court should grant review to determine whether federal criminal law, 21 U.S.C. § 856(a), prohibits non-commercial, non-profit social service agencies, such as petitioner Safehouse, from establishing an overdose-prevention site that includes medically supervised consumption—a lifesaving intervention that medical and public-health experts deem crucial to preventing overdose deaths and to providing pathways to drug treatment in the midst of this nation's opioid and overdose crises.

Congress enacted Section 856(a) as an amendment to the Controlled Substances Act to target so-called "crack houses" and promoters of drug-fueled "rave parties." Pet. App. 41a, 95a. The statute makes it a 20-year felony 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*." 21 U.S.C. § 856(a)(2). In 2018, respondents sought a declaratory judgment that Safehouse's proposed services would violate Section 856(a)(2); Safehouse counterclaimed for a declaration that its proposed overdose prevention model did not violate that federal criminal law. The district court issued a declaratory judgment that Safehouse's proposed supervised consumption services—established for the purpose of saving lives by providing immediate access to opioid reversal agents and urgent medical care—would *not* violate Section 856(a)(2). Pet. App. 76a-78a; *see also id.* at 79a-151a.

Over a powerful dissent by Senior Circuit Judge Jane R. Roth, the court of appeals reversed that determination based on an incorrect interpretation of Section 856(a)(2) that imposes criminal liability on property owners and operators based on the unlawful purpose of *third-party* visitors, rather than based on the *defendant's* own purpose. To avoid the illogical results of this interpretation, the panel announced a new, atextual exception for "incidental" drug-use under subsection (a)(2) that is untethered to the statute's purpose element and that would trigger Section 856(a)(2) liability for the property owner or manager based on the undefined prevalence of others' drug use at the property. This ill-defined standard will turn otherwise law-abiding citizens into criminals. In so doing, the majority's opinion creates substantial uncertainty and confusion about Section 856(a)'s reach by creating a division among the courts of appeals about the standard for Section 856(a) liability. It does so while establishing a federal criminal bar to an important measure to combat the opioid crisis advocated by state and local governments, medical and public health experts, religious and community leaders of conscience, and families and loved ones of those suffering from addiction.

Because this case was decided through a declaratory judgment based on undisputed facts, this case presents an ideal vehicle to decide the application of Section 856(a) to supervised consumption services, while resolving the division among the circuits on the scope of Section 856(a) created by the court of appeals' erroneous and sweeping interpretation of that provision. This question is a matter of life or death for thousands of Philadelphians and many thousands more throughout the country. Tragically, while respondents have

been pursuing this declaratory judgment against Safehouse, more than 3,200 people died in Philadelphia of drug overdoses—many of which could have been prevented if medical care had been immediately available through supervised consumption services. Underscoring the vital need for resolution and the importance of this question, in the courts below, amicus briefs representing 160 organizations and individuals were filed in support of Safehouse's position. These briefs included 8 states' Attorneys General, one of whom, Xavier Becerra, is now the Secretary of the U.S. Department of Health and Human Services; 14 municipalities; prominent national public-health and medical organizations; social service providers; current and former law enforcement officers; religious leaders; and the family and friends of those who have lost loved ones to opioid overdose.

As Judge Theodore McKee, Judge Jane Roth, and Judge L. Felipe Restrepo stated in dissent from the denial of Safehouse's petition for rehearing en banc, the court of appeals' interpretation of Section 856(a) is not only gravely erroneous, but also, in light of the immediate importance of this issue, "*few other cases will merit en banc review as much as this one.*" Pet. App. 56a (emphasis added). These same considerations warrant this Court's intervention to resolve this critical legal question.

STATEMENT OF THE CASE

The opioid epidemic, and the overdose crisis that accompanies it, is a national public health emergency as declared in 2017 by the U.S. Department of Health and Human Services, and in January 2018, the Governor of Pennsylvania similarly declared a statewide emergency. Every day, an average of three people die

of overdose in Philadelphia, where Safehouse seeks to provide its services. Pet. App. 22a.

The overdose crisis has been fueled by potent new opioids like fentanyl, which have infiltrated the nation, and can lead to an overdose within seconds of consumption, resulting in rapid loss of respiratory function. When breathing stops, even a brief delay while waiting for medical help to arrive may result in an otherwise preventable overdose death or irreversible injury. As a result, every second counts when responding to an opioid overdose; as more time elapses, the greater the risk of serious injury and death. Ensuring proximity to medical care and opioid reversal agents like the drug Naloxone at the time of consumption is therefore a critical component of efforts to prevent fatal opioid overdose.[1] When administered quickly and in sufficient dose, *Naloxone will reverse an opioid overdose with medical certainty*.[2]

In 2016, Congress recognized the critical importance of combating opioid addiction and overdose that includes affirmative authorization and funding of other harm-reduction measures including syringe exchange services and efforts to enhance the availability of overdose reversal agents like Naloxone. *See* Comprehensive Addiction and Recovery Act of 2016

---

[1] Although Naloxone is designed to be easily administered as an intra-nasal spray, a person experiencing an overdose (and thus losing consciousness) cannot self-administer it. In the event of an overdose, Naloxone can work only if someone is close by to administer it.

[2] That is why in over 120 supervised consumption sites operating for over 30 years worldwide, not a single person has reportedly died of overdose death. *See*, *e.g.*, Thomas Kerr et al., *Drug-related overdoses within a medically supervised safer injection facility*, 17(5) INT'L J. OF DRUG POLICY, 436–41 (2006).

("CARA"), Pub. L. No. 114-198, § 101, 130 Stat. 697; Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 520, 129 Stat. 2652.

A. The Safehouse Proposal

Safehouse was founded in 2018 by a former mayor of Philadelphia and governor of Pennsylvania, leading public health practitioners, and prominent religious leaders to establish an overdose prevention site in Philadelphia, at the recommendation of a task force of public health and medical experts convened by the current Mayor of Philadelphia.[3] Safehouse declares in its mission statement that "[a]t the core of our faith is the principle that preservation of human life overrides any other considerations," and that its "mission is to save lives by providing a range of overdose prevention services."[4]

Safehouse's overdose prevention model builds upon federally approved and funded methods for fighting the national opioid epidemic and includes the provision of clean injection equipment to reduce disease transmission and opportunities to encourage and facilitate pathways into drug treatment programs and

---

[3] Safehouse's advisory board includes the Commissioner of Philadelphia's Department of Behavior Health and Intellectual disAbility Services; the Medical Director, Division of Substance Use Prevention and Harm Reduction, Philadelphia Department of Health; deans of the schools of public health of prominent universities in Philadelphia and neighboring Camden, New Jersey; a managing director of a healthcare group; an emergency room physician and public health consultant; a neighbor activist; and a parent who has lost a child to overdose. *See* Pet. App. 57a.

[4] *See* About Safehouse, A nonprofit public health approach to overdose prevention in Philadelphia, https://www.safehousephilly.org/about; The Parties' Stipulation of Facts, No. 19-cv-519, Dkt. Entry No. 137, Ex. A (E.D. Pa. Jan 6, 2020).

other essential social services. Pet. App. 133a. Because, in the event of an overdose, proximity is so critical to providing lifesaving medical care, Safehouse seeks to offer, as part of its efforts to combat the opioid crisis, medically supervised consumption services by which trained personnel will supervise participants' consumption and, if necessary, intervene with medical care, including respiratory support and the administration of overdose reversal agents, such as Naloxone. *Id.* at 5a-6a; 73a-74a; 141a-142a.

Safehouse thus will engage in the indisputably legal (and in some cases *federally funded*) acts of providing sterile injection equipment and administering emergency medical care. *Id.* at 94a n.8, 133a. Under no circumstance will Safehouse provide, administer, or dispense any controlled substances. *See id.* at 5a, 82a. Nor will Safehouse manufacture, sell, or administer unlawful drugs, or permit the distribution or sale of drugs at its site. *Id.* at 32a. The district court thus properly recognized that Safehouse's overdose prevention site "ultimately seeks to reduce unlawful drug use" while preventing the tragic loss of life from opioid overdose. *Id.* at 142a.

The medical and public-health measures that Safehouse proposes, including supervised consumption services, have been recognized and endorsed by local elected officials in Philadelphia (including the Mayor and District Attorney), its Director of Public Health, and by prominent national and international medical and public health associations including the American Medical Association, the American Public Health Association, AIDS United, the European Monitoring Center for Drugs and Drug Addiction, the Infectious Diseases Society of America, the HIV Medical Association, the International Drug Policy

Consortium, and scores of public health experts, physicians, and addiction researchers. *See id.* at 148a n.49.

B. Procedural History

1. In February 2019, the DOJ filed a complaint under 21 U.S.C. § 856(e) seeking a declaratory judgment that Safehouse's medically supervised consumption services would violate 21 U.S.C. § 856(a)(2). Pet. App. 83a-84a. Safehouse filed a counterclaim seeking a declaration that its overdose prevention model is not prohibited by Section 856(a). *Id.*[5] DOJ moved for judgment on the pleadings, and Safehouse opposed the motion. *Id.* at 84a.

a. In a detailed 56-page memorandum opinion, the district court denied DOJ's motion for judgment on the pleadings, holding that Section 856(a) does not apply to Safehouse's proposed overdose prevention services because Safehouse "plans to make a place available for the purposes of reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services," and does not intend to make its facility available "for the purpose of" facilitating unlawful "drug use." *Id.* at 141a.

---

[5] Safehouse also asserted counterclaims seeking a declaration that application of Section 856(a) to Safehouse would violate the Commerce Clause of the U.S. Constitution by criminalizing entirely local, noncommercial activities and would violate the Religious Freedom and Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, by subjecting Safehouse and its founders to criminal penalties for exercising their sincerely held religious beliefs that they have an obligation to do everything possible to preserve life and to provide shelter and care to the vulnerable, including those suffering from addiction. *See* Pet. App. 84a.

The parties stipulated to the facts material to the district court's decision on the pleadings and then cross-moved for summary judgment. *Id.* at 69a.

b. The district court granted Safehouse's motion for a summary judgment and issued a declaratory judgment in Safehouse's favor. *Id.* at 68a-78a.[6] As the court explained, its prior analysis of the statute in its memorandum opinion "applies with equal validity to the expanded record." *Id.* at 74a-75a. Based on that analysis, the court concluded that Safehouse was entitled to judgment as a matter of law on its counterclaim concerning the proper interpretation of Section 856(a). *Id.* The court thus issued a declaration "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). *Id.* at 77a-78a ¶ 4 (citation omitted).

2. DOJ appealed this pure question of law—whether Section 856(a) prohibits Safehouse's proposed overdose prevention services.

a. A divided three-judge panel of the court of appeals reversed. Pet. App. 1a-52a. In so doing, the majority's interpretation of Section 856(a)(2) broadly expanded criminal liability under that provision. The majority disagreed with the district court's construction of the statute and held that the phrase "for the purpose of"—as used in paragraph (a)(2)—looks ***not*** to the defendant's purpose (*i.e.*, that of Safehouse), but rather, to the purpose of third parties (*i.e.*, those who

[6] Because the district court concluded that the CSA "does not criminalize Safehouse's proposed actions," it dismissed without prejudice Safehouse's alternative counterclaim seeking the same relief for violations of RFRA as moot. Pet. App. 70a n.1, 77a.

come to Safehouse for supervision and treatment). *See id.* at 10a–14a. The majority explained that "[t]o get a conviction under (a)(2), the government must show only that the defendant's *tenant or visitor* had a purpose to manufacture, distribute, or use drugs," and the defendant had knowledge of that fact. *Id.* at 10a (emphasis in original). Under that expansive view of the "purpose" element of the statute, the majority held that Safehouse's supervised consumption services would violate Section 856(a)(2), because those seeking treatment will come to Safehouse with the purpose of using illegal drugs. *Id.* at 18a–19a.

b. Judge Roth dissented. As she explained, the majority's interpretation of Section 856(a) is inconsistent with its text, purpose, and history, which is devoid of any reference to the purpose of any third party and instead targets those who control and operate property for the purpose of unlawful drug activity. *Id.* at 31a–39a (Roth, J., dissenting). The majority's contrary interpretation of the purpose requirement was unprecedented, she observed, as neither DOJ nor the majority "identified a single statute that criminalizes otherwise innocent conduct—here, lawfully making your property 'available for use'—solely because of the subjective thoughts of a third party not mentioned in the statute." *Id.* at 34a–35a. And "if Safehouse's 'purpose' were the relevant standard," Judge Roth reasoned, "Safehouse does not have the requisite purpose" and thus would not be violating Section 856(a) by opening its overdose prevention site. *Id.* at 31a.

Judge Roth further explained various reasons why the majority's "construction also violates the 'deeply rooted rule of statutory construction' that we must avoid 'unintended or absurd results.'" *Id.* at 39a (citations omitted). For instance, "under the majority's

construction, parents could violate the statute by allowing their adult child suffering from addiction "to live and do drugs in their home even if their only purpose in doing so was to rescue him from an overdose." *Id.* And "[t]he Majority would also criminalize homeless shelters where the operators know that their clients will use drugs on the property." *Id.* at 42a. Relevant here, under the majority's unreasonable view of Section 856(a), Safehouse's medical staff (or, for that matter, loving parents and other family members, concerned roommates, dedicated social workers, or good Samaritans) would be prohibited from furnishing these crucial medical interventions at the time and place they are required—the moment of consumption—and must instead force those suffering from addiction into the street and out of their sight and care at that crucial moment. All of this is because "the government's construction of the statute, adopted by the Majority here, is intolerably sweeping." *Id.* at 43a. By contrast, "Safehouse's construction avoids these absurd results." *Id.* at 45a.

3. Safehouse filed a petition for rehearing en banc. The court of appeals denied Safehouse's petition, *see* Pet. App. 54a, over the dissent of Judges McKee, Restrepo, and Roth. *Id.* at 55a-67a (McKee, J., dissenting from denial of rehearing en banc). Judge McKee's dissent disagreed with the panel majority's interpretation of Section 856(a) and its application to Safehouse, finding that the panel majority's textual reading was incorrect. While recognizing that "a court must give effect to a statute's unambiguous plain language," Judge McKee critiqued the majority's imposition of the non-textual limitation that "exclud[es] criminal liability where drug use is 'merely incidental'

to occupancy," and thereby "read words into the statute that simply are not there in order to avoid the very troubling consequences that naturally result from their rigid insistence on a strictly literal interpretation." Pet. App. 56a (internal quotation marks omitted).

Judge McKee opined "[e]ven if the Majority's analysis is [correct], this declaratory judgment action is too important to deny en banc review by the entire court," since it "will be studied by other jurisdictions around the country where entities like Safehouse are considering similar therapeutic responses to the life-threatening opioid epidemic that is engulfing so many communities and destroying so many lives." *Id.* at 55a.

REASONS FOR GRANTING THE WRIT

I. The Interpretation of Section 856(a) is of National and Paramount Importance in the Midst of the Nation's Opioid Crisis and a Question on which Courts of Appeals Are Divided.

The nationwide opioid and overdose crises have led to the loss of tens of thousands lives nationwide each year—losses that have tragically increased with the proliferation of fentanyl into the drug supply and with the curtailment of services and treatment for those suffering from addiction brought on by COVID-19. Recently released data by the Centers for Disease Control and Prevention (CDC) show that drug overdose deaths reached a record high of 93,331 in 2020.[7]

---

[7] *See* CDC, National Center for Health Statistics, *Provisional Drug Overdose Death Counts*, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm#dashboard; *see also* Betsy McKay, *U.S. Drug-Overdose Deaths Soared Nearly 30% in 2020, Driven*

To address these crises, state, local, and public health leaders across the nation have moved to establish supervised consumption sites, like those Safehouse proposes, to prevent overdose deaths in their communities.[8] This is an important measure that would prevent overdose deaths, mitigate the harms from the opioid epidemic, and encourage and enable pathways to drug treatment.

But the court of appeals' misreading and improper extension of Section 856(a) would make it a federal crime to do so. Intervention by this Court is warranted to make clear that the federal law does not criminalize this essential public health and medical intervention designed to save lives from preventable overdose death.

The district court was the first in the country to address the specific question of whether Section 856(a) prohibits the establishment of a medically supervised consumption site. Of the six federal judges who have opined on whether Section 856(a) prohibits supervised consumption services, only two have determined that the supervised consumption services proposed by Safehouse are illegal, while four would have held that they are not. Given this stark disagreement among

---

by Synthetic Opioids, Wall Street Journal (July 14, 2021), https://tinyurl.com/pervh3fr.

[8] Amicus briefs filed by 8 State Attorneys General and 14 municipalities underscore the national interest in employing supervised consumption services to prevent overdose death. *See, e.g.,* Brief for State Attorneys General, *United States v. Safehouse*, 985 F.3d. 225 (2021) (Dkt. No. 165); Brief for Fourteen Cities and Counties, *United States v. Safehouse*, 985 F.3d. 225 (2021) (Dkt. No. 168); *see also* RI Gen. L. § 23-12.10-1 (2021) https://tinyurl.com/p2a4n3sw (newly enacted Harm Reduction Center Advisory Committee and Pilot Program).

respected and reasonable jurists as to the proper interpretation of Section 856(a)—and given the critical importance of the issues raised in this proceeding—review by this Court is warranted to clarify the interpretation of Section 856(a) and its application to Safehouse's proposed overdose prevention services and comparable services that are being proposed across the nation.

But the court of appeals also created a broader division regarding the scope of Section 856(a)(2). By misinterpreting Section 856(a)(2)'s purpose element to depend on third party's subjective intentions and by establishing a new, undefined standard for the prevalence of others' drug use sufficient to trigger criminal liability, the court of appeals introduced grave uncertainty as to when property owners could be penalized under that statute and put itself at odds with the standard for liability established by its sister circuits. Under the court of appeals' interpretation of Section 856(a)(2), the boundary between lawful and criminal conduct is hopelessly confused and will be judged differently depending on the circuit court.

In contrast to the Third Circuit, other circuits uniformly have held that knowledge or participation in "casual" or "personal" consumption of drugs is insufficient to establish Section 856 liability; rather, the prohibited purpose must be the primary purpose (or "significant purpose," as the District Court concluded) to which the property is put. Unlike the court of appeals' majority, which had to read in a stand-alone "incidental" use exception into the statute when none textually appears, other courts of appeals have found a proper limitation on criminal liability embedded in the statutory requirement that the putative *defendant* bear the illicit *purpose*. Because the court of appeals

incorrectly found that it is third-party visitors' purpose that controls, it read in an "incidental" use exception to avoid the absurd results that its interpretation would otherwise entail. By creating a separate, undefined standard for "incidental" use divorced from the defendant's own purpose, the court of appeals departs from the interpretation advanced in the other circuits in a manner that introduces confusion and uncertainty into the law.

For example, the D.C. Circuit starkly stated that, in light of Section 856(a)'s limitation to open or maintain "any place *for the purpose of* manufacturing, distributing, or using controlled substances," that the statute "cannot reasonably be construed . . . to criminalize simple consumption of drugs in one's home." *United States* v. *Lancaster*, 968 F.2d 1250, 1253 (1992).

In *United States* v. *Verners*, 53 F.3d 291 (1995), the Tenth Circuit likewise held that "manufacturing, distributing, or using drugs must be more than a mere collateral purpose," and "[t]hus, 'the casual' drug user does not run afoul of this prohibition because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose." *Id.* at 296 (quoting *Lancaster*, 968 F.2d at 1253).

The Ninth Circuit similarly found—based on "the statutory language, which proscribes only those drug activities that are '*the* purpose' to which the property is put"—that "in the residential context, the manufacture (or distribution or use) of drugs must be at least one of the primary or principal uses." *United States* v. *Shetler*, 665 F.3d 1150, 1162 (2011) (quoting *Verners*, 53 F.3d at 296) (emphasis original); *see also United*

States v. *Russell*, 595 F.3d 633, 642–43 (6th Cir. 2010) (noting uniformity of circuit law to exclude personal use of drugs from Section 856(a) and holding that "the defendant's drug-related purpose for maintaining a premises be 'significant or important'"); *United States* v. *Church*, 970 F.2d 401, 406 (7th Cir. 1992) (assuming that "casual drug users" do not risk violating 856").

While these cases involved residential use, the cabining of Section 856(a) liability should apply *a fortiori* to simple drug use that occurs at a medical and public health facility for the purpose of providing essential and urgent medical care. In fact, throughout this litigation, DOJ has not identified a single prior prosecution under Section 856(a) involving owners who make their property available with knowledge only that drug "use" will occur on the premises. Pet. App. 129a n.39. And although the court of appeals recognized these rulings, the outcome of its decision cannot be reconciled with the decisions from its sister circuits that simple possession of drugs at a premises does not subject the property owner to liability under Section 856(a) because it fails to meet the purpose element.

The conflict over the meaning of Section 856(a) has significant consequences: People convicted under Section 856(a) can face up to twenty years in prison or a $2 million fine. 21 U.S.C. § 856(b). Meanwhile, simple possession of drugs is a seldom-prosecuted federal misdemeanor, and "use" alone is not defined as a crime in the CSA. *See*, *e.g.*, 21 U.S.C. § 844. The statute was never intended to impose these harsh punishments on innocent and altruistic actors such as Safehouse. But the court of appeals' decision does just that, whereas other circuits would find simple possession of drugs at a property insufficient to establish Section 856(a) liability.

II. The Court of Appeals' Interpretation of Section 856(a) Is Inconsistent with Its Text, Purpose, and History.

The interpretation of Section 856(a) adopted by the court of appeals is not supported by the statutory text, settled canons of statutory interpretation, its history, or Congressional purpose. That is demonstrated in the three opinions issued below rejecting that interpretation—the district court's opinion, the dissent's opinion, and opinion sur denial of rehearing. *See* Pet. App. 31a-52a, 54a-67a, 79a-151a.

A. Section 856(a)'s Text and Structure Demonstrate that Criminal Liability Only Applies Where the Defendant, Not a Third-Party Visitor, Acts with Unlawful Purpose.

Since it is unlawful under both Section 856(a)(1) and (a)(2) to maintain or make available a "place . . . *for the purpose of* . . . using a controlled substance," interpreting the term "purpose" is critical. "Purpose" means "one's objective, goal, or end," as the district court and court of appeals explained. Pet. App. 18a (quoting *Purpose*, *Black's Law Dictionary* (11th ed. 2019)); *see id.* at 125a–126a (citing dictionary definitions). The *purpose* for which a place is opened, maintained, or made available refers to the objective of such activity, *not* the *means* by which that objective is achieved. *See Kelly* v. *United States*, 140 S. Ct. 1565, 1573 & n.2 (2020) (distinguishing between "the objective of the [deceitful] scheme" and a "byproduct of it"). Applying that straightforward interpretation of Section 856(a)'s text, Safehouse—and similar overdose prevention services—will operate "for the purpose of" providing necessary, urgent, lifesaving medical care

and treatment to people with opioid and substance use disorder, not to facilitate the unlawful use of drugs.

But the court of appeals' decision makes Safehouse's purpose in opening the facility irrelevant under its incorrect reading of Section 856(a)(2). What matters under the court of appeals' reasoning is not *Safehouse's* purpose, but rather, the purpose of people that come to Safehouse's overdose prevention site seeking treatment and medical supervision. Pet. App. 10a–14a. The court of appeals' interpretation was based on the incorrect premise that Safehouse would violate the statute because Safehouse would know *its participants* unlawfully use controlled substances in its facility. That conflates the potential criminal liability of people who use drugs (who may come to Safehouse in possession of small quantities of drugs obtained before their arrival), with the entirely legal, and indeed vital, medical services proposed by Safehouse and its staff.

This is incorrect under the plain language of the statute. As the district court rightly noted, "[a]t no point has the Government presented a compelling textual reason why the structure of (a)(2) dictates that the purpose requirement must refer to the purpose of the third party." *Id.* at 102a n.14. Indeed, Section 856(a) is devoid of any reference to the purpose of any third party (*i.e.*, a Safehouse participant). *Id.* at 31a (Roth, J., dissenting). And it would not make sense for a putative defendant's serious criminal liability to hinge on a third party's mental state and motivations. *Id.* at 34a–37a.

The court of appeals' reading also rests on the counter-textual premise that the phrase "place for the purpose" should be given an entirely different and far more expansive meaning in Section 856(a)(2) than in

Section 856(a)(1). But both subsections 856(a)(1) and (a)(2) use the identical phrase "*for the purpose of*" in the same manner. And the court of appeals opinion acknowledged that, as used in Section 856(a)(1), "for the purpose of" refers to the *defendant*'s state of mind. Pet. App. 11a. But the court read precisely the same phrasing and structure in Section 856(a)(2) entirely differently to instead depend on the purpose of unknown third parties, *i.e.*, the purpose of the people who will use Safehouse's overdose prevention facility. *Id.* at 11a–14a. This violates the basic tenet of statutory interpretation that a word or phrase in a statute is presumed to bear the same meaning throughout the statutory text. *See id.* at 34a (Roth, J., dissenting); *id.* at 105a; Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012); *see, e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 484–85 (1990).

Courts that have made this interpretive mistake have done so to avoid purported surplusage that does not exist. But avoidance of surplusage does not support the court of appeals' reading because Section 856(a)(1) and 856(a)(2) prohibit different activities. Section 856(a)(1) targets those who "open," "lease," rent," "use" or "maintain," property, *i.e.*, typically the non-owner operator of the property; whereas Section 856(a)(2) targets those who "manage or control any place" and who then "rent, lease, profit from, or make available for use" the property, *i.e.,* typically the owner landlord or manager. Pet. Appx 34.[9] *Cf. United States* v. *Chen,* 913 F.2d 183, 190 (5th Cir. 1990).

---

[9] In (a)(1), *noscitur a sociis* suggests that "rent" and "lease" are used to refer to the actions of a tenant, while in (a)(2) those same ambiguous terms are used to refer to the actions of a landlord. Thus, there is no redundancy. The declaratory judgment action

The court of appeals' interpretation of Section 856(a) would result in a dramatic expansion of criminal liability that is not faithful to its statutory text or structure. It puts at risk of federal criminal liability an indeterminate array of non-commercial property owners who know of a guest's "purpose" to use drugs. *Cf. Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) ("[T]he Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity . . . the fallout underscores the implausibility of the Government's interpretation.").

B. The History of Section 856(a) Shows No Congressional Intent to Regulate Public Health Facilities Like Safehouse.

Legislative evidence confirms that Congress intended Section 856(a) to impose liability on landlords or property-owners who make their properties available for unlawful purposes, and never contemplated its application to an overdose prevention site—or any similar public health facility. Pet. App. 80a–81a; 134a–141a; *see id.* at 60a (McKee, J., dissenting from denial of rehearing en banc). Although this "focus on making places available for such illicit purposes does not limit the provision's applicability to only crack houses and raves"—as the district court recognized—"it does caution against extending the statute too far beyond similar circumstances." *Id.* at 140a.

---

underlying this petition, however, did not turn on an understanding that Safehouse would "rent" or "lease" in either sense, but rather that it would "manage or control" a facility and "make [it] available for use" that the government contended had an unlawful "purpose."

Congress enacted Section 856 to target "crack houses," promoters of drug-fueled "raves," and other predatory actors and promoters of drug activity—not to criminalize the services proposed by Safehouse designed to prevent overdose death, stop drug use, and mitigate its harms. *Id.* at 95a (explaining that "[t]he impetus for § 856(a) initially was a concern about crack houses, and a similar concern about drug-fueled raves motivated the 2003 amendment"); *see id.* (quoting statement of Senator Chiles, 132 Cong. Rec. 26474 (1986), that Congress enacted Section 856(a) to "[o]utlaw operation of houses or buildings, so-called 'crack houses', where 'crack', cocaine and other drugs are manufactured and used"). Congress never contemplated that Section 856(a) would be used to prosecute property owners and operators based on the acts of third parties, much less overdose prevention services, or any comparable medical or public-health intervention designed to save lives by reducing the harms of the opioid epidemic.

As then-Senator Joseph R. Biden stated during the floor debates on his proposed 2003 amendments to Section 856(a): "Let me be clear. Neither current law nor my bill seeks to punish a promotor for the behavior of their patrons." *Id.* at 34a (Roth, J., dissenting) (quoting 149 Cong. Rec. 1678). He further explained that the "bill would help in the prosecution of rogue promoters who *not only know* that there is drug use at their event but *also hold the event for the purpose of illegal drug use or distribution. That is quite a high bar*." *Id.* at 105a–106a (quoting 149 Cong. Rec. 9384 (daily ed. Jan. 28, 2003) (emphasis added)).

During the debates over the 2003 Amendment, Senator Charles E. Grassley stressed that the target of the legislation was events where drugs are sold, but

pointed specifically "to drug reduction efforts as an example of conduct that would be *inconsistent* with criminal intent." *Id.* at 137a (citing 149 Cong. Rec. 1849 (2003)) (emphasis added). Those statements quelled concerns "about the Government using the existing crack house statue, or any expanded version, to pursue legitimate business owners." *Id.* at 116a–117a & n.29. "To read § 856(a)(2) to apply to medical purposes and efforts to combat drug abuse would take the statute well beyond what it aimed to criminalize." *Id.* at 141a.

C. The Court of Appeals Failed to Consider Lenity and the Clear Statement Rule, Resulting in Unintended Criminalization of Those that Operate Facilities Serving People Suffering from Addiction.

The Court need not look beyond the text of Section 856(a) to conclude that Safehouse's overdose prevention model would not violate that statute. But even if the court of appeals' strained interpretation of Section 856(a)(2) were plausible, ambiguity in its scope should have been resolved against criminalization of Safehouse's overdose prevention services. That is because criminal law requires clear statements and does not "default to criminalization." Pet. App. 146a (citing cases); *see, e.g., Jones* v. *United States*, 529 U.S. 848, 850 (2000); *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). As Judge Roth explained in dissent, the statute is "nearly incomprehensible"; even the then-U.S. Attorney for the Eastern District of Pennsylvania conceded at argument that it is "poorly written." *Id.* at 34a (Roth, J., dissenting). The ambiguities in Section 856 are thus "grievous." *Ocasio v. United States*, 136 S. Ct. 1423, 1434 & n.8 (2016). Ignoring that "legislatures and not courts should define criminal activity," *see United States* v.

Bass, 404 U.S. 336, 348 (1971), the majority incorrectly defaulted to the broadest possible reading of the statute.

"Under a long line of [Supreme Court] decisions, the tie must go to the defendant." *United States* v. *Santos*, 553 U.S. 507, 514–15 (2008) (Scalia, J.) (plurality opinion) (emphasis added); *see, e.g.*, *Burrage* v. *United States*, 571 U.S. 204, 216 (2014); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978); *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952). The law neither "default[s] to criminalization" nor requires "Congress to clarify when it wishes *not* to incarcerate citizens." Pet. App. 146a (emphasis added).

Ignoring these bedrock principles, the court of appeals' interpretation eviscerates the intended boundaries of the statute and would criminalize the operation of legitimate businesses, charities, families, and good Samaritans that serve and reside with those suffering from addiction. For example, the court of appeals simply assumed that good actors like homeless shelters and parents will not be punished under its expanded view of Section 856(a) because "[t]he drug use in homes or shelters would be incidental to living there." *Id.* at 19a; *but see id.* at 42a (Roth, J., dissenting). But its finding that Safehouse would violate the statute based only on individual acts of simple possession and use by those seeking medical supervision and treatment renders the line between "incidental" drug use at a property (no liability for the property owner) and something more significant (a 20-year felony) hopelessly unclear. As Judge Roth explained:

> The Majority assumes that the son's purpose in moving in with his parents was to

> use the home as a residence. Not necessarily. Although the parents likely "maintain" their home for the purpose of living in it, their son may be motivated by many purposes to "use" it. If the son could not do drugs there, would he still move in? . . . Or suppose the son intended to do drugs there once, steal his mother's jewelry and run away. If the parents were reasonably sure he would run away but gave him a chance anyway, have they violated the statute . . . ? The Majority's construction suggests so, particularly if this was the son's second or third chance.

Id. at 41a (Roth, J., dissenting). The example of homeless shelters poses the same problem:

> An operator of a homeless shelter may know (or be deliberately ignorant of the fact) that some clients will stay at the shelter because they want a concealed place to use drugs and to sleep off the high. In other words, if they were prevented from using drugs there, some of them might not go there at all.

Id. at 42a. In fact, the U.S. Department of Housing and Urban Development's guidance for its "Housing First" program, which funds housing for current substance users, advises that its grant recipients "*do not consider . . . drug use* in and of itself to be lease violations" and advises that, even if a property managers *knows* they house people who are actively using drugs in such locations, they should *not* be evicted "unless such use results in disturbances to neighbors or is as-

sociated with illegal activity (e.g. *selling* illegal substance)." *Id.* at 43a (quoting HUD, *Housing First in Permanent Supportive Housing* (July 2014), https://bit.ly/3ievCzs (emphasis added)). The court of appeals' opinion is difficult to square with this federal program guidance.

Underscoring these ambiguities, at oral argument before both the district court and the court of appeals, the then–U.S. Attorney for the Eastern District of Pennsylvania could not provide coherent or consistent answers as to whether the statute would apply to such everyday scenarios that parents, business owners, social service providers, and medical providers will face. *See, e.g.*, *id.* at 42a-43a. Yet the court of appeals adopted DOJ's untenable and expansive view of Section 856(a).

III. The Court of Appeals Should Have Interpreted Section 856(a) to Avoid the Federalism and Commerce Clause Concerns Posed By Federal Regulation of Local, Non-Commercial Public Health Interventions.

The refusal of the court below to interpret Section 856(a) narrowly raises constitutional and federalism concerns relating to the exercise of federal Commerce Clause authority to regulate a non-commercial, entirely local medical intervention. These provide additional reasons for this Court to grant the petition and consider the exceptionally important issues presented in this case.

The court of appeals' expansive interpretation of Section 856(a) would exceed the constitutional limits on Congress's Commerce Clause authority, which does not permit Congress to adopt freestanding regulation

of Safehouse's free medical and public health services—entirely local activities that would not increase the interstate market for controlled substances and which fall within the traditional province of state and local police powers.

According to the court of appeals, by enacting Section 856(a), Congress criminalized every local property owner who has "knowledge" that drugs are used on her premises and rendered it a felony to provide local medical services to prevent those visitors from overdosing on those drugs. Principles of federalism weigh against interpreting Congress's Commerce Clause authority in a manner that converts it into a "general police power of the sort retained by the states." *United States* v. *Lopez*, 514 U.S. 549, 567 (1995); *see United States* v. *Morrison*, 529 U.S. 598, 618–19 (2000). Although "[t]he States have broad authority to enact legislation for the public good" through their "police power," the "Federal Government, by contrast, has no such authority." *Bond* v. *United States*, 572 U.S. 844, 854 (2014); *see Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985); *see Oregon*, 546 U.S. at 271–72.

Section 856 lacks any jurisdictional element limiting the reach of the law to a discrete set of activities that affect interstate commerce. And making a property available on an entirely local, non-commercial basis for drug "use" is not part of an economic class of activities that have a substantial effect on interstate commerce—even when viewed in the aggregate. *See* 21 U.S.C. § 801(3)–(6) (Congressional findings that local

manufacture, distribution, and possession may affect commerce, but not mentioning drug "use"). Any "link between" that conduct and "interstate commerce" (*Morrison*, 529 U.S. at 612), can be imagined only by creating a speculative chain of contingencies and "pil[ing] inference upon inference." *Lopez*, 514 U.S. at 567.

This Court's decision in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), does not foreclose consideration of these substantial Commerce Clause concerns. In *Raich*, the Court held that the CSA's prohibitions on intrastate possession and manufacture of marijuana constituted a valid exercise of congressional authority. This Court has repeatedly stressed since *Raich* that its holding depended on Congress's judgment that prohibiting intrastate possession and manufacture of marijuana would affect the national market for marijuana. *See, e.g., Taylor* v. *United States*, 136 S. Ct. 2074, 2077–78 (2016); *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 560–61 (2012) (Roberts, C.J.).[10] Congress made no such findings with respect to simple drug "use." 21 U.S.C. § 801(3)–(6).

---

[10] *Cf. Standing Akimbo, LLC* v. *United States*, 141 S. Ct. 2236, 2238 (2021) (Thomas, J., respecting denial of certiorari) ("Suffice it to say, the Federal Government's current approach to marijuana bears little resemblance to the watertight nationwide prohibition that a closely divided Court found necessary to justify the Government's blanket prohibition in *Raich*. If the Government is now content to allow States to act "as laboratories" "'and try novel social and economic experiments,'" *Raich*, 545 U.S. at 42, (O'Connor, J., dissenting), then it might no longer have authority to intrude on "[t]he States' core police powers ... to define criminal law and to protect the health, safety, and welfare of their citizens." *Ibid*. A prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper to support the Federal Government's piecemeal approach.").

In addition, like the non-commercial possession of weapons in *Lopez*, Section 856(a) is "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Raich*, 545 U.S. at 24 (quoting *Lopez*, 514 U.S. at 561). Rather, Section 856(a) regulates the use of property; it is a single-subject statutory provision with a non-economic objective removed from the core of the CSA's broader regulatory regime. DOJ has not identified a single prior prosecution under Section 856 of owners who make their property available with knowledge that "use" will occur on the premises. It is therefore difficult to conclude that such a construction is "an essential part" of the CSA. *Id.* And were this Court "to adopt the Government's expansive interpretation" of Section 856(a), "hardly a building in the land would fall outside the federal statute's domain." *Jones*, 526 U.S. at 241.

The court of appeals should have accorded weight to these constitutional question and federalism concerns by adopting the construction of Section 856(a) urged by Safehouse. *See, e.g., Kelly*, 140 S. Ct. at 1573; *Bond*, 572 U.S. at 858–59; *Oregon*, 546 U.S. at 270.

IV. This Case is an Ideal Vehicle to Resolve this Question, Which Warrants this Court's Immediate Attention.

Because this case is a declaratory judgment action resolved on stipulated and undisputed facts, it presents a pure question of law for this Court to resolve the confusion and conflict over the scope of Section 856(a) and decide its application to overdose prevention sites that seek to offer supervised consumption

services. This case is therefore an ideal vehicle to decide the important question presented.

That the court below, after reversing the declaratory judgment, remanded to allow litigation of the petitioners' conditionally dismissed RFRA claim does not make the case in its present posture any less suitable for immediate review. Safehouse intends to pursue its rights to advance its religious beliefs that it should do everything possible to preserve life and take care of those suffering from addiction. Nonetheless, now is the time for this Court's intervention.

States, cities, public health entities like Safehouse, and caring good Samaritans are seeking to take action to stop the preventable loss of life from the opioid crisis that relentlessly continues. Public health and medical experts, including those who founded and guide Safehouse, predict that supervised consumption services can help save lives. Meanwhile, although Congress evinced no intent to regulate this public health intervention, the court of appeals' decision bars Safehouse and others from proceeding. This Court should not wait; it should grant the petition and correct the court of appeals' fundamental misinterpretation of federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronda B. Goldfein
Yolanda French Lollis
Adrian M. Lowe
Jacob M. Eden
AIDS LAW PROJECT OF PENNSYLVANIA
1211 Chestnut St.,
Ste. 600
Philadelphia, PA 19107
(215) 587-9377

Seth F. Kreimer
3501 Sansom St.
Philadelphia, PA 19104
(215) 898-7447

Ilana H. Eisenstein
Counsel of Record
Courtney G. Saleski
Ben C. Fabens-Lassen
DLA PIPER LLP (US)
1650 Market St.,
Ste. 5000
Philadelphia, PA 19103
(215) 656-3300
Ilana.Eisenstein
@dlapiper.com

Peter Goldberger
LAW OFFICE OF PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Counsel for Petitioner

AUGUST 23, 2021

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1422

UNITED STATES OF AMERICA
v.
SAFEHOUSE, a Pennsylvania nonprofit corporation;
JOSÉ BENITEZ, as President and Treasurer of
Safehouse

****

SAFEHOUSE, a Pennsylvania nonprofit corporation
v.
U.S. DEPARTMENT OF JUSTICE;
WILLIAM P. BARR, in his official capacity
as Attorney General of the United States; and
WILLIAM M. MCSWAIN, in his official capacity as
U.S. Attorney for the Eastern District of
Pennsylvania

United States of America, U.S. Department of Justice, United States Attorney General William P. Barr, and the United States Attorney for the Eastern District of Pennsylvania William M. McSwain,
Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:19-cv-00519)
District Judge: Honorable Gerald A. McHugh

Argued: November 16, 2020

Before: AMBRO, BIBAS, and ROTH, *Circuit Judges*

(Filed: January 12, 2021)

OPINION OF THE COURT

BIBAS, *Circuit Judge*.

Though the opioid crisis may call for innovative solutions, local innovations may not break federal law. Drug users die every day of overdoses. So Safehouse, a nonprofit, wants to open America's first safe-injection site in Philadelphia. It favors a public-health response to drug addiction, with medical staff trained to observe drug use, counteract overdoses, and offer treatment. Its motives are admirable. But Congress has made it a crime to open a property to others to use drugs. 21 U.S.C. § 856. And that is what Safehouse will do.

Because Safehouse knows and intends that its visitors will come with a significant purpose of doing drugs, its safe-injection site will break the law. Although Congress passed § 856 to shut down crack houses, its words reach well beyond them. Safehouse's benevolent motive makes no difference. And even though this drug use will happen locally and

Safehouse will welcome visitors for free, its safe-injection site falls within Congress's power to ban interstate commerce in drugs.

Safehouse admirably seeks to save lives. And many Americans think that federal drug laws should move away from law enforcement toward harm reduction. But courts are not arbiters of policy. We must apply the laws as written. If the laws are unwise, Safehouse and its supporters can lobby Congress to carve out an exception. Because we cannot do that, we will reverse and remand.

I. BACKGROUND

A. The federal drug laws

Drug addiction poses grave social problems. The opioid crisis has made things worse: more than a hundred Americans die every day of an overdose. Dep't of Health & Human Servs., Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Spotlight on Opioids* 1 (2018). People of good will disagree about how to tackle these enormous problems. Lawmakers and prosecutors have traditionally used criminal prosecution to try to stem the flow, targeting the supply and hoping to curb demand. Others emphasize getting users into rehab. Harm-reduction proponents favor treating drug users without requiring them to abstain first. Still others favor decriminalizing or even legalizing drugs. There is no consensus and no easy answer.

But our focus is on what Congress has done, not what it should do. Congress has long recognized that illegal drugs "substantial[ly]" harm "the health and general welfare of the American people." 21 U.S.C. § 801(2). Indeed, half a century ago, Congress tackled this national problem by consolidating scattered drug

laws into a single scheme: the Comprehensive Drug Abuse Prevention and Control Act of 1970. Pub. L. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801– 971); *see Gonzales v. Raich*, 545 U.S. 1, 10–12 (2005). To this day, this scheme governs the federal approach to illegal drugs. Title II of that law, the Controlled Substances Act, broadly regulates illegal drugs. The Act spells out many crimes. A person may not make, distribute, or sell drugs. 21 U.S.C. § 841. He may not possess them. § 844. He may not take part in a drug ring. § 848. He may not sell drug paraphernalia. § 863. He may not conspire to do any of these banned activities. § 846. And he may not own or maintain a "drug-involved premises": a place for using, sharing, or producing drugs. § 856.

This last crime—the one at issue—was added later. At first, the Act said nothing about people who opened their property for drug activity. Then, the 1980s saw the rise of crack houses: apartments or houses (often abandoned) where people got together to buy, sell, use, or even cook drugs. *See United States v. Lancaster*, 968 F.2d 1250, 1254 n.3 (D.C. Cir. 1992). These "very dirty and unkempt" houses blighted their neighborhoods, attracting a stream of unsavory characters at all hours. *Id.* But it was hard to shut crack houses down. To go after owners, police and prosecutors tried to cobble together conspiracy and distribution charges. *See, e.g.*, *United States v. Jefferson*, 714 F.2d 689, 691–92 (7th Cir. 1983), *vacated on other grounds*, 474 U.S. 806 (1985). But no law targeted the owner or maintainer of the premises.

To plug this gap, Congress added a new crime: 21 U.S.C. § 856. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841, 100 Stat. 3207, 3207–52. This law banned running a place for the purpose of

manufacturing, selling, or using drugs. Congress later extended this crime to reach even temporary drug premises and retitled it from "Establishment of manufacturing operations" to "Maintaining drug-involved premises." *Compare* 21 U.S.C. § 856(a) & caption (2003) *with* 21 U.S.C. § 856(a) & caption (1986). After all, the statute covers much more than manufacturing drugs.

B. Safehouse's safe-injection site

The parties have stipulated to the key facts: Safehouse wants to try a new approach to combat the opioid crisis. It plans to open the country's first safe-injection site. Safehouse is headed by José Benitez, who also runs Prevention Point Philadelphia. Like Prevention Point and other sites, Safehouse will care for wounds, offer drug treatment and counseling, refer people to social services, distribute overdose-reversal kits, and exchange used syringes for clean ones.

But unlike other sites, Safehouse will also feature a consumption room. Drug users may go there to inject themselves with illegal drugs, including heroin and fentanyl. The consumption room is what will make Safehouse unique—and legally vulnerable.

When a drug user visits the consumption room, a Safehouse staffer will give him a clean syringe as well as strips to test drugs for contaminants. Staffers may advise him on sterile injection techniques but will not provide, dispense, or administer any controlled drugs. The user must get his drugs before he arrives and bring them to Safehouse; he may not share or trade them on the premises. The drugs he consumes will be his own.

After he uses them, Safehouse staffers will watch him for signs of overdose. If needed, they will

intervene with medical care, including respiratory support and overdose-reversal agents. Next, in an observation room, counselors will refer the visitor to social services and encourage drug treatment.

Safehouse hopes to save lives by preventing diseases, counteracting drug overdoses, and encouraging drug treatment. It believes that visitors are more likely to accept counseling and medical care "after they have consumed drugs and are not experiencing withdrawal symptoms." App. 685.

C. Procedural history

The Government sought a declaratory judgment that Safehouse's consumption room would violate § 856(a)(2). Safehouse counterclaimed for a declaratory judgment that it would not and that applying the statute to Safehouse would violate either the Commerce Clause or the Religious Freedom Restoration Act (RFRA). U.S. Const. art. I, § 8, cl. 3; 42 U.S.C. §§ 2000bb–2000bb-3.

The Government moved for judgment on the pleadings, and the District Court denied the motion. It held that § 856(a)(2) does not apply to Safehouse's proposed consumption room. *United States v. Safehouse*, 408 F. Supp. 3d 583, 587 (E.D. Pa. 2019). Rather, it held that someone violates § 856(a)(2) only if *his* purpose is for others to manufacture, distribute, or use illegal drugs on the premises. *Id.* at 595, 605. And it found that Safehouse's purpose was to offer medical care, encourage treatment, and save lives, not to facilitate drug use. *Id.* at 614. Because the statute did not apply, the court did not need to reach Safehouse's Commerce Clause or RFRA defenses. After the parties stipulated to a set of facts, the court entered a final declaratory judgment for Safehouse. The Government now appeals. On appeal,

Safehouse renews its Commerce Clause defense but reserves its RFRA defense for remand.

We have jurisdiction to hear this appeal. The District Court's declaratory judgment has "the force and effect of a final judgment." 28 U.S.C. § 2201. "Once [the] district court 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." *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 211 (3d Cir. 2001). So it does not matter that the court did not reach the affirmative defenses. We review the court's reading of the statute and application of the statute to Safehouse de novo. *Rotkiske v. Klemm*, 890 F.3d 422, 424 n.2 (3d Cir. 2018) (en banc), *aff'd*, 140 S. Ct. 355 (2019).

II. SAFEHOUSE WILL VIOLATE 21 U.S.C. § 856(A)(2) BY KNOWINGLY AND DELIBERATELY LETTING VISITORS USE DRUGS

Section 856(a)(2) makes it illegal to "manage or control" a property and then "knowingly and intentionally" open it to visitors "for the purpose of . . . using a controlled substance":

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

> lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place *for the purpose of* unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(a) (emphasis added). This case turns on how to construe and apply §856(a)(2)'s last phrase: "for the purpose of … ." Safehouse insists that, to violate that paragraph, Safehouse itself would need to have the purpose that its visitors use drugs. The Government disagrees. It argues that only the visitors need that purpose; Safehouse just needs to intentionally open its facility to visitors it knows will use drugs there.

We agree with the Government. To break the law, Safehouse need only "knowingly and intentionally" open its site to visitors who come "for the purpose of . . . using" drugs. The text of the statute focuses on the third party's purpose, not the defendant's. Even if we read paragraph (a)(2) as Safehouse does, its purpose *is* that the visitors use drugs. That is enough to violate paragraph (a)(2).

A. Under §856(a)(2), the defendant must knowingly and deliberately let another person use his property for drug activity.

Before getting to the disputed requirement of "purpose," we must first discuss the statute's two other mental states, neither of which is really in dispute. To violate (a)(2), a defendant must "knowingly and intentionally . . . make [his property] available for use" by a third party for that person's illegal drug use. The first two phrases of (a)(2) focus on the voluntary conduct or

knowledge of the defendant. The first phrase requires the defendant to "manage or control [a] place." And the second phrase requires the defendant to "knowingly and intentionally rent, lease, profit from, or make [the place] available for use" for illegal drug activity. The adverbs "knowingly" and "intentionally" introduce this second phrase, modifying the defend-ant's making the place available to a third party. In practice, this means three things.

First, the defendant must know that other(s) are or will be manufacturing, storing, distributing, or using drugs on his property. *See United States v. Barbosa*, 271 F.3d 438, 457–58 (3d Cir. 2001). For instance, the owner of a building cannot be prosecuted if he does not know that others are selling drugs out of his building. But the defendant cannot just turn a blind eye to rampant drug activity. *See United States v. Ramsey*, 406 F.3d 426, 431–32 (7th Cir. 2005). Other courts hold that the owner's willful blindness or deliberate ignorance can suffice. *See, e.g.*, *United States v. Chen*, 913 F.2d 183, 192 & n.11 (5th Cir. 1990).

Second, the defendant need know only that his tenants or customers are selling or using heroin, fentanyl, cocaine, or the like. He does not need to know that they are violating the law or intend for them to do so. *See Bryan v. United States*, 524 U.S. 184, 192–93 (1998); *Barbosa*, 271 F.3d at 457–58. "[I]gnorance of the law generally is no defense to a criminal charge." *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994). Of course, Congress can make it a defense. *Id.* But it does so sparingly, almost exclusively for tax and regulatory crimes. *See Cheek v. United States*, 498 U.S. 192, 199–200 (1991) (tax crimes); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (misusing food stamps). And when Congress does require knowledge of the law, it uses the word

"willfully." *Bryan*, 524 U.S. at 191–92 & n.13; *Ratzlaf*, 510 U.S. at 141–42 (equating willfulness with "a purpose to disobey the law"). It did not do so here.

Finally, the defendant must make the place available to others "intentionally." That means deliberately, not accidentally or by mistake. *Barbosa*, 271 F.3d at 458. Because paragraph (a)(2) predicates liability on a third party's drug activities, it adds this extra intent requirement to shield owners who are not complicit. An owner is not liable, for instance, if he knows that trespassers are doing drugs but did not invite them and does not want them.

B. Under § 856(a)(2), the defendant need not have the *purpose* of drug activity

While (a)(2) requires the defendant to act knowingly and intentionally, it does not require him to also have another mental state: "purpose." Paragraph (a)(2) requires *someone* to have a "purpose"—but not the defendant. To get a conviction under (a)(2), the government must show only that the defendant's *tenant or visitor* had a purpose to manufacture, distribute, or use drugs. This conclusion follows from the law's language and grammar. It avoids making paragraph (a)(2) redundant of (a)(1). It also avoids making (a)(2)'s intent requirement redundant. And it is the conclusion reached by every circuit court to consider the issue.

1. *The plain text requires only that the* third party *have the purpose of drug activity*. Section 856's text makes it clear that (a)(2)'s "purpose" is not the defendant's. We see this from the way that paragraphs (a)(1) and (a)(2) are written and structured.

i. *Paragraph (a)(1)*. The Government does not charge Safehouse with violating paragraph (a)(1). But

to understand its sibling, paragraph (a)(2), we must start with (a)(1):

> [I]t shall be unlawful to—
>
> (1) *knowingly* open, lease, rent, use, or maintain any place, whether permanently or temporarily,
>
> *for the purpose of* manufacturing, distributing, or using any controlled substance.

21 U.S.C. § 856(a)(1) (line break added; mens rea terms italicized). This paragraph *requires* just one actor and two sets of actions. The actor is the defendant. He "open[s], lease[s], rent[s], use[s], or maintain[s] [the] place." He also has "the purpose of manufacturing, distributing, or using" the drugs. These actions do not require a third party. A person can "maintain" an apartment or "manufactur[e]" drugs all by himself. Yet this paragraph does not *forbid* third parties. A defendant does not have to act alone; he can "us[e]" drugs with a friend or "man-ufactur[e]" them with a business partner. He can even have his employees do that work for him; a kingpin can run a drug empire without ever touching the drugs himself. But even if no one joins him in his drug activities, he still falls under (a)(1). The inquiry turns on the purpose of the defendant.

So paragraph (a)(1) bars a person from operating a place for his own purpose of illegal drug activity. On this, the parties, the District Court, and our sister circuits all agree. For instance, a person may not use his bedroom as the base of his drug dealing operation. *See United States v. Verners*, 53 F.3d 291, 296–97 (10th Cir. 1995). He may not manufacture meth in his garage and regularly invite others over to use meth in that garage. *See United States v. Shetler*, 665 F.3d 1150, 1163–64

(9th Cir. 2011). And he certainly may not rent houses to serve as drug distribution centers by day and house his street-level drug dealers by night. *See United States v. Clavis*, 956 F.2d 1079, 1083- 85, 1090-94 (11th Cir. 1992).

ii. *Paragraph (a)(2).* Now we turn to paragraph (a)(2):

> [I]t shall be unlawful to—
>
> . . .
>
> (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)(2) (line breaks added; mens rea terms italicized). The District Court read this paragraph, like paragraph (a)(1), to require that the defendant act for *his own* purpose of illegal drug activity. But paragraph (a)(2) does not require such a high mental state (mens rea). Instead, the defendant need only deliberately make his place available to another, knowing that *this other person* has the purpose of illegal drug activity.

Unlike paragraph (a)(1), paragraph (a)(2) contemplates at least two actors: a defendant and a third party. The defendant "manage[s] or control[s]" the place, whether "as an owner, lessee, agent, employee,

occupant, or mortgagee." He could be a landlord, a business owner, or a renter.

The second actor is some third party: a tenant, a customer, or a guest. She is the one who uses or occupies the place. The law does not mention this third party, but its verbs require her. The landlord must "rent" or "lease" the place out to a tenant. For the business owner to "profit from" the place, customers must pay him. If a defendant "make[s] [the place] available for use," someone must be there to use it.

In turn, that third party engages in the drug activity. Paragraph (a)(2) lays out three sets of actions, corresponding to the three phrases broken out separately above. The defendant does the first two: he "manage[s] or control[s]" the place, and he "rent[s], lease[s], profit[s] from, or make[s] [it] available for use." The third party does the last set of actions: she "manufacture[s], stor[es], distribut[es], or us[es] a controlled substance" (or at least has the purpose to do so). For instance, the tenant, not the landlord, sells drugs out of the apartment.

This third party, we hold, is the one who must act "for the purpose of" illegal drug activity. The parties vigorously contest this point. But this reading is logical. Paragraph (a)(1) requires just the defendant. He must have the purpose of drug activity, whether he engages in it by himself or with others. Paragraph (a)(2) requires at least two people, adding the third party. She performs the drug activity. The phrase "for the purpose of" refers to this new person.

Thus, a defendant cannot let a friend use his house to weigh and package drugs, even if the defendant himself is not involved in the drug ring. *See United States v. McCullough*, 457 F.3d 1150, 1157–58, 1161 (10th Cir.

2006). He cannot tell his son to stop selling drugs from his trailer, yet let him stay even when he keeps selling. *See Ramsey*, 406 F.3d at 429, 433. And he cannot lease storefronts to known drug dealers just because he needs the money. *See United States v. Cooper*, 966 F.2d 936, 938 (5th Cir. 1992).

2. *Safehouse's interpretation would make paragraph (a)(2) and "intentionally" redundant.* Together, paragraphs (a)(1) and (a)(2) compose a coherent package, forbidding different ways of "[m]aintaining [a] drug-involved premises." 21 U.S.C. § 856 (caption). Each paragraph sets out a distinct crime, separated by a paragraph number, spacing, and a semicolon. *United States v. Rigas*, 605 F.3d 194, 209 (3d Cir. 2010) (en banc). Each requires a different actor to have the required purpose.

Safehouse's reading, by contrast, would make paragraph (a)(2) redundant of (a)(1). In each, Safehouse says, the defendant himself must have the purpose of drug activity. It concedes that the paragraphs partly overlap. But it argues that (a)(1) covers the crack house's operator, while only (a)(2) covers a "distant landlord." Oral Arg. Tr. 63. This distinction does not hold. If each paragraph required just one actor who has the purpose of drug activity, the distant landlord would fall under either. Safehouse admits that he violates (a)(2). He is guilty under (a)(1) too, because he has "rent[ed]" and "maintain[ed]" a place for drug activity. Nothing would differentiate (a)(2) from (a)(1).

Safehouse's other example to distinguish the two paragraphs fares no better. It postulates an owner who lets her boyfriend run a crack ring from her apartment while she is at work. It says she would violate only (a)(2). Not so. If she does not have the purpose of

using the apartment for drug sales, Safehouse's reading would exclude her from either paragraph. But if she does have that purpose, she would be liable under both.

Thus, on Safehouse's reading, (a)(2) would do no independent work. Recall that a defendant can just as easily violate (a)(1) while working with someone else. Both paragraphs would require the defendant to have the requisite purpose, so (a)(2) would add nothing. That redundancy is fatal. Though statutes sometimes overlap, we try to avoid reading one part of a statute to make another part surplusage. *Yates v. United States*, 574 U.S. 528, 543 (2015). That is especially true of two paragraphs nestled in the same subsection. *Id.* We will not collapse the two into one.

Safehouse's reading would also make paragraph (a)(2)'s intent requirement redundant of its purpose requirement. Congress added the word "intentionally" to paragraph (a)(2) but not (a)(1). Intention, like purpose, is a volitional mental state; it requires the defendant to will something. One cannot have a purpose of unlawful drug activity without intending that activity. In paragraph (a)(2), the intent requirement would make no sense layered on top of requiring the defendant to have the purpose. But it makes sense to require the defendant's intent on top of the third party's purpose. That protects defendants against liability for mistaken, accidental, or involuntary use of their property.

3. *Other circuits read § 856(a) similarly.* Finally, six other circuits agree with our reading of the two paragraphs. *See United States v. Wilson*, 503 F.3d 195, 197–98 (2d Cir. 2007) (per curiam); *United States v. Chen*, 913 F.2d 183, 189–90 (5th Cir. 1990); *United States v.*

Banks, 987 F.2d 463, 466 (7th Cir. 1993); *United States v. Tebeau*, 713 F.3d 955, 959–61 (8th Cir. 2013); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991); *United States v. Verners*, 53 F.3d 291, 296–97 & n.4 (10th Cir. 1995). No circuit has held otherwise.

True, as Safehouse notes, no other circuit has addressed a safe-injection site. The other circuits' cases involved egregious drug activity. But these cases all recognize the textual difference between the defendant's own purpose under paragraph (a)(1) and the third party's purpose under (a)(2). Safehouse has much better intentions. But good intentions cannot override the plain text of the statute.

4. *Safehouse's other arguments are unpersuasive.* Safehouse raises three objections to the plain reading of the text, but they all fail. First, it responds that "for the purpose of" cannot mean two different things in the two sister paragraphs. It does not. We presume that "purpose" means the same thing in both. *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). But we do not presume that the "purpose" belongs to the same *actor* in each paragraph.

The difference in phrasing draws that distinction. For instance, paragraph (a)(1) forbids a defendant's "use" of a place "for the purpose of" drug activity. Paragraph (a)(2) forbids a defendant's "mak[ing] [a place] available for use . . . for the purpose of" drug activity. In each subsection, "for the purpose of" refers back to "use," its nearest reasonable referent. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152–53 (2012). Whoever "use[s]" the property is the one who must have the purpose. Since the third party is the actor who "use[s]" the place in paragraph (a)(2), it is her purpose that matters.

Those two phrases are worded differently because they target use by different actors.

Second, Safehouse fares no better by citing the rule of lenity. We interpret ambiguities in criminal statutes in favor of the defendant. *Liparota*, 471 U.S. at 427. Before we do, though, we must exhaust the traditional tools of statutory construction. *Shular v. United States*, 140 S. Ct. 779, 787 (2020). And once we do that, this statutory text is clear enough, not "grievous[ly] ambigu[ous]." *United States v. Castleman*, 572 U.S. 157, 173 (2014) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)).

Finally, Safehouse objects that it would be "extremely odd" to tie a defendant's liability to a third party's state of mind. Oral Arg. Tr. 61. That is not so strange. When a robber holds up a cashier with a toy gun, the prosecution must prove that the cashier had a real "fear of injury." 18 U.S.C. § 1951(b)(1). Or in a kidnapping case, to show that the defendant acted "unlawfully," the prosecution must prove that the victim did not consent to come along. 18 U.S.C. § 1201(a). And when one member of a drug ring goes astray and kills someone, his coconspirators can still be liable for murder. *Pinkerton v. United States*, 328 U.S. 640, 645–47 (1946). Though only the killer has the requisite specific intent to kill, it is enough that his partners in crime could reasonably foresee that he would kill in furtherance of the conspiracy. *United States v. Gonzales*, 841 F.3d 339, 351–52 (5th Cir. 2016); *United States v. Alvarez*, 755 F.2d 830, 848–49 (11th Cir. 1985).

In sum, all that paragraph (a)(2) requires is that the third party, not the defendant, have the purpose of drug activity. Still, the defendant must have a mental state: he must knowingly and willingly let others use

his property for drug activity. Now we apply this statute to Safehouse.

C. Section 856(a)(2) applies to Safehouse because its visitors will have a significant purpose of drug activity

Everyone agrees that Safehouse satisfies the first two phrases of paragraph (a)(2). First, it will "manage [and] control" the site. Second, it will "intentionally . . . make [its consumption room] available for [visitors'] use," knowing that they will use drugs there. But visitors will come for other reasons too, including Safehouse's medical and counseling services. So the question is whether the visitors' use of the consumption room will satisfy the third phrase: (a)(2)'s purpose requirement. It will.

A person's purpose is his "objective, goal, or end." *Purpose*, *Black's Law Dictionary* (11th ed. 2019). It is something he "sets out to do." *Purpose* (def. 1a), *Oxford English Dictionary* (3d ed. 2007).

People often have multiple purposes. A parent might scold a screaming child *both* to silence her *and* to teach her how to behave in public. But not every purpose satisfies the statute. The statute requires the actor to act "for *the* purpose of" drug activity, not just *a* purpose of drug activity. 21 U.S.C. § 856(a) (emphasis added). That choice of "the" rather than "a" means that not just any purpose will do. The actor's purpose must be more than "merely incidental." *Lancaster*, 968 F.2d at 1253. But it need not be his "*sole* purpose." *Shetler*, 665 F.3d at 1161. Otherwise, Congress would have said "for the sole purpose," as it has elsewhere. *E.g.*, 18 U.S.C. § 48(d)(2)(B); 15 U.S.C. § 62; 17 U.S.C. § 1201(d)(1).

Since the actor's purpose must fall somewhere between an "incidental" and a "sole" purpose, we think the District Court and our sister circuits have it right: the actor need have only a "significant purpose" of drug activity. *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010). If he has a "significant purpose" of drug use, he violates the statute, even if he also has *other* significant purposes. *United States v. Soto-Silva*, 129 F.3d 340, 342, 347 (5th Cir. 1997).

Safehouse's visitors will have the significant purpose of drug activity. True, some people will visit Safehouse just for medical services or counseling. Even so, Safehouse's main attraction is its consumption room. Visitors will bring their own drugs to use them there. And many of Safehouse's services will revolve around the visitors' drug use there. The clean syringes and fentanyl strips will let them inject drugs more securely. The respiratory support and overdose-reversal agents will reduce their chances of dying of an overdose. And the medical and counseling care will be offered after they have used drugs. When a visitor comes to Safehouse to prevent an overdose, that reason is bound up with the significant purpose of doing drugs. That satisfies the statute.

Safehouse worries that our reading will punish parents for housing their drug-addicted children, or homeless shelters for housing known drug users. It will not. People use these places to eat, sleep, and bathe. The drug use in homes or shelters would be incidental to living there. But for most people, using drugs at Safehouse will not be incidental to going there. It will be a significant purpose of their visit.

D. In any event, Safehouse has a significant purpose that its visitors do drugs

Even if paragraph (a)(2) looked to Safehouse's own purpose, Safehouse would violate the statute. For Safehouse itself has a significant purpose that its visitors use heroin, fentanyl, and the like.

Safehouse vigorously contests this point. As it stresses, *one* of Safehouse's purposes is to stop overdoses and save lives. Other purposes include preventing disease and providing medical care. But as Safehouse conceded at oral argument, "there can be multiple purposes" that a defendant pursues at once. Oral Arg. Tr. 53. Plus, motive is distinct from mens rea. A defendant can be guilty even if he has the best of motives. A child who steals bread to feed his hungry sister has still committed theft. The son who helps his terminally ill mother end her life has still committed murder.

One of Safehouse's significant purposes is to allow drug use. Start with the facility's name: Safehouse calls it a "consumption room" or "safe-injection site." App. 683–84. It expects visitors to bring heroin, fentanyl, or the like with them to use on-site. It will offer visitors clean syringes and fentanyl strips and advise visitors on how to inject heroin or fentanyl safely. Safehouse even foresees a benefit to this on-site drug use: it thinks visitors will be more likely to accept drug treatment "after they have consumed drugs and are not experiencing withdrawal symptoms." App. 685.

In short, Safehouse will offer visitors a space to inject themselves with drugs. Even on its own reading of purpose, that is enough to violate the statute.

E. We cannot rewrite the statute to exclude the safe-injection site

Finally, Safehouse asks us to look beyond the statute's text to consider Congress's intent. The public-policy debate is important, but it is not one for courts. If the text of a criminal statute "is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

1. *We apply the plain text, not Congress's expectations.* First, Safehouse objects that Congress targeted crack houses, but never expected the law to apply to safe-injection sites. That is true but irrelevant. *See Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998). Statutes often reach beyond the principal evil that animated them. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). For instance, though Congress meant RICO to target mobsters, it reaches far beyond them to legitimate businesses as well. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (analyzing the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68).

A court's job is to parse texts, not psychoanalyze lawmakers. "[W]e do not inquire what the legislature meant; we ask only what the statute means." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (internal quotation marks omitted) (quoting Justice Jackson quoting Justice Holmes). At least when the text is clear, we will not look beyond it to lawmakers' statements, because "legislative history is not the law." *Id.*; *accord Pellegrino v. TSA*, 937 F.3d 164, 179 (3d Cir. 2019) (en banc). The words on the page, not the intent of any legislator, go through bicameralism and presentment and

become law. Here, the statute's plain text covers safe-injection sites. We look no further.

2. *Congress's recent efforts to combat addiction did not revoke the statute.* Next, Safehouse and its amici claim that our reading of the statute is bad policy. On average, nearly three Philadelphians die of drug overdoses each day. A consumption room, they argue, could save those lives. And the Government has spent lots of time and money fighting the opioid crisis. In 2016, Congress passed the Comprehensive Addiction and Recovery Act, which creates federal grants to treat drug addiction and prevent overdoses. Pub. L. No. 114-198, § 103, 130 Stat. 695, 699–700 (codified at 21 U.S.C. § 1536). Since then, it has banned federal funding of syringe-exchange programs but authorized an exception. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 520, 129 Stat. 2242, 2652.

Safehouse asks us to read the Act to "[h]armonize[]" it with these federal efforts. Appellees' Br. 38. But to do that, we would have to rewrite the statute. These laws say nothing about safe-injection sites, and § 856(a)(2)'s plain text forbids them. If that ban undermines Congress's current efforts to fight opioids, Congress must fix it; we cannot.

III. APPLYING § 856(a)(2) TO SAFEHOUSE IS A VALID EXERCISE OF CONGRESS'S POWER OVER INTERSTATE COMMERCE

Having held that Safehouse's safe-injection site would violate § 856(a)(2), we turn to its affirmative defense under the Commerce Clause. Safehouse argues that Congress lacks the power to criminalize its local, noncommercial behavior. After all, it will not charge visitors to use the consumption room. But the Supreme

Court foreclosed that argument in *Gonzales v. Raich*, rejecting a Commerce Clause challenge to a different section of the Controlled Substances Act. 545 U.S. 1, 9 (2005). *Raich* clarifies that Congress can regulate local, noncommercial activity when that activity will affect a national market. Even though Safehouse's consumption room will be local and free, the Act bans it as part of shutting down the national market for drugs. The Commerce Clause, together with the Necessary and Proper Clause, gives Congress the power to do that. U.S. Const. art. I, § 8, cl. 3, 18.

A. Congress can regulate local activities either (1) if they are economic and, taken together, substantially affect interstate commerce, or (2) as part of a comprehensive regulatory scheme

Using its commerce power, Congress can regulate the "channels of interstate commerce"; "instrumentalities," people, and "things in interstate commerce"; and "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). That last category can cover local activity and thus risks blurring the line "between what is truly national and what is truly local." *Id.* at 567–68. To hold that line, we demand that the local activity Congress regulates be either (1) economic or else (2) covered by a broader scheme to regulate commerce. *See id.* at 559–61. Either route suffices.

1. *Congress can regulate local economic activities that substantially affect interstate commerce.* Federal law may regulate local activities if they are economic and, as a "class of activities," they substantially affect interstate commerce. *Raich*, 545 U.S. at 17 (quoting *Perez v. United States*, 402 U.S. 146, 151 (1971)); *Lopez*,

514 U.S. at 559–60. A court does not decide for itself that a class of activity has substantial economic effects. We ask only whether Congress had a rational basis to think so. *Raich*, 545 U.S. at 22.

Activities can count as economic even if they are not commercial. *Raich*, 545 U.S. at 18. That is because, even without buying or selling, some local activities can collectively affect national supply and demand. Thus, in *Wickard v. Filburn*, the Supreme Court upheld a law capping how much wheat a farmer could grow to feed his own livestock, bake his own bread, and plant his next year's crop. 317 U.S. 111, 114, 127–28 (1942). In the aggregate, it reasoned, excess homegrown wheat could lower demand, compete with wheat on the market, and so substantially affect interstate commerce. *Id.*

2. *Congress can regulate noneconomic activities only as part of a larger regulatory scheme.* Congress's power to regulate noneconomic activities, like many traditionally local crimes, is more limited. "Congress may [not] regulate noneconomic, violent criminal conduct based solely on that con-duct's aggregate effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 617 (2000). For instance, Congress cannot ban possessing guns near schools just because violent crime might raise insurance rates, hinder education, and thus dampen economic production. *Lopez*, 514 U.S. at 563–64. Nor can it ban violence against women based on how it might harm employment and the economy. *Morrison*, 529 U.S. at 614–15. That is the job of state and local legislatures, not Congress.

But Congress *can* regulate traditionally local, noneconomic activities as part of a larger regulatory scheme. The laws in *Lopez* and *Morrison* were single-

subject statutes, not part of regulating interstate markets. By contrast, Congress *can* reach local, noneconomic activities (like simple possession) as "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. For example, when this Court faced a federal ban on possessing certain machine guns, we upheld it. *United States v. Rybar*, 103 F.3d 273, 274 (3d Cir. 1996). That law, unlike the one in *Lopez*, sought to halt interstate gun trafficking. *Id.* at 282–83. To shut down the interstate market in machine guns, it had to reach intrastate possession too. *Id.* By the same token, Congress can ban even intrastate possession of child pornography. *United States v. Rodia*, 194 F.3d 465, 479 (3d Cir. 1999).

When Congress regulates local noneconomic activities as part of a scheme, it need only choose means that are "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich*, 545 U.S. at 37 (Scalia, J., concurring) (quoting *United States v. Darby*, 312 U.S. 100, 121 (1941)).

Having discussed the two bases for regulating local activities, we can now apply them. As the next two sections explain, both the comprehensive-scheme and aggregate-economic-effect rationales independently justify § 856's ban.

B. Congress can ban local drug-involved premises as part of a comprehensive regulatory scheme

Whether providing drug-involved premises counts as economic activity or not, Congress can regulate it. The drug market is national and international. Congress has found that this trade poses a national threat. Thus, it passed the Controlled Substances Act, a

scheme to suppress or tightly control this market. The Act properly seeks to shut down the market for Schedule I and unprescribed Schedule II–V drugs. Because Congress passed a valid scheme to regulate the interstate drug trade, § 856 is constitutional as long as it is "reasonably adapted" to that scheme. *Raich*, 545 U.S. at 37 (Scalia, J., concurring) (quoting *Darby*, 312 U.S. at 121). And it is. To bolster the Act's scheme, Congress can reach local premises where drug activities happen.

The Controlled Substances Act is a scheme to tightly control the interstate drug market. Drugs are big business. In 2016 alone, Americans spent $146 billion on cannabis, cocaine, heroin, and methamphetamine. Gregory Midgette et al., RAND Corp., *What America's Users Spend on Illegal Drugs, 2006–2016*, at xiv tbl. S.2 (2019). Congress has recognized that much of this traffic flows in interstate and international commerce. 21 U.S.C. § 801(3). It addressed that market in the Act.

To control drug manufacture, sale, and possession, the Act creates a "closed regulatory system." *Raich*, 545 U.S. at 13. Because Schedule I drugs have no accepted medical use, the Act bans them entirely. *See* 21 U.S.C. § 812(b)(1). For other drugs that have some accepted uses but a "potential for abuse" (those in schedules II–V), the Act requires a prescription. §§ 812(b)(2)(A), (3)(A), (4)(A), (5)(A), 844(a). This scheme seeks to shut down the markets in Schedule I and unprescribed Schedule II–V drugs. *See Raich*, 545 U.S. at 19, 24. That goal is valid, as the power to regulate a market includes the power to ban it. *Id.* at 19 n.29.

Congress can serve this goal by reaching intrastate activities. The national drug market is bound up with local activities. Drugs produced locally are often sold

elsewhere; drugs sold or possessed locally have usually been imported from elsewhere. § 801(3). Even local possession and sale "contribute to swelling the interstate market." § 801(4). So to control the interstate market, the Act reaches intrastate activities. *Raich* confirms that Congress can do that. *Raich* upheld the Act's ban on local production and possession of marijuana for personal medical use. 545 U.S. at 9. Unlike the laws in *Lopez* and *Morrison*, this ban was part of a comprehensive regulatory scheme to shut down the interstate market in marijuana. *Id.* at 19, 23–24. Drugs are fungible. *Id.* at 18. Local drugs are hard to distinguish from imported ones and can be diverted into the interstate market. *Id.* at 22. Congress rationally believed that failing to regulate intrastate drugs "would leave a gaping hole in the [Act]." *Id.* So it was necessary and proper to enact a flat ban, with no intrastate exception. *Id.; id.* at 34 (Scalia, J., concurring).

3. *Section 856 is a key part of the Act's comprehensive regulatory scheme.* At oral argument, Safehouse sought to distinguish consuming drugs from providing a place to consume them. But just as Congress regulates the drug activities, it can also regulate places where those activities are likely to flourish. Congress added § 856 to plug a "gaping hole" in the Act that made it harder to stop drug use and dealing at crack houses and the like. *Raich*, 545 U.S. at 22.

Section 856 is reasonably adapted to control drug manufacture, sale, and possession. Consider state laws that forbid BYOB restaurants to let minors drink alcohol on-site. *See, e.g.*, N.J. Rev. Stat. § 2C:33-27(a)(3). Of course, minors themselves may not drink in public. *Id.* § 2C:33-15(a). And the restaurants would not be providing the alcohol, only the space and glasses. Yet states still punish them if the minors drink there. Why?

Because the ban makes it harder for minors to drink. If restauranteurs know that they could face steep fines for tolerating underage drinking, they will prevent it from happening. So too here. Just as local drug possession "swell[s] the interstate [drug] traffic," clamping down on local drug use helps restrict that market. 21 U.S.C. § 801(3), (4).

We could stop here. Because § 856 is part of the Act's comprehensive regulatory scheme, Congress has the power to ban even local, noneconomic activity that would undercut that scheme. But another ground independently supports the Act: it regulates economic activity that could, in the aggregate, substantially affect interstate commerce.

C. Congress had a rational basis to believe that making properties available for drug use will have substantial economic effects

Even if § 856 were not part of a comprehensive regulatory scheme, Congress could still regulate the activities it covers. Safehouse argues that making a local safe-injection site available for free is noneconomic. But *Raich* forecloses that argument.

1. *Making properties available for drug use is economic activity*. *Raich* defined "economics" broadly as "the production, distribution, *and consumption* of commodities." 545 U.S. at 25–26 (quoting *Webster's Third New International Dictionary* 720 (1966)) (emphasis added). These are all activities that affect national supply and demand and thus interstate commerce. So producing, distributing, and consuming drugs are "quintessentially economic" activities. *Id.* Even intrastate growing of marijuana for home consumption is economic, because it could substantially affect the national marijuana market. *Id.* at 19, 25–26.

To be sure, Safehouse will not itself consume drugs. But it will create a "consumption room," a dedicated space for streams of visitors to use drugs. "[T]here is an established, and lucrative, interstate market" for those drugs. *Id.* at 26. Opening a space for consuming drugs will encourage users to come do so. Making consumption easier and safer will lower its risk and so could increase consumption. More drug consumption would create more market demand. Just as "home consumption [of] a fungible commodity" is economic activity that can substantially affect the national market, so too is hosting consumption. *See Raich*, 545 U.S. at 7.

It makes no difference that Safehouse will let its visitors come for free. Wickard grew wheat to feed his own livestock and bake his own bread. 317 U.S. at 114. And though one of the drug users in *Raich* grew her own marijuana and another was given it as a gift, that did not matter. 545 U.S. at 7. Economic activity is broader than commercial activity; it need not involve buying and selling. Congress validly banned these noncommercial uses to control supply and demand in the drug market. *Raich*, 545 U.S. 22–23; *Wickard*, 317 U.S. at 127–28. That was necessary and proper. Congress had the power to regulate the whole class of drug activities, and courts cannot "excise" individual cases from that class just because they are "trivial." *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

2. *Congress has a rational basis to believe that this activity, as a class, substantially affects interstate commerce.* Congress could find that maintaining drug-involved premises, as a class, substantially affects commerce. Drug dealers may well congregate near Safehouse, increasing the drug trade and arguably

drug demand. True, Safehouse argues that its site will not increase drug demand, as visitors must buy their drugs before arriving. And amici dispute whether safe-injection sites increase drug use and trafficking. That empirical and policy debate is for Congress, not courts. It is enough that Congress could rationally find a causal link between drug-involved premises as a class and commerce. *Raich*, 545 U.S. at 22.

Congressional findings confirm common sense. 21 U.S.C. § 801(3)–(6). Drugs typically flow through interstate markets before someone possesses them. § 801(3)(C). And intrastate possession helps swell the interstate market. § 801(4). So regulating intrastate activity is necessary and proper to clamp down on the interstate market. To be sure, these findings in the Act predate § 856, and they do not specifically discuss drug-involved premises. But we may consider findings from prior legislation. *Rodia*, 194 F.3d at 474 n.4; *Rybar*, 103 F.3d at 281. And "Congress [need not] make particularized findings in order to legislate." *Raich*, 545 U.S. at 21.

In short, Congress can regulate Safehouse both to complete the Act's comprehensive regulatory scheme and to stop economic activity that, in the aggregate, could substantially affect interstate commerce.

* * * * *

The opioid crisis is a grave problem that calls for creative solutions. Safehouse wants to experiment with one. Its goal, saving lives, is laudable. But it is not our job to opine on whether its experiment is wise. The statute forbids opening and maintaining any place for visitors to come use drugs. Its words are not limited to crack houses. Congress has chosen one rational approach to reducing drug use and trafficking:

a flat ban. We cannot rewrite the statute. Only Congress can. So we will reverse and remand for the District Court to consider the RFRA counterclaim.

ROTH, Circuit Judge, dissenting in part and dissenting in judgment.

The Majority's decision is *sui generis*: It concludes that 8 U.S.C. § 856(a)(2)—unlike § 856(a)(1) or any other federal criminal statute—criminalizes otherwise innocent conduct, based solely on the "purpose" of a third party who is neither named nor described in the statute. The text of section 856(a)(2) cannot support this novel construction. Moreover, even if Safehouse's "purpose" were the relevant standard, Safehouse does not have the requisite purpose. For these reasons, I respectfully dissent.[1]

I

Despite the ongoing public-health crisis caused by the COVID-19 pandemic, we cannot forget that the United States is also in the middle of an opioid epidemic. "Safehouse intends to prevent as many [opioid-related] deaths as possible through a medical and public health approach to overdose prevention."[2] Safehouse is prepared to provide a wide range of services desperately needed in Philadelphia and routinely provided at Safehouse's companion facility, Prevention Point Philadelphia, including:

---

[1] I concur with the Majority's rejection of Safehouse's argument that Congress cannot regulate its conduct under the Commerce Clause.

[2] Appx. 116.

clean syringe exchange services, primary medical care, an HIV clinic, a Hepatitis C clinic, wound care and education on safer injection techniques, overdose prevention education, overdose reversal kits and distribution, housing, meals, mail services, Medication-Assisted Treatment, and drug recovery and treatment services.[3]

The government takes no issue with any of these services. Instead, it argues that Safehouse should not be permitted to open its doors because of one additional service that it will provide: A Consumption Room. Specifically, Safehouse will provide "medically supervised consumption and observation" so that "[t]hose who are at high risk of overdose death would stay within immediate reach of urgent, lifesaving medical care."[4] "Medical supervision at the time of consumption ensures that opioid receptor antagonists such as Naloxone, and other respiratory and supportive treatments like oxygen, will be immediately available to the drug user in the event of an overdose."[5] Significantly, no one is required to use the Consumption Room to be eligible for any of Safehouse's other services,[6] nor will Safehouse provide, store, handle, or encourage the use of drugs, or allow others to distribute drugs on its property.

---

[3] *Id*. at 683.

[4] *Id*. at 116.

[5] *Id*.

[6] *The Safehouse Model*, Safehousephilly.com, https://www.safehousephilly.org/about/ the-safehouse-model (last accessed Nov. 17, 2020) ("Upon arrival, participants may choose to go directly to the observation room to access MAT and other services.").

In other words, Safehouse is a drug treatment facility that also seeks to provide much needed overdose care to drug users. If these users are denied access to a Consumption Room, they will still use drugs -- and possibly die on the street. Philadelphia's police and mobile emergency services (EMS) already attempt to provide rescue services for users who pass out on the streets. Often, the Police and EMS cannot do so in a timely manner. Instead of patrolling the streets for users who have overdosed, Safehouse wants to save lives *indoors*.

At oral argument, the government conceded that Safehouse could provide the exact same services it plans to provide in the Consumption Room if it did not do so *indoors*—if, for instance, it provided a Consumption Room inside a mobile van. Yet, according to the Majority's interpretation of section 856(a)(2), Safehouse would be committing a federal crime, punishable by twenty years' imprisonment, if the Consumption Room services were provided inside a building, rather than in a mobile van, parked in front. I cannot interpret section 856(a)(2) to reach such a result.

II

At oral argument, the government conceded that section 856(a) is poorly written. Indeed, it is nearly incomprehensible. Rather than construe this ambiguous statute narrowly, however, the Majority opts for broad criminal liability, arguing that an organization violates the statute if it makes its property available to a third party, knowing that *the third party* has "the purpose of unlawfully manufacturing, storing, distributing, or *using* a controlled

substance."[7] I disagree with such a construction of the statute. I know of no statute, other that section 856(a)(2), in which the "purpose" of an unnamed third party would be the factor that determines the mens rea necessary for a defendant to violate the statute. This problematic construction is particularly evident here because the parties agree that the "purpose" in section 856(a)(1) refers to the defendant's "purpose."

A

This divergence of interpretation violates the rules of statutory construction: "identical words used in different parts of the same statute are generally presumed to have the same meaning."[8] The Majority offers no reason to disregard this presumption. And to the extent that there is any ambiguity, the legislative history goes against the Majority. This precise issue was addressed in the floor debates of the 2003 amendments to section 856(a): Then-Senator Joseph Biden stated that "rogue promoters" charged under the statute must "not only know that there is drug activity at their event but also *hold the event for the purpose of illegal drug use or distribution*. . . . Let me be clear. Neither current law nor my bill seeks to punish a promoter for the behavior of their patrons."[9]

The Majority also construes section (a)(2)'s *mens rea* requirement unlike any other federal criminal statute. Indeed, the Majority has not identified a single statute that criminalizes otherwise innocent conduct—here, lawfully making your property "available for use"—

---

[7] 18 U.S.C. § 856(a)(2) (emphasis added).

[8] *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).

[9] 149 Cong. Rec. S1678 (emphasis added).

solely because of the subjective thoughts of a third party not mentioned in the statute.

At oral argument, the government suggested that conspiracy requires proof of third-party intent. True, but conspiracy statutes use the word "conspire," which refers to a third party and that party's purpose. For centuries, "conspiracy" has had a well-accepted common law meaning that we still use today: an "agreement," "combination," or "confederacy" of multiple people.[10] "When Congress uses a common law term . . . we generally presume that it intended to adopt the term's widely-accepted common law meaning . . .."[11] Moreover, conspiracy is a specific-intent crime[12] that requires a defendant to share and agree to facilitate a co-conspirator's illicit purpose.[13] By contrast, the Majority's construction

---

[10] *United States v. Hinman*, 26 F. Cas. 324, 325 (C.C.D.N.J. 1831) (No. 15,370); *accord United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) ("[A defendant] cannot conspire alone."); 4 WILLIAM BLACKSTONE, COMMENTARIES 136 n.19 ("To constitute a conspiracy . . . there must be at least two persons implicated in it."); *see also State v. Buchanan*, 5 H. & J. 317, 334 (Md. 1821) ("[I]f combinations for any of the purposes mentioned in the statute, were punishable at all, it could only have been on the ground, that both the offence of conspiracy (*eo nomine*), and the punishment, were known to the law anterior to the enactment of the statute . . ..").

[11] *United States v. Hsu*, 155 F.3d 189, 200 (3d Cir. 1998); *accord Salinas v. United States*, 522 U.S. 52, 63 (1997).

[12] *Ocasio v. United States*, 136 S. Ct. 1423, 1429 (2016); *United States v. Applewhaite*, 195 F.3d 679, 684 (3d Cir. 1999); *accord United States v. Williams*, 974 F.3d 320, 369–70 (3d Cir. 2020) ("[T]he defendant [must] join[] the agreement knowing of its objectives and with the intention of furthering or facilitating them.").

[13] *See United States v. Tyson*, 653 F.3d 192, 209 (3d Cir. 2011) ("[T]he pertinent inquiry is whether Tyson and Morrell agreed to

of section 856(a)(2) does not require a defendant to have any particular purpose whatsoever; it is the third party's purpose that is unlawful. And, unlike in a conspiracy, the government specifically argues that intent to facilitate is not necessary.

Nor is the Majority's construction of section 856(a)(2) similar to *Pinkerton* liability.[14] *Pinkerton* allows for liability based on a coconspirator's *completed acts*,[15] not her thoughts. Moreover, those acts must be a foreseeable part or consequence of a conspiracy that the defendant intentionally entered.[16] Finally, the penalties for conspiracy and *Pinkerton* liability are usually limited to those available for the underlying crimes.[17] By contrast, a section 856(a)(2) defendant may receive up to twenty years'

---

achieve the conspiracy's ends."); *United States v. Coleman*, 811 F.3d 804, 808 (3d Cir. 1987).

[14] *See* Nov. 16, 2020 Tr. at 65:23–66:2.

[15] *See United States v. Ramos*, 147 F.3d 281, 286 (3d Cir. 1998); *see also Bahlul v. United States*, 840 F.3d 757, 792 (D.C. Cir. 2016) (Millett, J., concurring in *per curium* opinion) ("Pinkerton liability . . . relies on the imputation of co-conspirators' completed offenses.").

[16] *See United States v. Casiano*, 113 F.3d 420, 427 (3d Cir. 1997).

[17] *See, e.g.*, 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."); *United States v. Brooks*, 524 F.3d 549, 557 (4th Cir. 2008). *But see* 18 U.S.C. § 371 (providing for five-year maximum for conspiracies against the United States, which may be committed without an underlying criminal object); *see also United States v. Conley*, 92 F.3d 157, 163–65 (3d Cir. 1996).

imprisonment, while the third party could be exposed to as little as one year.[18]

B

The Majority's construction wreaks havoc with the rest of the statute. The Majority relies on out-of-circuit decisions, beginning with *United States v. Chen*,[19] holding 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)."[20] *Chen* and its progeny did not explain their leap from the (likely correct) conclusion that the illicit "activity is engaged in by others" to their (incorrect) conclusion that the defendant need not have an illicit purpose.

Instead, *Chen* and its progeny stated only that a contrary interpretation would render either section (a)(1) or (2) "superfluous." Unsurprisingly, *Chen* and its progeny did not explain that conclusion. In fact, they contradict each other as to which subsection would be rendered superfluous: The *Chen* court stated that *section (a)(2)* would be superfluous,

---

[18] *See* 21 U.S.C. § 844(a) ("Any person who [possesses a controlled substance] may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both . . . .").

[19] 913 F.2d 183 (5th Cir. 1990).

[20] *Chen*, 913 F.2d at 190 (citing *United States v. Burnside*, 855 F.2d 863 (Table) (9th Cir. 1988)); *accord United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013); *United States v. Wilson*, 503 F.3d 195, 197–98 (2d Cir. 2007); *United States v. Banks*, 987 F.2d 463, 466 (7th Cir. 1993); *United States v. Tamez*, 941 F.2d 770, 773–74 (9th Cir. 1991).

whereas other courts of appeals have stated that *both* sections would "entirely overlap" and "have no separate meaning."[21]

In any event, the text of the statute demonstrates that all these courts of appeals are wrong. When *Chen* was decided, the *only* overlap between the two sections was the phrase "for the purpose of."[22] In other words, *Chen* and its progeny decided that, to avoid superfluity, the *only* words that were the *same* between the two sections must have *different* meanings. There is no rule of construction that supports or even permits such a reading.

Rather, the distinction between sections (a)(1) and (2) is in their respective *actus reus* requirements. Section (a)(1) has one *actus reus* element; section (a)(2) has two. Before 2003, those elements did not overlap at all; the 2003 amendments created only minor overlap by adding "rent" and "lease" to section (a)(1). I do not see why we should twist the text of the statute based on the potential overlap of two words,[23] let alone why *Chen* did so before *any* overlap existed.

In sum, the Majority construes sections 856(a)(1) and (2)'s identical "purpose" elements differently but holds that their different *actus reus* elements are identical. That need not be the case. For example, section (a)(1) would be violated where a property owner sells drugs from his home but does not

---

[21] *Tamez*, 941 F.2d at 774; *accord Tebeau*, 713 F.3d at 960.

[22] Even the listed purposes are not identical: Unlike § (a)(1), § (a)(2) includes "storing" controlled substances.

[23] *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014) (explaining that even "substantial" overlap between sections of a criminal statute "is not uncommon").

let others use it; section (a)(2) would not. Section (a)(2) would be violated where a rave operator encourages drug dealers to attend events to increase attendance; section (a)(1) would not. Because Safehouse's construction better comports with the statute's text and does not render either section completely superfluous, I would adopt it.

C

The Majority's construction also violates the "deeply rooted rule of statutory construction" that we must avoid "unintended or absurd results."[24]

i

As Safehouse correctly argues, under the Majority's construction, parents could violate the statute by allowing their drug-addicted adult son to live and do drugs in their home even if their only purpose in doing so was to rescue him from an overdose. Conceding that its reading of section (a)(2) cannot be taken literally, the Majority concludes that a defendant cannot be guilty where drug use is merely "incidental" to the guest's other purposes. Thus, the hypothetical parents would not violate the statute because their son's drug use was incidental to his use of the home as a residence. By trying to assure us that the hypothetical parents would not violate the statute, the Majority implicitly acknowledges that such a result would be impermissibly absurd. Although I agree that incidental purposes do not

---

[24] *United States v. Hodge*, 321 F.3d 429, 434 (3d Cir. 2003) (Ambro, J.); *accord United States v. Bankoff*, 613 F.3d 358, 369 n.10 (3d Cir. 2010) (Ambro, J.) (explaining that assuming Congress was unaware of the terms used in one statute when enacting another statute "would lead to an absurd result").

trigger the statute, absurd results are unavoidable under the Majority's construction.

The Majority relies on the consensus of other courts of appeals that a defendant's "casual" drug use in his home does not violate the original version of section 856(a)(1) because the drug use was incidental to the purpose for which he maintained the property, *i.e.*, as a residence.[25] Neither the Majority nor the cases it cites define "incidental." Fortunately, we have. In *United States v. Hayward*,[26] we adopted an incidental-purpose test for 18 U.S.C. § 2423(b), which made it unlawful to "travel in foreign commerce for the purpose of engaging in sex with a minor." We held that illicit sexual activity must be "a *significant or motivating* purpose of the travel across state or foreign boundaries," rather than merely "incidental" to the travel.[27] Even assuming that other courts of appeals' gloss on "maintain" in section (a)(1) survived the 2003 amendment[28] and

---

[25] *E.g.*, *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992).

[26] 359 F.3d 631 (3d Cir. 2004) (Garth & Ambro, J.).

[27] *Hayward*, 359 F.3d at 638 (emphasis added); *accord United States v. Vang*, 128 F.3d 1065, 1071 (7th Cir. 1997). Although "for the purpose of" in § 2434(b) was later amended explicitly to "with a motivating purpose," the legislative history does not indicate that Congress intended to increase the government's burden of proof.

[28] That amendment added "use" to § 856(a)(1). Other circuits have continued to assume—correctly, I think—that using drugs in one's own home still does not violate § (a)(1). *See United States v. Shetler*, 665 F.3d 1150, 1164 n.8 (9th Cir. 2011) ("The amendments increase the possibility that § 856(a)(1) would be unconstitutionally vague if construed expansively. What is meant by 'use' of 'any place ... temporarily' is, for example, certainly far from clear.").

comports with *Hayward*, it does not neatly apply to a guest's purpose in "us[ing]" property under section (a)(2) or avoid the absurd results inherent in the Majority's construction.

The Majority assumes that the son's purpose in moving in with his parents was to use the home as a residence. Not necessarily. Although the parents likely "maintain" their home for the purpose of living in it, their son may be motivated by many purposes to "use" it. If the son could not do drugs there, would he still move in? Alternatively, the son might already have a home (or be indifferent to being homeless) but begrudgingly accepted his parents' invitation to move in with them because he shared their concern about overdosing. Like Safehouse's participants, the son would 'use" the home because he was motivated by an "unlawful" purpose (supervised drug use) that was not incidental to his residency in the home, and the parents knew it. Under the Majority's construction, the parents were operating a crack house. That cannot be what the statute intends to say. Or suppose the son intended to do drugs there once, steal his mother's jewelry, and run away. If the parents were reasonably sure that he would run away but gave him a chance anyway, have they violated the statute under *Chen*'s deliberate-ignorance standard? The Majority's construction suggests so, particularly if this was the son's second or third chance. And under the Majority's construction, the parents would certainly violate section (a)(2) if they invited their son to do drugs in their home under supervision but not live there; this result is far afield from the crack houses and raves targeted by the statute.

Even apart from the hypothetical parents, absurd results abound under the Majority's construction. For example, the Majority would criminalize a vacationing

homeowner who pays a house sitter but also allows the sitter to smoke marijuana in his home. If the homeowner knew that the sitter cared less about the pay than about having a place to smoke marijuana, *housesitting* is the incidental use. At oral argument, the government contended that drug use in these circumstances would still be an "incidental" purpose because violating the statute somehow depended on the number of people that the defendant allowed to use the property. The statute does not mention a numeric threshold. The Majority does not explain why a guest's purpose depends on the number of persons sharing that purpose, and any threshold would necessarily involve arbitrary line-drawing.

The Majority would also criminalize homeless shelters where the operators know their clients will use drugs on the property. Although the government argues that the shelter, like the parents, would be protected by the incidental-purpose test, it again just *assumes* that "the people who stay [at the shelter] have housing as their primary purpose."[29] Again, not necessarily. An operator of a homeless shelter may know (or be deliberately ignorant of the fact) that some clients will stay at the shelter because they want a concealed place to use drugs and to sleep off the high. In other words, if they were prevented from using drugs there, some of them might not go there at all.

Throughout these proceedings the government has followed the statute's text only selectively. As yet another example, the government insists that "place" includes only "real property."[30] Thus, the

---

[29] Gov't's Reply at 15.

[30] Nov. 16, 2020 Tr. at 34:4–35:7.

government concedes that Safehouse could provide a Consumption Room in a mobile van parked outside its facility. Although that hypothetical does not directly implicate the "purpose" element, the government's response when pressed on this hypothetical at oral argument is significant: The government conceded that it "ha[sn't] thought . . . enough" about the potential consequences of its construction of the statute.[31] As shown above, the government's lack of thought is self-evident. In fact, the government's construction of the statute, adopted by the Majority here, is intolerably sweeping. No amount of a textual gloss will save it.

ii

The Majority's construction also conflicts with other federal policies. For example, HUD strongly discourages landlords from evicting certain classes of tenants for drug use alone.[32] The government again invokes the incidental-purpose test, arguing that HUD's "guidance regarding drug use . . . aims to connect homeless individuals to housing 'without preconditions and barriers to entry.'"[33] Under the Majority's construction, however, *HUD's* purpose is irrelevant. Nor is the landlord protected because this is a "residential example[]"[34]: Even if the landlord knows that a tenant uses the property *primarily* for drug binges, HUD expects the landlord to

---

[31] *Id.* at 37:7–21.

[32] HUD, HOUSING FIRST IN PERMANENT SUPPORTIVE HOUSING at 3 (July 2014), available at https://files.hudexchange.info/resources/documents/Housing-First-Permanent-Supportive-Housing-Brief.pdf.

[33] Gov't's Reply at 15 n.5.

[34] *Id.*

continue leasing the property to the tenant unless the tenant otherwise violates the lease.

The Majority's construction is also inconsistent with congressional grants for sanitary syringe programs. In some instances, this funding can be used to purchase syringes for the injection of controlled substances,[35] and the CDC strongly encourages these programs to "[p]rovi[de] . . . naloxone to reverse opioid overdoses."[36] Naloxone is indicated to reverse "opioid depression, including respiratory depression."[37] By explicitly acknowledging that these programs will provide syringes for controlled substances and encouraging them to provide medication used to treat ongoing overdoses, Congress clearly envisioned that drug use would likely occur on or immediately adjacent to the programs' properties. In other words, Congress is knowingly funding conduct that, according to the Majority, is a crime punishable by twenty years' imprisonment.

The Majority does not dispute that this would be anomalous. Instead, the government argues that "Congress's failure to speak directly to a specific case that falls within a more general statutory rule"

---

[35] *See, e.g.*, Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242, § 520.

[36] CDC, PROGRAM GUIDANCE FOR IMPLEMENTING CERTAIN COMPONENTS OF SYRINGE SERVICES PROGRAMS, 2016 at 2 (2016), *available at* https://www.cdc.gov/hiv/pdf/risk/cdc-hiv-syringe-exchange-services.pdf.

[37] FDA, PRODUCT INSERT, NALOXONE HYDROCHLORIDE INJECTION SOLUTION (Sept. 9, 2020), *available at* https://www.accessdata.fda.gov/spl/data/5ac302c7-4e5c-4a38-93ea-4fab202b84ee/5ac302c7-4e5c-4a38-93ea-4fab202b84ee.xml.

does not "create[] a tacit exception."[38] But that begs the question. Safehouse argues that it does not fall under the "general statutory rule" because the statute requires ***it*** to act with a particular "purpose" that it does not have; it does not seek to create an "exception." Although not dispositive, Congress's appropriation decisions provide further evidence that Safehouse's construction is correct.

iii

Safehouse's construction avoids these absurd results. Illicit drug activity does not motivate parents to make their home available to an adult son who is addicted to heroin. To the contrary, they want their son's drug use to stop. Nor does illicit drug activity motivate shelter operators to admit homeless people; or vacationing homeowners to look the other way when their house sitters use drugs; or landlords to continue leasing property to HUD recipients. In each instance, the owners act *despite* their knowledge that drug use will occur, not *for the purpose* that drug use occur.

By contrast, and contrary to the government's assertions, illicit drug activity does motivate drug dealers to operate crack houses. They may have an overarching motive of making money, but they specifically desire to achieve that end through drug sales. They want the drug sales to occur. Making the property available to customers to buy and use drugs also facilitates the dealer's unlawful purpose by helping to avoid police. Similarly, drug sales and use are part of rave operators' business models

---

[38] Gov't's Reply at 23 (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1746 (2020)).

because they drive up attendance. Thus, in *United States v. Tebeau*,[39] there was ample circumstantial evidence that the campground owner wanted attendees to use drugs. Drug use and sales at his music festivals were so widespread that they presumably influenced attendance, for which the owner charged a $50 admission fee. Indeed, the owner explicitly instructed security to admit dealers of marijuana and psychedelics, who openly advertised their products.

****

In sum, despite complaining that Safehouse's construction is somehow inconsistent with the statute's ambiguous text, the Majority has not identified a single inconsistency. Instead, the Majority relies on textual gloss after textual gloss, read into the statute by other courts of appeals over the last thirty years. The result is like a George Orwell novel where identical words have different meanings, different words are superfluous, and two plus two equals five. Furthermore, the Majority would require a defendant to divine whether a third party's illicit purpose is "primary," "substantial," "incidental," or whatever other adjective fits the government's argument at a given moment. Far from having a "well-established limiting principle,"[40] the Majority does not define these terms, and courts have had substantial difficulty pinning them down.

I would construe section (a)(2)'s purpose element consonant with the identical language in section

---

[39] 713 F.3d 955 (8th Cir. 2013).

[40] Gov't's Reply at 13.

(a)(1) and not contrary to virtually every other criminal statute on the books. If the government wishes to prosecute Safehouse, it must show that Safehouse will act with the requisite purpose. As explained below, the government has not done so.

III

I agree with the Majority that a defendant can have multiple purposes and still be criminally liable.[41] I also agree that a defendant's intentional, unlawful acts usually are not excused merely because they are a step to achieving some benevolent goal. Thus, in *United States v. Romano*,[42] we held that a lawful motive was not a defense to a crime requiring the defendant to act with "*an*" or "*any*" "unlawful purpose."[43] Where, as here, a statute uses the phrase "for *the* purpose of,"[44] however, our precedents focus on the defendant's motivations.[45] Accordingly, I would hold that a defendant, who is not motivated at least in part by a desire for unlawful drug activity to occur and who in fact wants to reduce drug activity, has not acted with the requisite purpose under section 856(a). On this record, Safehouse has no "unlawful" motivating purposes.

---

[41] *See Hayward*, 359 F.3d at 638.

[42] 849 F.2d 812 (3d Cir. 1988).

[43] *Romano*, 849 F.2d at 812, 816 n.7 (emphasis added); *accord* 18 U.S.C. § 1382 (making it unlawful to "go[] upon any military … installation, for *any* purpose prohibited by law or lawful regulation" (emphasis added)).

[44] *United States v. Shetler*, 665 F.3d 1150, 1162 (9th Cir. 2011).

[45] *See Hayward*, 359 F.3d at 638.

A

The government concedes that Safehouse's entire facility is the relevant "place."[46] There is no evidence suggesting that Safehouse will admit anyone to its facility hoping that they will use drugs. To the contrary, it actively tries to persuade users to stop. Unlike drug dealers and rave operators, Safehouse's motivating purpose is to put itself out of business.

The Majority puts undue emphasis on Safehouse's belief that the Consumption Room will make participants more amenable to drug treatment. The record does not show that that belief is the Consumption Room's *purpose*. To the contrary, increased amenability to drug treatment may be just an incidental *benefit* of making Safehouse's facility "available for use" for the purpose of providing medical care to people who would otherwise do drugs on the street and risk overdose—just as having an indoor place to use drugs is an incidental benefit of "maintaining" a house for the purpose of living there. Significantly, Safehouse does not prefer that participants choose the Consumption Room over direct entry into rehabilitation: Participants can always enter drug treatment at Safehouse,[47]

---

[46] Nov. 16, 2020 Tr. at 7:13–23, 8:12–23.

[47] I have again "look[ed] at the factual stipulations," as the government requested, but found nothing suggesting that it "is very unlikely" that "somebody could come into Safehouse and not be there to . . . ingest drugs" or that Safehouse "is not . . . set up [for] people to come in to just get treatment." Nov. 16, 2020 Tr. at 17:10– 18:21. To the contrary, "Safehouse intends to encourage every participant to enter drug treatment, which will include an offer to commence treatment *immediately*," Appx. at 684, ¶ 9 (emphasis added), and Safehouse explicitly states on its website that

and, for decades, defendant Benitez has tried (and continues to try) to have drug users enter into rehabilitation through PPP.

Even if just the Consumption Room, not the full Safehouse premises, were the relevant "place," the government's claim still fails. In effect, the Majority is trying to put yet another gloss on the statute: Section 856(a)(2) requires the defendant to make a place "available for use" for the purpose of "using a controlled substance," not, as the Majority would have it, "using a controlled substance [*in the place*]." Because Safehouse requires participants to bring their own drugs, Safehouse likely believes that participants would use drugs regardless of whether the Consumption Room is available. Safehouse's desire for participants to use drugs in the Consumption Room, *as opposed to the street*, does not imply that Safehouse desires that they use drugs at all.

Moreover, and significantly, the record does not suggest that participants must use drugs to enter to the Consumption Room. For example, they could go to the Consumption Room to receive fentanyl testing or safe-injection education for drugs they intend to ingest elsewhere, or Naloxone to treat an ongoing overdose that began outside the facility. Nor is there any evidence that the Consumption Room will facilitate drug use or that Safehouse believes that it will do so.[48] Making the Consumption Room

---

participants can access its other services withing using the Consumption Room.

[48] Although the government is correct that § 856(a)(2) does not include the word "facilitate," it is hard to imagine how an action can be taken "for" a particular "purpose" if it does not facilitate that purpose. Courts routinely use "purpose" and "facilitate" interchangeably. *See, e.g.*, *Abuelhawa v. United States*, 556 U.S.

available may make drug use safer, but the record does not show that safer drug use is easier than unsafe drug use or causes more drug use to occur.

In conclusion, the government has not met its burden of showing that drug use will be one of Safehouse's motivating purposes. Rather, Safehouse is trying to save people's lives.

B

Even if "drug use" were Safehouse's purpose, Safehouse still does not violate the statute. Moreover, to the extent that the Majority holds that Safehouse does, the statute is unconstitutional. "Using a controlled substance" is not "unlawful" under federal law; possessing it is. At oral argument, it was suggested that using drugs is unlawful under state law. Not so. Pennsylvania law criminalizes the

---

816, 824 (2009) ("The Government does nothing for its own cause by noting that 21 U.S.C. § 856 makes it a felony to facilitate 'the simple possession of drugs by others by making available for use . . . a place for the purpose of unlawfully using a controlled substance" even though the crime facilitated may be a mere misdemeanor."); *United States v. Durham*, 902 F.3d 1180, 1193 (10th Cir. 2018); *United States v. McGauley*, 279 F.3d 62, 76 (1st Cir. 2002); *United States v. Bolden*, 964 F.3d 283, 287 (4th Cir. 2020); *United States v. Petersen*, 622 F.3d 196, 208 (3d Cir. 2010); *United States v. Cole*, 262 F.3d 704, 709 (8th Cir. 2001); *United States v. Ellis*, 935 F.2d 385, 390–91 (1st Cir. 1991); *see also Rewis v. United States*, 401 U.S. 808, 811 (1971); *Fed. Ins. Co. v. Mich. Mut. Liab. Co.*, 277 F.2d 442, 445 (3d Cir. 1960) ("Removing and replacing the rear wheels was to facilitate unloading, not for the purpose of preserving an existing state or condition . . . .").

use of drug paraphernalia in certain circumstances,[49] but not the use of drugs itself.[50]

Moreover, because "drug use" is not unlawful in some states but is unlawful in others, we are faced with situations where property possessors in different states may be treated differently by section 856(a)(2). In situations where the only "unlawful" purpose of an establishment is "drug use," section 856(a)(2) would allow someone in one state to use his property in ways that someone in another state could not.[51] The Equal Protection Clause has long been applied to the federal government[52] and prohibits discrimination that is not "rationally related

---

[49] *See* 35 PA. CONS. STAT. § 780-113(a)(32);

[50] *Commonwealth v. Rivera*, 367 A.2d 719, 721 (Pa. 1976) ("The m[e]re possession of such drugs, however, is not an offense under the law . . . ."). The government argues that using drugs necessarily involves unlawful possession. Section 856(a) requires, however, that the defendant act for the purpose of "unlawfully . . . using" drugs; it is not enough that they act for the purpose of using drugs coupled with some different unlawful activity such as possession. If Congress meant "possessing," it certainly knew how to say so; instead, it said "using." Although proof of use can serve as proof of unlawful possession, "the terms 'possession' and 'use' are by no means synonymous or interchangeable." *United States v. Blackston*, 940 F.2d 877, 883 (3d Cir. 1991). The same is true of using drug paraphernalia for the purpose of ingesting drugs: The operative unlawful conduct is the use of drug paraphernalia for the purpose of using drugs; § 856(a) requires the drug use itself, however, to be unlawful.

[51] *See Hurtado v. United States*, 410 U.S. 578, 595 (1973) (Brennan, J. concurring in par) ("My conclusion that the majority has misconstrued the statute is fortified by the conviction that the statute, as interpreted by the Court, would be invalid under the Due Process Clause of the Fifth Amendment.").

[52] *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

to a legitimate governmental interest."[53] I cannot conceive of any rational basis for prosecuting those who manage or control property in a state where "drug use" is illegal and not doing so in a state where "drug use" has not been made illegal.[54]

IV

In sum, I cannot agree with the Majority's interpretation of section 856(a)(2). Because Safehouse does not have any of the purposes prohibited by section 856(a)(2), I would affirm the District Court's holding that Safehouse's conduct will not violate the CSA. For the above reasons, I respectfully dissent.

---

[53] *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973); *cf. Soto-Lopez v. N.Y. City Civ. Serv. Comm'n*, 755 F.2d 266, 275–76 (2d Cir. 1985).

[54] That is not to say that Congress can never incorporate state law into a federal criminal statute if it does not discriminate based on the location of property or has a rational basis for doing so. *See, e.g.*, *United States v. Titley*, 770 F.3d 1357, 1360–62 (10th Cir. 2014).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1422

UNITED STATES OF AMERICA

v.

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

****

SAFEHOUSE, a Pennsylvania nonprofit corporation

v.

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

United States of America, U.S. Department of Justice, United States Attorney General William P. Barr, and the United States Attorney for the Eastern District of Pennsylvania William M. McSwain,

Appellants

(E.D. Pa. No. 2:19-cv-00519)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, HARDIMAN, GREENAWAY, JR., SHWARTS, RESTREPO, BIBAS, MATEY, PHIPPS, and ROTH[1], Circuit Judges

The petition for rehearing filed by Appellees in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**. Judges McKee, Restrepo, and Roth would have granted the petition.

By the Court,

s/ Stephanos Bibas
Circuit Judge

Dated: March 24, 2021
Lmr/cc: All Counsel of Record

[1] Judge Roth's vote is limited to panel rehearing only.

OPINION SUR DENIAL OF PETITION FOR REHEARING

McKee *joined by* Restrepo and Roth

Ultimately, the meaning of 21 U.S.C. § 856(a)(2) must be decided by Congress. However, that is no reason for us not to hear this case *en banc*. Until Congress acts, Safehouse and others who attempt the kind of therapeutic response that is at issue here will continue to risk substantial prison sentences.

The District Court was the first in the country to interpret 21 U.S.C. § 856(a)(2) and numerous jurisdictions around the country are considering the same kind of therapeutic intervention that now places Safehouse in prosecutorial crosshairs. Even if the Majority's analysis is correct, this declaratory judgment action is too important to deny *en banc* review by the entire court. The Majority opinion will be studied by other jurisdictions around the country where entities like Safehouse are considering similar therapeutic responses to the life-threatening opioid epidemic that is engulfing so many communities and destroying so many lives.[2]

---

[2] Examples of innovative programs were brought to the Court's attention in amicus briefs submitted on behalf of interested cities and states. As of 2018, 44 states have enacted Good Samaritan legislation offering limited immunity from drug-related charges for bystanders and other drug-users seeking help for those experiencing overdose. *See* Brief of the District of Columbia, and the States of Delaware, Illinois, Michigan, Minnesota, New Mexico, Oregon, Vermont, and Virginia as Amici Curiae in Support of the Petition for Rehearing *En Banc* at 6-9, *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422) (hereinafter States' Amicus). *See also* Brief of Fourteen Cities and Counties as Amici Curiae in Support of Appellees' Petition for Rehearing

Yet, by denying the Petition for Rehearing that has been filed, we declare that the issue is not sufficiently important for the entire court to consider *en banc*. Hopefully, legislation will clarify the meaning of 21 U.S.C. § 856(a)(2), but until that day comes, we owe it to these parties and to communities within our jurisdiction to adjudicate this matter *en banc*. Moreover, for the reasons so cogently set forth in Judge Roth's dissent, which I will briefly elaborate upon, I believe there are problems with the Majority's analysis. Independent of the sweeping importance of this matter, those problems counsel rehearing. However, whether the Majority or Dissent is correct, few other cases will merit *en banc* review as much as this one. I therefore dissent from the denial of the Petition for Rehearing.

I.

The Majority proceeds as if this statute is so clear and unambiguous that resort to legislative history and canons of statutory construction is not appropriate; that simply is not so. Four judges have now examined the language of 21 U.S.C. § 856(a)(2). Two interpret it one way and two interpret it another. In a very thorough and well-reasoned opinion, the District Court painstakingly examined the statutory text as well as several doctrines of statutory construction and explained why § 856(a)(2) is ambiguous. In resolving that ambiguity, the District Court explained why the statute cannot reasonably be interpreted as an expression of congressional intent to criminalize what all agree is a therapeutic intervention by Safehouse. Judge Roth's

---

En Banc at 4, *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422). Additionally, California, New Mexico, and Utah have all introduced bills seeking to open safe injection sites. *See* States' Amicus at 11.

dissent explains why she believes the District Court's interpretation of § 856(a)(2) is correct. The Majority reaches the opposite conclusion based upon its interpretation of that same language. My colleagues in the Majority claim that their conclusion is based solely on the text of the statute devoid of any and all policy considerations. That is not true. They must read words into the statute that simply are not there in order to avoid the very troubling consequences that naturally result from their rigid insistence on a strictly literal interpretation.

Safehouse is an entity whose Board of Directors is comprised of a former Governor of Pennsylvania, an academician, and prominent evangelists and theologians. The Advisory Committee includes the Commissioner of Public Health of the City of Philadelphia, deans of the schools of public health of prominent universities in the city, a managing director of a healthcare group, and an emergency room physician. Given the Majority's interpretation of this statute, each of them could theoretically be prosecuted under 21 U.S.C. § 856(a)(2) and exposed to a period of incarceration of up to 20 years.[3]

Of course, neither status nor professional achievement should ever immunize one from prosecution for criminal conduct. If community leaders, university deans, theologians, and clinicians have actually engaged in conduct that Congress intended to criminalize, their status in the community and their good intentions is relevant, if at all, only to sentencing. As the Majority correctly notes, "[G]ood intentions cannot

---

[3] *See* 18 U.S.C. § 2 (imposing liability as a principal on anyone who aids, abets, counsels or procures the commission of a federal crime).

override the plain text of [a] statute."[4] But the forceful argument of the Dissent and the very well-reasoned District Court opinion illustrate that we are not dealing with "plain text." As Judge Roth explains, the statute is "nearly incomprehensible," and the Government conceded at argument that it is "poorly written."[5]

All agree that 21 U.S.C. § 856(a)(2) makes it illegal to "manage or control" a property and "knowingly and intentionally" open it to visitors "for the purpose of . . . using a controlled substance." As the Majority explains, "[t]his case turns on how to construe and apply § 856(a)(2)'s last phrase: 'for the purpose of.'"[6] The Majority believes that "[t]o get a conviction under (a)(2), the government must show only that the defendant's *tenant or visitor* had a purpose to . . . use drugs."[7] They conclude that this "follows from the law's language and grammar," and that "[i]t avoids making paragraph (a)(2) redundant of (a)(1)."[8] But, of course, there is a problem. As the Dissent explains, such an interpretation imposes criminal liability on a property owner based upon the conduct of a third party.[9] Judge Roth correctly hypothesizes that this would subject parents to substantial criminal sanctions—including lengthy imprisonment—if they allow their addicted child to

---

[4] *United States v. Safehouse*, 985 F.3d 225, 236 (3d Cir. 2021).

[5] *Id.* at 244 (Roth, J., dissenting).

[6] *Id*. at 232.

[7] *Id.* at 233 (emphasis in original).

[8] *Id*.

[9] *Id.* at 245 (Roth, J., dissenting).

live at home and consume drugs there in order to minimize the chances of a fatal overdose.[10]

The Majority nevertheless insists that the language of § 856 controls: as "the statute's plain text covers safe-injection sites[, w]e look no further."[4] By looking "no further," my colleagues put on blinders and thereby avoid the uncomfortable and troubling consequences of their interpretation. If the statute were clear, I would agree. It is well established that a court must "give effect to a statute's unambiguous plain language unless it produces a result demonstrably at odds with the intentions of the drafters ... or an outcome so bizarre that Congress could not have intended it."[11] Both considerations are present here. Given the ambiguities of the statute and the logical consequences of our holding, we should be exceedingly reluctant to assume Congress intended this statute to sweep as broadly as the Majority holds.

As a purely textual matter, Judge Roth's hypothetical about parents who allow their addicted son or daughter to return home to "shoot up" certainly does fall squarely within the text of the statue. The Majority concludes that "[t]he plain text requires only that the third party [i.e. the child] have the purpose of drug activity," and "Section 856's text makes it clear that (a)(2)'s 'purpose' is not the defendant's [i.e. the parents']."[12] According to the Majority, this result follows not only from the text of the statute, but "from the way

---

[10] Other hypotheticals abound, but for the sake of brevity, I focus on this one. For other examples of the reach of the Majority's holding, *see id.* at 238, 247-48.

[11] *In re Visteon Corp.*, 612 F.3d 210, 231 (3d Cir. 2010).

[12] *Safehouse*, 985 F.3d at 233.

that paragraphs (a)(1) and (a)(2) are written and *structured*."[13]

II.

Congress did not historically enact legislation targeted at owners or managers of property where drugs were used. However, after "very dirty and unkempt houses blighted . . . neighborhoods, attracting a stream of unsavory characters at all hours,"[14] Congress found it necessary to legislate. Initially, the statute passed by Congress was "effectively used to shut down crack houses."[15] However, legislation before enactment of 21 U.S.C. § 856(a)(2) did not reach club promoters and "rave" organizers who profited from drug use at their events. As Judge Roth explains, then-Senator Joseph Biden introduced an amendment to § 856(a)(2) in 2003 to reach "rogue [club] promoters" who "not only know that there is drug activity at their event[s] but also hold the event[s] for the purpose of illegal drug use or distribution."[16] Senator Biden made it clear that this was a targeted extension of criminal liability focused on the actions of the "few promoters out there who are taking steps to profit from drug activity at their events."[17] He even cautioned that § 856(a)(2) had not been—and should not be—used to "prosecute legitimate" businesses.[18] Subjecting Safehouse to criminal prosecution

---

[13] *Safehouse*, 985 F.3d at 233 (emphasis added).

[14] *Id.* at 230.

[15] 149 Cong. Rec. S1679 (2003).

[16] *Safehouse* at 245 (Roth, J., dissenting). *See also* 149 Cong. Rec. S1679. Section 856 was later adopted as part of the 2003 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act.

[17] 149 Cong. Rec. S1678 (2003).

[18] *Id.*

under that statute is far worse than prosecuting a legitimate business. It is prosecution of an entity engaged in the struggle against the very evil that the Bill was intended to combat. It is the polar opposite of the evil then-Senator Biden had in mind when this legislation was proposed.[19]

As I suggested earlier, even the Majority appreciates that a purely textual reading of this statute achieves a result that conflicts with congressional intent. They explain that under the statute, criminal liability attaches when drug activity is a "significant" purpose of the third-party visitor.[20] Though there has been no relevant finding or stipulation, they assert that § 856(a)(2) is violated in this case because "for most people, using drugs at Safehouse . . . will be a significant purpose of their visit."[21]

To avoid the problem of parental liability in Judge Roth's hypothetical, my colleagues in the majority insist that parents could not be prosecuted based on a child's drug use in their home because such use would merely be "incidental" to him/her living there.[22] They state that, instead, "[p]eople use these places to eat, sleep, and bathe."[23] Excluding criminal liability where drug use is "merely incidental" to occupancy is necessary to avoid the absurd results of Judge Roth's hypothetical. But, of course, there is no such textual limitation in 18 U.S.C. § 856(a)(2). Moreover, the creative limiting

---

[19] *See Safehouse*, 985 F.3d at 251 (Roth, J., dissenting).

[20] *Id.* at 237.

[21] *Id.* at 238.

[22] *Id.*

[23] *Id.*

language that the Majority reads into the statute does not preclude criminal liability of parents if an addicted child is not very concerned about eating, sleeping or bathing at home as long as s/he can use drugs there. In such a scenario, the child's significant purpose would be using drugs in the home. Given the tenacity of the craving occasioned by addiction and the distorted priorities that accompany addiction, that is not only possible, it is quite probable. The purpose of such addicted persons would be no different than the purpose the Majority assigns to visitors to Safehouse. The text of § 856(a)(2) does not allow for any distinction.

Their parsing of the statutory text alone purports to inform my colleagues in the Majority that "the actor's purpose must be more than 'merely incidental.'"[24] We are told this adherence to the text avoids the evil of judges making policy and that a contrary holding would be judicial-policy-making.[25] As I have already suggested, the problem is that this interpretation is not based solely on clear text despite the Majority's assertions to the contrary. Rather, it is based on nothing more than the need to avoid the uncomfortable absurdity that flows directly from a literal interpretation of the statute.

Where is the language that is needed to exclude situations where the actor's purpose is "merely incidental" to the drug usage? Nowhere does the text of the statute require the use to be incidental to avoid criminalization and nowhere does the Majority assist in defining these terms. The Majority adds that, while it is the visitors who are required to, and do,

---

[24] *Safehouse*, 985 F.3d at 237.

[25] *See id.* at 243.

have the significant purpose of using drugs, "[i]n any event, Safehouse [itself] has a significant purpose that its visitors do drugs."[26] But the Majority's analysis fails to address the possibility that—like Safehouse—parents may too have the "significant purpose" of allowing loved ones to consume drugs in their home to avoid a fatal overdose. In fact, given all of the agony of living with someone afflicted with severe drug addiction, it is highly likely that a significant (and possibly the only) parental purpose for keeping an addicted adult "child" at home would be ensuring a lifeline in the event of an overdose.

The Majority takes the absurd results one step further in making a finding that Safehouse's own significant purpose is for third parties to use drugs at its facility.[27] However, no visitor is "required to use the Consumption Room to be eligible for *any* of Safehouse's other services, nor will Safehouse provide, store, handle, or encourage the use of drugs, or allow others to distribute drugs on its property."[28]

III.

Nearly everyone here agrees that Congress did not envision the situation posed by Safehouse's Consumption Room when it enacted 21 U.S.C. § 856(a)(2). The District Court explained:

> [T]here is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse. Although the language, taken to its

---

[26] *Id.* at 238.

[27] *Id.* ("For Safehouse itself has a significant purpose that its visitors use heroin, fentanyl, and the like.").

[28] *Id.* at 244 (Roth, J., dissenting) (emphasis in original).

> broadest extent, can certainly be interpreted to apply to Safehouse's proposed safe injection site, to attribute such meaning to the legislators who adopted the language is illusory. Safe injection sites were not considered by Congress and could not have been, because their use as a possible harm reduction strategy among opioid users had not yet entered public discourse.[29]

The Majority concedes that Congress could not have conceived that operations such as Safehouse would be criminalized by enacting the statute but cites *Pa. Dep't of Corrections v. Yeskey* to argue that should not influence our statutory inquiry.[30] But of course, *Yeskey* did not involve the kind of creative judicial amendment that the Majority slips into the statute. Rather, there, the Court simply held that a prisoner could sue a state penal institution under the ADA because "[s]tate prisons fall squarely within the statutory definition of 'public entity,' which includes 'any . . . agency . . . or other instrumentality of a State . . . or local government."[31] It was therefore irrelevant that Congress did not intend to subject prisons to such claims. The plain text authorized them.

It is, of course, correct to observe that "[s]tatutes often reach beyond the principal evil that animated them[,]" as my colleagues do in citing *Sedima,*

---

[29] *United States v. Safehouse*, 408 F. Supp. 3d 583, 585-86 (E.D. Pa. 2019).

[30] *Safehouse*, 985 F.3d at 238.

[31] 524 U.S. 212, 210 (1998).

S.P.R.L. v. Imrex Co.[32] They correctly remind us that "though Congress meant RICO to target mobsters, it reaches far beyond them to legitimate business as well."[33] The analogy does not advance our inquiry. Congress clearly intended to reach individuals who operate a criminal "enterprise" through a pattern of racketeering when it enacted RICO. Courts did not have to read any language into the statute to hold that legitimate businesses could constitute an enterprise if persons other than traditional "mobsters" conducted their affairs through a pattern of racketeering activity.

As Judge Roth notes in dissent, none of the examples relied upon by the Majority include imposing criminal sanctions on someone based upon someone else's "purpose." Neither she nor I "know of . . . [a] statute, other [than] § 856(a)(2), in which the 'purpose' of an unnamed third party would . . . determine[] the mens rea necessary for a defendant to violate the statute."[34] There is little comfort in the argument that this is required in order to avoid the evil of judicial-policy-making.

At oral argument, the Government confidently proclaimed that Safehouse's Consumption Room "is exactly the type of thing that Congress was concerned about, even though they didn't specifically know about injection sites."[35] That is simply wrong. Not surprisingly, no authority was offered to

---

[32] *Safehouse*, 985 F.3d at 238.

[33] *Id.* (citing *Sedima S.P.R.L v. Imrex Co.*, 473 U.S.479, 499 (1985)).

[34] *Id.* at 245 (Roth, J., dissenting).

[35] Transcript of Oral Argument at 23, *United States v. Safehouse*, 985 F.3d 225 (2021) (No. 20-1422).

support that bare assertion, and none has been offered in its brief to this Court. And subsequent events prove its fallacy. Since 21 U.S.C. § 856(a)(2) was enacted, the federal government has adopted a policy of overdose prevention.[36] Moreover, most states now have Syringe Exchange Programs, which provide clean needles to drug users to reduce the transmission of blood-borne diseases.[37] Several of these interventions are recommended by the Center for Disease Control.[38] Safehouse is simply not the type of "place" that Congress was concerned about when the statute was enacted. One need only look to the aforementioned statement of then-Senator Biden to appreciate just how far off the mark the Government's contrary assertion was. We simply

---

[36] *See* U.S. Dept. of Health & Human Services, Strategy to Combat Opioid Abuse, Misuse, and Overdose (2017), https://www.hhs.gov/opioids/about-the-epidemic/hhs-response/index.html.

[37] While the federal government cannot provide funds for the purchase of syringes, once a state has demonstrated the need for a needle exchange program, they can get funding from the Center for Disease Control to provide services including (but not limited to) personnel, syringe disposal kits, and education in support of syringe exchange programs. The prohibition on using federal funds to purchase syringes does not prevent the CDC from extolling the benefits of such programs. *See Safehouse* 985 F.3d at 239; *see also* States' Amicus at 8; *see also* Center for Disease Control, Federal Funding for Syringe Service Programs, https://www.cdc.gov/ssp/ssp-funding.html#regarding-funding.

[38] Center for Disease Control, Summary of Information on the Safety and Effectiveness of Syringe Services Programs (SSPS), https://www.cdc.gov/ssp/syringe-services-programs-summary.html ("Syringe services programs can benefit communities and public safety by reducing needlestick injuries and overdose deaths, without increasing illegal injection of drugs or criminal activity.").

cannot (and should not) presume that Congress meant to equate the efforts of Safehouse with crack house operators and expose them to 20 years in prison. Furthermore, as the District Court explained in its scholarly opinion, traditional rules of statutory construction counsel against it.

IV.

I end where I began. I fully appreciate that the final answer to this inquiry must come from Congress. Only Congress can clarify the intended scope of 21 U.S.C. § 856(a)(2). In the interim, whether or not the Majority's analysis is correct, this case is simply too important to deny *en banc* review. It deserves to be heard by the full court. I therefore must respectfully dissent from our denial of the Petition for Rehearing. Judge Restrepo joining Judge McKee's dissent.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civ. No. 19-0519

UNITED STATES OF AMERICA,
Plaintiff,
v.
SAFEHOUSE, a Pennsylvania nonprofit corporation;
JOSÉ BENITEZ, as President and Treasurer of
Safehouse,
Defendants.

****

SAFEHOUSE, a Pennsylvania nonprofit corporation,
Counterclaim Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
Counterclaim Defendant,

and

WILLIAM P. BARR, in his official capacity
as Attorney General of the United States; and
WILLIAM M. MCSWAIN, in his official capacity as
U.S. Attorney for the Eastern District of
Pennsylvania,
Third-Party Defendants.

Filed: February 25, 2020

MEMORANDUM

McHugh, J., District Judge.

This case arises out of Defendant Safehouse's proposal to open a safe injection site in Philadelphia to mitigate the harms resulting from unlawful opioid abuse, and the Government's determination that opening such a site would be unlawful. Previously, I denied a motion for judgement on the pleadings filed by the United States. ECF 134. In doing so, I concluded that, "[a]ccepting the facts in the pleadings as true, as required under Rule 12 of the Federal Rules of Civil Procedure, 21 U.S.C. § 856(a)(2) would not prohibit Safehouse from establishing and operating an overdose prevention facility that provides medically supervised consumption services." ECF 134, at 1-2.

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

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

In response, the Government principally restates its "core contention" that Safehouse's

1 Safehouse requests the Court dismiss without prejudice its counterclaim under the Religious Freedom Restoration Act as moot, see ECF 3, at 42-43 (pleading counterclaim); ECF 137-3, ¶ 3 (proposing dismissal without prejudice), and, in doing so, seeks to "reserve[] the right to press those claims if this Court's declaratory judgment on the underlying statutory question were vacated, reversed, or remanded by an appellate court or if changed circumstances otherwise established a ripe controversy as to those claims." *Id.* The Government contends that by making this request Safehouse has "abandon[ed] its claim[s]" under RFRA and a related claim under the Commerce Clause. ECF 139, at 11-12, 12 n.8. I disagree. Given that Safehouse has won the declaratory judgment it seeks, there is no need to reach its additional claims, and its request that this Court dismiss the RFRA and Commerce Clause claims without prejudice is sensible. The claims are therefore deemed to be preserved.

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

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

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

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

The Government further contends that inferences drawn in resolving a motion to dismiss under Rule 12 are not properly drawn in resolving the

pending motions. Specifically, the Government protests that Safehouse "never said in its pleadings that it would reduce unlawful drug use, nor do the Stipulated Facts so state," and that, because Safehouse has moved affirmatively for final relief, "the Court cannot make this factual inference in Safehouse's favor." ECF 139, at 11 n.4. In advancing this argument, the Government continues to confuse purpose with outcome. The reach of Section 856(a)(2) did not then and does not now depend to any degree on whether Safehouse's model actually "would reduce unlawful drug use." Section 856(a)(2)'s applicability turns on the *objective* of the relevant actor, not on the *effectiveness* of a proposed intervention model. In fact, my opinion of October 2, 2019, explicitly declined to address "whether safe injection sites are an appropriate means of dealing with the opioid crisis." ECF 133, at 2.

In any case, no inference is necessary at this stage because the parties have stipulated to various facts as recommended by the Court. These include that "Safehouse seeks to open the first safe injection site in the U.S. in the City of Philadelphia and is . . . [a] nonprofit corporation whose mission is to save lives by providing a range of overdose prevention services," and that "the overdose prevention services it intends to offer are aimed at preventing the spread of disease, administering medical care, and encouraging drug users to enter treatment." ECF 137, Ex. A, ¶ 1. Admittedly, that stipulation is prefaced by "according to Safehouse" or "according to [Safehouse's] website," but later stipulations remove any ambiguity. The parties agree that "Safehouse intends to offer each participant its services, which include use of supervised drug

consumption and observation rooms, medical services, including wound care, onsite initiation of Medication-Assisted Treatment, recovery counseling, HIV and HCV counseling, testing and treatment, referral to primary care, and referrals to social services, legal services and housing opportunities." *Id.* ¶ 9. The parties also agree that Safehouse "intends to encourage every participant to enter drug treatment, which will include an offer to commence treatment immediately." *Id.* Given those stipulations, the analysis in my memorandum opinion of October 2, 2019, applies with equal validity to the record before me, and there is nothing procedurally improper in granting the declaratory relief sought by Safehouse.

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

not apply to that conduct. It conceded the parents would not have an unlawful "purpose" in participating in such life-saving activity. ECF 133, at 41; *see also* ECF 131, at 38:17-42:3.

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

* * * * *

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

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

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civ. No. 19-0519

UNITED STATES OF AMERICA,
Plaintiff,
v.
SAFEHOUSE, a Pennsylvania nonprofit corporation;
JOSÉ BENITEZ, as President and Treasurer of
Safehouse,
Defendants.

****

SAFEHOUSE, a Pennsylvania nonprofit corporation,
Counterclaim Plaintiff,
v.
U.S. DEPARTMENT OF JUSTICE,
Counterclaim Defendant,
and
WILLIAM P. BARR, in his official capacity
as Attorney General of the United States; and
WILLIAM M. MCSWAIN, in his official capacity as
U.S. Attorney for the Eastern District of
Pennsylvania,
Third-Party Defendants.

Filed: February 25, 2020

ORDER

For the reasons set forth in the accompanying Memorandum, and in this Court's previous memorandum opinion of October 2, 2019, upon consideration of Defendants' Motion for Final Declaratory Judgment (ECF 137), the Government's Motion for Summary Judgment and Opposition to Defendants' Motion for Declaratory Judgment (ECF 139), and Defendants' Memorandum of Law in Opposition to the Government's Cross-Motion for Partial SummaryJudgment (ECF 140), this 25th day of February, 2020, it is hereby **ORDERED** that Defendants' motion is **GRANTED** and the Government's motion is **DENIED**, as follows:

1. Defendants' Motion for Declaratory Judgment is GRANTED.

2. JUDGMENT is ENTERED in favor of Safehouse and Jose Benitez and against the United States of America, U.S. Department of Justice, United States Attorney General William P. Barr, and United States Attorney for the Eastern District of Pennsylvania William M. McSwain on all of Plaintiff's claims and on Count I of Safehouse's counterclaim.

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

4. It is DECLARED that the establishment and operation of Defendants' overdose prevention services model, including supervised consumption in accordance with the

parties' stipulated facts (ECF 137, Ex. A), does not violate 21 U.S.C. § 856(a).

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

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civ. No. 19-0519

UNITED STATES OF AMERICA,
Plaintiff,
v.
SAFEHOUSE, a Pennsylvania nonprofit corporation;
JOSÉ BENITEZ, as President and Treasurer of
Safehouse,
Defendants.

****

SAFEHOUSE, a Pennsylvania nonprofit corporation,
Counterclaim Plaintiff,
v.
U.S. DEPARTMENT OF JUSTICE,
Counterclaim Defendant,
and
WILLIAM P. BARR, in his official capacity
as Attorney General of the United States; and
WILLIAM M. MCSWAIN, in his official capacity as
U.S. Attorney for the Eastern District of
Pennsylvania,
Third-Party Defendants.

Filed: October 2, 2019

MEMORANDUM

McHugh, J., District Judge.

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

This narrowness of focus reflects a fundamental underlying reality, which is that no credible argument can be made that facilities such as safe injection sites were within the contemplation of Congress either when it adopted § 856(a) in 1986, or when it amended the statute in 2003. And that

baseline reality ultimately has substantive significance in determining whether this statute is properly applied to the safe injection site proposed by Safehouse.

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

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

responsible use of judicial power under those circumstances is to decline to expand the scope of criminal liability under the statute and allow Congress to address the issue.

I. The Relevant Factual Background

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

Participants who choose to use drugs in the medically supervised consumption room will receive sterile consumption equipment as well as fentanyl test strips once they enter the room. At no point will Safehouse staff handle or provide controlled substances. Staff members will supervise participants' consumption and, if necessary, intervene with

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

medical care, including reversal agents to prevent fatal overdose. Before leaving the room, participants will dispose of used consumption equipment. After participants finish in the medically supervised consumption room, staff will direct them to the medically supervised observation room. Nothing in the Safehouse protocol appears to require that a participant remain in the observation room for a specified period of time. In the observation room, certified peer counselors, as well as recovery specialists, social workers, and case managers will be available to offer services and encourage treatment. The same services will again be offered for the third time at check out.

II. Procedural Posture

After Safehouse announced its plans, the Government engaged in some correspondence with Safehouse's leadership. The parties could not reach agreement, and the United States then initiated this action against Safehouse and its President and Treasurer, Jose Benitez.[3] *See* Pl.'s Compl., ECF No. 1; Pl.'s Am. Compl., ECF No. 35. The Government seeks a declaratory judgment that the medically supervised consumption rooms violate 21 U.S.C. § 856(a)(2). I commend the Government for proceeding in this manner, rather than with criminal prosecution. Defendants answered the Government's

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

Declaratory Judgment Complaint with several affirmative defenses, including an argument that application of the statute to their proposed site would be unconstitutional. Defs.' Answer to Compl., ECF No. 3; Defs.' Answer to Am. Compl., ECF No. 45. Safehouse also brought counterclaims and third-party claims, first seeking a declaratory judgment that its proposed operation will not violate § 856(a) and second seeking a declaratory judgment that the Department of Justice's efforts to enforce the statute, threats to prosecute Safehouse, and litigation against Safehouse violate 42 U.S.C. § 2000bb, the Religious Freedom Restoration Act. *Id.* The Government answered Safehouse's counterclaims and third-party complaint, Pl. & Third-Party Defs.' Answer, ECF No. 46, and then filed a Motion for Judgment on the Pleadings as to its claim as well as the counterclaims and third-party claims. Pl. & Third-Party Defs.' Mot. for J. on the Pleadings, ECF No. 47.[4]

---

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

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

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

III. The Controlling Procedural Standard

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

IV. The Statutory Question

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

a. The Absence of a Controlling Standard of Statutory Construction

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

its application to medically supervised consumption sites.[5]

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

The Third Circuit has noted that a court's "goal when interpreting a statute is to effectuate Congress's intent." *S.H. ex rel. Durrell v. Lower Merion School Dist.*, 729 F.3d 248, 257 (3d Cir. 2013) (quoting *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012)). Stated differently, "[w]hen a court interprets a statute, the court articulates the meaning of the words of the legislative branch." Robert A. Katzmann, *Judging Statutes* 8 (2014). In this endeavor, the Third Circuit has, as recently as this past August, again emphasized that "words matter" and that interpreters must

---

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

begin the process of statutory construction by looking to the text. *Pellegrino v. Transp. Sec. Admin.*, 937 F.3d 164, 2019 WL 4125221, at *12 (3d Cir. Aug. 30 2019) (en banc) (Ambro, J.) (majority opinion); *id.* (Krause, J., dissenting). Accordingly, where the meaning of a provision is clear, a court need not look beyond the statutory language.

To determine whether language is unambiguous, the Third Circuit has instructed that one should "read the statute in its ordinary and natural sense." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010) (quoting *In re Harvard Indus., Inc.*, 568 F.3d 444, 451 (3d Cir. 2009)). "A provision is ambiguous only where the disputed language is 'reasonably susceptible of different interpretations.'" *Id.* (quoting *Dobrek v. Phelan*, 419 F.3d 259, 264 (3d Cir. 2005)). In application, however, reliance on the plain meaning of the text is hardly as simple as its proponents contend, as evidenced by cases where both the majority and dissent claim that the language of a statute is clear and unambiguous while reaching opposite results. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ*, 550 U.S. 81 (2007). I find substantial merit to the observation that "[p]lain meaning is a conclusion, not a method." Victoria Nourse, *Misreading Law, Misreading Democracy* 5, 66, 68-69 (Harvard Univ. Press 2016) (hereinafter Nourse, *Misreading Law*).

Where plain meaning proves elusive or "a statute is unclear on its face," the Court of Appeals has recently reaffirmed that "good arguments exist that materials making known Congress's purpose 'should be respected, lest the integrity of legislation be undermined.'" *Pellegrino*, 2019 WL 4125221 at *11 (quoting Robert A. Katzmann, *Judging Statutes* 4 (2014)). In fact, respecting Congress's purpose is necessary to

preserve both the legislative and judicial roles, and legislative materials often provide helpful insight into what Congress meant to accomplish with a given statute. Among the criticisms leveled at courts' use of legislative materials is that they are cited selectively and cited indiscriminately without recognition that different sources are entitled to different weight.[6] Judges must therefore consider legislative materials with an accurate understanding of Congress's rules and procedures. Katzman, *supra* at 49; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 802-05 (1983) (hereinafter Posner, *Statutory Interpretation*).

Recently, Georgetown Law Professor Victoria Nourse[7] articulated five guiding principles to facilitate a disciplined, objective use of legislative history—which she prefers to call "legislative evidence"—in statutory interpretation. Nourse, *Misreading Law*,

---

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

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

supra at 68-69; *see also* Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70 (2012). First, she observes that "Statutes Are Elections." By that she means that the legislature makes choices, and one side prevails. Accordingly, statements of a law's opponents should never be cited for the authoritative meaning of the law, much in the way that a dissenting opinion would not be cited as authority without explanation. Nourse, *Misreading Law*, *supra* at 68. Nourse's second principle emphasizes the sequential nature of how laws develop. Just as subsequent appellate decisions trump trial court decisions, later text or legislative evidence can trump earlier legislative evidence. *Id.* at 69. One should therefore read legislative history in reverse, beginning with the last point in the decision-making process related to the text at issue. *Id.* at 79-80. The third principle recognizes that Congress's own rules can provide meaningful interpretive guidance when used as legislative canons. *Id.* at 85-88. Nourse's fourth principle rejects the view that any particular "type" of legislative history will always be the most reliable. Any type of legislative history may mislead the interpreter absent an understanding of the realities of legislative conflict, sequence, and congressional rules. *Id.* at 88-90. Finally, the fifth principle recognizes that Congress operates with different institutional expectations and incentives than the courts, which may cause courts to misunderstand the significance of certain congressional language. *Id.* at 91-94. To the extent that I consider legislative context, it is with these principles in mind.

Necessarily, statutory construction also requires consideration of the "canons" of construction given new life by the late Justice Scalia, and now widely used. *See*

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

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

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

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

applies to those examples. But just as courts should not interpret the law in a way that excludes the ordinary examples to which it undisputedly applies, courts should hesitate to extend a statute far beyond its ordinary meaning.

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

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

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

room, falls within the scope of the statute's criminal prohibition.[8]

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

> Except as authorized by this subchapter, it shall be unlawful to--
>
> (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

Some aspects of the statute's application to these facts are clear. Safehouse will manage or control a place and make that place available to participants. Safehouse participants undisputedly will use drugs on Safehouse's property. The remaining question is

---

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

whether Safehouse will knowingly and intentionally make its property available "for the purpose of unlawfully . . . using drugs" within the meaning of the statute. In the parties' view, this is a simple question. I disagree.

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

The Government argues that (a)(2) prohibits Safehouse's medically supervised consumption rooms because the purpose requirement there applies to the third party using the property, not the actor charged with violating the statute. That is, in the Government's view, only the third party must act "for the purpose of unlawfully . . . using drugs." The Government further contends that, even if the relevant purpose under the statute is that of Safehouse, Safehouse is necessarily acting for the purpose of unlawful drug use. Safehouse disagrees, arguing that the relevant purpose is the purpose for which the property itself is used and contending that its site is not "for the purpose of unlawfully . . . using drugs." Safehouse also asserts that § 856(a) does not prohibit safe consumption rooms because the CSA authorizes their operation and because the statute does not define "unlawfully . . . using."

I reject Safehouse's latter two arguments for reasons explained more fully below. With respect to the

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

i. Authorization

Safehouse contends that its proposed conduct is "authorized by" the Controlled Substances Act (CSA) and therefore falls within the "[e]xcept as authorized by this subchapter" exemption of § 856(a). According to Safehouse, this follows not from any express authorization, but from the fact that medically supervised consumption sites constitute a legitimate medical practice "which the CSA does not regulate and Section 856 does not prohibit." Defs.' Resp. to Pl.'s Mot. J. on the Pleadings at 28, ECF No. 48 (hereinafter Safehouse Response). As a logical matter, Safehouse advances an argument that is both simplistic and circular: because the proposed conduct is not prohibited or regulated by the CSA, it is therefore necessarily authorized by the statute and excluded from the reach of § 856 of the CSA. I reject the premise that Congress's failure to prohibit activity constitutes an affirmative authorization. Rather, I am confident that the statute neither expressly prohibits nor authorizes the sites for

the same reason—the legislature simply never contemplated them when enacting the law. Granted, if § 856 does not prohibit Safehouse's medically supervised consumption sites—a matter explored further below—additional express authorization would of course be unnecessary. That may make the sites "authorized" in the colloquial sense that they are not illegal, but it does not render them "authorized by this subchapter" within the meaning of the statute.

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

of a physician's registration under the CSA. 546 U.S. at 254.

Although the Supreme Court ruled against the Government, *Gonzales* does not control on the facts of the current case for several reasons. As a preliminary matter, the proposed activities of Safehouse here are not analogous to the detailed state-regulated scheme at issue in *Gonzales*. Safe injection sites are recognized as a legitimate harm reduction strategy among some public health experts and recognized medical authorities such as the American Medical Association, *see* Defs.' Answer at 31, but as Safehouse concedes, no state medical board has issued standards governing their operation. Tr. at 52. It is clear that the Supreme Court in *Gonzales* was also concerned with issues of federalism, which are not present in a case where the conduct in question is not formally endorsed by any state or local governmental entity.[9] *See* 546 U.S. at 270.

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

Finally, as to Safehouse's argument that because "Congress does not regulate the legitimate practice of medicine" under *Gonzales*, the CSA does not prohibit safe consumption sites, Tr. at 49, I again find

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

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

ii. Meaning of "unlawfully . . . using"

Safehouse also suggests that, because the statute does not offer a technical definition of "unlawfully . . . using," the meaning of that phrase is indecipherable, and § 856 cannot apply where the drug activity in question is consumption or use. With this argument, Safehouse advocates a problematic isolationist approach to statutory interpretation that can lead courts to conclusions far from the legislature's meaning. I decline to isolate "using" and read that term out of the text when the statutory and

---

[10] Safehouse also cites several cases for the proposition that, to convict a practitioner, the Government must prove the practitioner acted outside the course of professional practice and without a legitimate medical purpose. But the cases cited exclusively concern distribution under 21 U.S.C. § 841(a) and its implementing regulation concerning prescriptions, 21 C.F.R. § 1306.04. These cases might be relevant if the Government were accusing Safehouse of distributing medication, but they offer no insight into the question about § 856(a)(2)'s applicability to the facts at hand.

legislative context easily clarify the meaning of "unlawfully . . . using." Although the CSA does not criminalize "use" alone, the statute criminalizes possession, which, as the Government points out, is a necessary predicate to use.[11] By definition, a person cannot lawfully use or consume[12] a substance that the person cannot even lawfully possess. In the context of the statute, a reader can fairly understand "unlawfully . . . using" to refer to use of a substance the person cannot lawfully possess. This view is consistent with the legislative evidence, which refers to "using illegal drugs." *See* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 108-66, 108th Cong., 1st Sess. 49, at 68 (2003) (hereinafter Joint Explanatory Statement).[13] In a case where the illegality of the controlled substances involved is undisputed, the use of the term "unlawfully using" is not ambiguous. The question remains whether Safehouse plans to knowingly and intentionally make a place available for the purpose of unlawfully using drugs.

---

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

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

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

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

With respect to the purpose requirement, the first dispute concerns *whose* purpose is at issue. The text of (a)(2) requires that the actor charged with violating the statute "knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. § 856(a)(2). The Government contends that the actor in (a)(2) simply needs to have knowingly made a place available *to others who have the purpose* of engaging in drug activity. Pl. & Third-Party Defs.' Mot. for J. on the Pleadings at 9. Safehouse argues that the relevant purpose is that of the place itself. I reject both constructions and conclude that the statute requires that the *actor* have acted for the proscribed purpose.

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

The context of the whole statute supports this reading. Sections 856(a)(1) and (a)(2) both contain the requirement that one engage in the prohibited

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

The substantive difference between the two provisions, as the Government agrees, Tr. at 9, and as many courts have recognized, is that (a)(1) targets actors who themselves use or maintain the place in question to engage in drug activity, whereas (a)(2) encompasses actors who manage or control a space and then make the place available *to others* who

---

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

engage in drug activity. The legislative context confirms as much. Joint Explanatory Statement at 68 (explaining that the 2003 amendment to § 856 aimed to make "clear that anyone who knowingly and intentionally uses their property, or allows another person to use their property, for the purpose of distributing or manufacturing or using illegal drugs will be held accountable"). But that distinction does not mean that in (a)(2) the actor need not have the proscribed purpose. One can still make a place available to others for the purpose of those people manufacturing, distributing, or using illicit substances there.[15] Reading § 856(a) naturally, the purpose requirement applies to the actor in both (a)(1) and (a)(2) on its face, and absent evidence that it should apply differently in each, I decline to assign (a)(2) a lower mental state than its text requires.

Legislative evidence confirms that the purpose requirement applies to the actor in both provisions. When Congress most recently considered § 856, in 2003, it amended the statute, including (a)(2).[16] The

---

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

[16] Although the "for the purpose of" language was also in the original version of § 856, the legislative evidence from 2003 carries no less weight simply because the language was not entirely new in 2003. Congress revisited the language in question in 2003 and decided to enact the modified provision with the "for the

amendment to § 856, originally introduced as the Illicit Drug Anti-Proliferation Act, was added to the PROTECT Act in the Conference Committee, an Act aimed at preventing child abuse and facilitating prosecution of crimes against children. Then-Senator Joseph Biden sponsored the Illicit Drug Anti-Proliferation Act and was a conferee at the Conference Committee on the PROTECT Act.[17] His remarks during the subsequent debate on the Conference Report offer strong evidence that § 856's meaning requires the actor or defendant to act with the purpose of drug use. The remarks were made just prior to Congress's collective decision to agree to the Conference Report, which represented the final decision about the text at issue. Because these comments were made by a sponsor of the original bill containing the amendment, who was also a conferee to the Conference Committee, they carry weight as evidence of the text's meaning. *See* Nourse, *Misreading Law, supra* at 69. Biden stated explicitly that the actor must make the place available for the purpose of drug activity: "My bill would help in the prosecution of rogue promoters who **not only know** that there is drug use at their event but also **hold**

---

purpose of" language. The context surrounding that decision constitutes evidence of the most recent legislative decision about the relevant text and can therefore shed light on its meaning. *See* Nourse, *Misreading Law*, at 69, 80.

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

the event for the purpose of illegal drug use or distribution. That is quite a high bar." 149 Cong. Rec. 9384 (emphasis added). He further commented that "[t]he bill is aimed at the defendant's predatory behavior," which points to the requirement of purposeful action on the part of the person accused of violating the statute. 149 Cong. Rec. 9383. Coupled with the text of the statute, the legislative context makes clear that, to be liable under (a)(2), an actor must make the place in question available for the specific purpose of drug activity.

A deeper textual analysis, tested by application of judicial canons, leads to the same conclusion. On the face of (a)(2), "for the purpose of" modifies the preceding verbs (rent, lease, profit from, make available for use), the subject of which is the actor accused of violating the statute.[18] The "grammar canon" therefore supports the view that the purpose applies to the actor, rather than an unspecified third party. *See* Scalia & Garner, *supra* at 140. The "presumption of consistent usage" likewise encourages this view. That canon holds that, if a phrase has a clear meaning in one portion of a statute, but the meaning is less clear in a related section, courts should presume that the phrase carries the same meaning in both. *Id.* at 170; *see Si Min Cen v.*

---

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

Attorney General, 825 F.3d 177, 193 (3d Cir. 2016). Though canons must be applied with caution, the presumption of consistent usage carries inherent logical force where, as here, the two provisions in question are part of the same subsection, were enacted together, and use the phrase in the same way. In that regard, the presumption of consistent usage canon is one that directs the court to focus on how *Congress* used terms within the structure of a statute, reducing the risk of judges importing a meaning of their own. "For the purpose of" in (a)(1) clearly and undisputedly refers to the purpose of the actor accused of violating the provision. Although the implication in (a)(2) that third parties will use the place in question may make the purpose clause there less clear to some readers than in (a)(1), courts should presume—absent context indicating otherwise[19]—that the clause carries the same

[19] The close reader may notice that the terms "rent" and "lease" also appear in both provisions, but context clarifies that these terms carry different meanings in (a)(1) and (a)(2). In (a)(2), the indication that the actor must "manage or control" the property as an owner or lessee *and then* rent, lease, or make it available, clarifies that "rent" and "lease" in that provision refer to renting and leasing a space to others. In (a)(1), the same words refer to renting and leasing a space for one's own use. The legislative context reinforces this interpretation. When Congress added these terms to the statute in 2003, it did not change the primary distinction between (a)(1) and (a)(2)—that the former applies to use of one's own property and the latter to making a property one controls available to others. *See* Joint Explanatory Statement at 68; 149 Cong. Rec. 1849 (Statement of Senator Grassley at introduction of the Illicit Drug Anti-Proliferation Act that the bill was "an important step, but a careful one"). Construing "rent" and "lease" to mean the same thing in both would run counter to the meaning the legislature gave the two sections. Proponents of the "Latin canons" will also note that the *noscitur a sociis* canon, which holds that interpreters should give related meanings to

meaning. That is, courts should presume that (a)(2) requires that the *actor* act "for the purpose of" drug activity.

The inclusion of "and intentionally" in (a)(2) further emphasizes that the actor allowing others to use the property must do so "for the purpose of" drug activity. Unlike (a)(1), which requires only that the defendant act "knowingly," (a)(2) requires that the defendant have "knowingly *and intentionally*" made the place available for the proscribed purpose—expressly requiring not only knowledge of the drug-related circumstances but the intention that the proscribed purpose occur. The Government concedes that the combination of "knowingly" and "for the purpose of" in (a)(1) unambiguously requires that the actor "open" or "maintain" the place in question "for the purpose of" drug activity. The addition of "intentionally" to that combination cannot possibly signal a change in the purpose requirement from (a)(1)— particularly not a change that would lower the requisite mental state for an (a)(2) violation. Congress's addition of the term "intentionally" resolves any doubt over whether the actor

---

words in a list, requires this interpretation. *See* Scalia & Garner, *supra* at 195. In (a)(1), "rent" and "lease" take on meanings related to "open," "use," and "maintain," and in (a)(2), their meaning must relate to "profit from" and "make available for use," both of which imply a third party using the property. Nothing in the text counters the presumption that "for the purpose of" has consistent meaning in both provisions. In fact, both the statutory and legislative context confirm that "for the purpose of" applies to the actor in both.

must act with the proscribed purpose of fostering drug activity under (a)(2).[20]

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

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

---

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

shirk from their responsibility to follow where reason and logic take them.

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

Rather than analyze (a)(2) as it did (a)(1), however, the *Chen* court stated in an almost offhand way that reading (a)(1) differently would make it superfluous in relation to (a)(2). This conclusion was, according to the Court, simply "[b]ased on [its] reading" of (a)(2)—a reading that involved little to no analysis of the text. *Chen*, 913 F.2d at 190. Under the Fifth Circuit's reading, "§ 856(a)(2) is designed

---

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

to apply to the person who may not have actually opened or maintained the place for the purpose of drug activity, but who has knowingly allowed others to engage in those activities by making the place 'available for use . . . for the purpose of unlawfully' engaging in such activity." *Id.* at 190. Without elaboration, the court then concluded that in (a)(2), "the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (i.e., others have the purpose)."

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

First, the baseline premise of *Chen*, that (a)(1) and (a)(2) overlap, is not one I can accept. Read naturally, (a)(1) addresses circumstances where the actor uses their property for their own unlawful drug activity, whereas (a)(2) addresses circumstances where the actor makes the property available to others for the purpose of those individuals engaging in unlawful drug activity. As I have described above, a violation of (a)(1) requires that "any person"

"knowingly open, lease, rent, use, or maintain any place . . . for the purpose of" drug activity. §§ 856(a)(1), (b).[22] Section (a)(2) then makes it unlawful for "any person" to "manage or control any place," in one of a variety of capacities, "and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of" unlawful drug activity. §§ 856(a)(2), (b). I find it clear from the face of subsection (a) that (a)(1) and (a)(2) are different: (a)(1) refers to one's use of their property for their own drug activity, and (a)(2) refers to one making property available for the purpose of others engaging in drug activity. I do not see the redundancy that concerned the *Chen* court.

Second, as to the inconsistency between the court's interpretation of (a)(2) and its analysis of (a)(1), the court offered no textual reason why the terms "for the purpose of" should apply to a different person in (a)(2) than (a)(1). In its analysis of (a)(1), the court emphasized that the combination of "knowingly" and "for the purpose of" clearly signified that the relevant purpose was that of the actor—the person controlling the property. To hold otherwise would "twist the clear and plain language of the statute." *Id*. at 190. In support of that conclusion, the court noted that, in sixteen other federal statutes combining the terms "knowingly" and "for the purpose of," the purpose clearly referred to that of the actor. *Id*. at 190 n.9. The problem with this analysis is that the *same* combination of

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

"knowingly" and "for the purpose of" appears in (a)(2), *reinforced* by the addition of the term "intentionally." Yet the court offered no explanation why its reasoning as to whose purpose matters in (a)(1) should not apply equally if not with greater force in (a)(2).[23]

Third, the court unnecessarily altered the meaning of the statute. As discussed above, the court did not need to change the purpose requirement to retain the key distinction that (a)(2) involves *others* engaging in drug activity. It reached that result applying a statutory canon, the rule that "a statute should be construed so that each of its provisions is given its full effect," *id.* at 190 (citation omitted), also known as the rule against surplusage. Ironically, that same cannon requires that *every* word in a statute be given meaning when possible. *See Bastardo-Vale v. Attorney General*, 934 F.3d 255, 261-62 (3d Cir. 2019) (en banc) (Schwartz, J.) (majority opinion); *id.* at 271-72 (McKee, J., dissenting); Scalia & Garner, *supra* at 174-79. Yet the *Chen* court read "intentionally" out of the statute.[24]

---

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

[24] The Government concedes the responsibility of a judge to give meaning to every word in a statute, Tr. at 28, but its briefing,

Earlier in its opinion, the *Chen* court noted that "intention" is a synonym for purpose, *id.* at 189, and quoted the trial court jury instruction stating that "[a]n act is done 'willfully' or 'intentionally' if done voluntarily and purposely with the intent to do something the law forbids." *Id.* at 187.[25] Yet the court failed to examine the implication of the inclusion of "intentionally" in (a)(2) before concluding that (a)(2) requires a person to act with a significantly lower mental state than (a)(1).

The *Chen* court's use of the rule against surplusage brings me to my fourth point about the selective application of the canons of construction and underscores one of the risks of their use.[26] The rule against surplusage generally presumes that Congress is not redundant. But it applies in different

---

like the *Chen* court, simply ignores the term "intentionally," and it offered no insight at argument as to how this term should be construed.

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

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

ways. When a court deems two provisions of a statute redundant, it is *the court* who then proceeds to supply meaning by means of inference. Necessarily, there is a risk that the meaning supplied by the court is different from that of Congress. In contrast, when a court invokes the rule for the purpose of giving meaning to every word of a statutory provision, the focus is on the actual term employed by Congress, reducing the risk of legislating from the bench. In failing to assign any meaning to the term "intentionally," but deeming (a)(1) and (a)(2) redundant save for the court's inferred meaning, *Chen* applied the rule against surplusage selectively.

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

redundancy on the one hand, while simply ignoring the term "intentionally."[27]

Finally, as reviewed above, legislative evidence directly contradicts the Chen court's interpretation. The court gave life to the precise interpretation that the sponsor of the 2003 amendment expressly rejected. Then-Senator Biden rejected the concern that the law might allow prosecution of businesses that knew individuals would come onto their property and use drugs. He specifically stated that the provision would allow for prosecution of those who "**not only know** that there is drug use at their event but **also hold the event for the purpose of illegal drug use** or distribution. That is quite a high bar." 149 Cong. Rec. at 1847, 9384. Biden further remarked that "[t]he bill provides federal prosecutors the tools needed to combat the manufacture, distribution or use of any controlled substance at any venue **whose purpose is to engage in illegal narcotics activity**." 149 Cong. Rec. at 9383 (Apr. 10, 2003). These statements make clear that the event-holder or the venue—in practice the venue operator—must have the proscribed purpose.

Biden's remarks were directed at criticisms that the mental state required to support conviction was too low and would allow prosecution of legitimate businesses for knowingly allowing others to use drugs on their property without some greater

---

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

involvement in the unlawful conduct. *Id.* Earlier in the debate, Senator Leahy, who ultimately voted for the Act, had voiced concerns about the Government using the existing crack house statute, or any expanded version, to pursue legitimate business owners. 132 Cong. Rec. 9378 (addressing reports of the Government using the statute to prosecute business owners who take precautions against drug use rather than "solely against property owners who have been directly involved in committing drug offenses" and contending that business owners' worries "about being held personally accountable for the illegal acts of others" warranted a fuller hearing).[28]

---

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

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

Of course, the *Chen* court—and most of the cases following *Chen* for that matter—did not have the benefit of this 2003 legislative evidence, nor did it

---

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

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

look to the 1986 legislative record. That is no reason, however, for this Court to ignore a clear explanation of the meaning of the most recent congressional decision as to the text.[30] The legislative evidence demonstrates that *Chen* misinterpreted whether the actor in (a)(2) must act for the purpose of drug activity. For this and the four other reasons described above, I decline to follow *Chen*'s interpretation.

---

[30] As noted above, Congress revisited the statutory text in 2003 and decided to enact the modified provision, with the original "for the purpose of" language included. The context surrounding that decision constitutes evidence of the most recent legislative decision about the relevant text and sheds light on its meaning. See Nourse, *Misreading Law, supra* at 69, 80. To the extent one might argue that Congress incorporated *Chen* and related decisions in 2003, the legislative record reveals no evidence that *Chen*'s interpretation of (a)(2) was debated or considered by the 108th Congress prior to the enactment of the PROTECT Act. It is true that courts often employ the so-called prior-construction canon. That canon presumes that Congress, if it adopts language used in an earlier version of the act, must also be considered to have adopted "judicial interpretations [that] have settled the meaning of an existing statutory provision." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *see also Berardelli v. Allied Servs. Inst. Of Rehab. Med.*, 900 F.3d 104, 117 (3d Cir. 2018). Judicial interpretations are "settled" only if a word or phrase has been authoritatively interpreted by the jurisdiction's highest court or has been given a uniform interpretation by the lower courts. See id. Neither has occurred here. At the time of the 2003 amendment, the Supreme Court had not interpreted the meaning of (a)(2)'s "purpose" clause. Nor had the courts of appeals produced anything close to a "uniform body of . . . judicial precedent." *See Bragdon*, 524 U.S. at 645. To be sure, *Chen* (in the Fifth Circuit) and *Tamez* (in the Ninth Circuit) were on the books, but no other court of appeals had sought to interpret (a)(2), and as discussed below, *Tamez* relied exclusively "on the logic of *Chen*." 941 F.2d at 744.

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

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

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

The Government has cited only one Third Circuit case, a non-precedential decision that, ironically, does not support its position. In *United States v.*

---

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

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

Coles, 558 F. App'x 173, 181 (3d Cir. 2014), a panel of the Court considered an appeal where a defendant convicted under § 856(a)(2) argued the Government had failed to establish his knowledge of drug activity at an apartment he rented but allowed his cousin to live in. The Court reviewed the record, including evidence that the defendant had coached his cousin to cook crack, and concluded that "the jury was entitled to infer [the defendant] intended that the property be used for manufacturing and storing controlled substances." *Id.* In short, this panel of the Third Circuit appears to have read the purpose requirement of (a)(2) as I do, referring to the purpose of the actor in control of the property. The Government is certainly correct that this case is not binding, and that non-precedential decisions of our Circuit are not meant to involve the same depth of analysis as precedential decisions. But in a case where ordinary meaning is the question, I give at least some weight to the fact that no ambiguity arose in the minds of these jurists applying the statute to a trial record.[33]

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

---

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

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

Having determined who must act "for the purpose of" unlawful drug activity under (a)(2)—that the actor who manages or controls the place must make it available "for the purpose of unlawfully . . . using a controlled substance"—does not end the inquiry. There remains a question of what it means to make a space available "for the purpose of unlawfully . . . using a controlled substance"—and whether Safehouse is acting for that purpose.[34] I began with the observation that, by its very nature, the phrase "for the purpose of" can be assigned many different meanings and can operate on multiple levels.

In the Government's view, Safehouse plans to make safe consumption rooms available for the

---

[34] Setting aside the dispute resolved in the preceding section about whether the actor must have the purpose in question, the parties seem to accept that the conduct (a)(2) addresses involves making a space available to *others* who use, manufacture, distribute, or store drugs. In contrast, cases brought under § 856(a)(1), at least in this circuit, typically center on drug activity in which the defendant is directly involved. *See, e.g.*, *United States v. Sawyers*, 2019 WL 3816940, at *1 (M.D. Pa. Aug. 14, 2019) (defendant charged under § 856(a)(1) stemming from his "selling drugs from [his residence]"); *United States v. Fuhai Li*, 2019 WL 1126093, at *1 (M.D. Pa. Mar. 12, 2019) (defendant "charged [with] violations of 21 U.S.C. § 856(a)(1)" for "maintaining locations . . . for the purpose of unlawfully distributing controlled substances"); *United States v. Rice*, 2017 WL 6349372, at *1 (W.D. Pa. Dec. 13, 2017) (defendant charged under § 856(a)(1) stemming from discovery of "grow operation" at defendant's residence and commercial building used by defendant).

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

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

---

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

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

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

Although I am certain the parties would each claim "plain meaning" on the face of the text, both their interpretations implicitly add some meaning to the language of the statute. The Government argues that "for the purpose of unlawfully . . . using"

drugs plainly includes *any* intended allowance of drug use on one's property, even as part of an effort to administer medical treatment. Safehouse, on the other hand, argues that "for the purpose of unlawfully . . . using" drugs plainly does not extend to a purpose that would allow drug use on-site only to provide life-saving treatment to drug users. Safehouse reads the statute to require a *primary* purpose to *encourage* drug use, not just any purpose that involves allowing drug use and certainly not a purpose aimed at stopping drug use.

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

I turn first to whether the proscribed purpose must be the primary purpose of the actor or whether it may be one of many purposes. To answer that question, I consider the dictionary definition of "purpose." Both the Supreme Court and the Court of Appeals cite to dictionaries as a tool of statutory construction, observing that "[o]rdinarily, a word's usage accords with its dictionary definition." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015); *Pellegrino*, 2019 WL 4125221, at *3. Dictionary definitions offer substantial support to Safehouse's view, as neither party seems to dispute that, as a definitional matter, "purpose" refers to one's objective, goal, or end. Safehouse Response at 21; Tr. at 31;

see *Purpose*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("[S]omething set up as an object or end to be attained."); *Purpose*, Black's Law Dictionary (7th ed. 1999) ("An objective, goal, or end."); *Purpose*, Oxford English Dictionary (1986) ("That which one sets before oneself as a thing to be done or attained; the object which one has in view.").[36]

Based on this definition, Safehouse insists that the only relevant purpose under § 856(a) is the primary or principal purpose, because the term "purpose" would ordinarily refer to one's ultimate objective. If one literally reads the dictionary definitions into the statute—"for the [objective, goal, end] of unlawfully using a controlled substance"—Safehouse's interpretation would appear to be correct, for the dictionary definitions do in fact consider purpose as referring to one's ultimate end, goal, or objective, rather than an intermediate step. Those who find dictionaries sufficient to determine the ordinary meaning of statutory language might stop here.[37] But it remains conceivable that an

---

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

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

> It is not enough for a judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would

intermediate purpose could be relevant under the statute or that one could act with more than one ultimate purpose. I therefore decline to adopt Safehouse's position merely on the authority of Webster or Black.

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

---

> contradict or leave unfulfilled [the statute's] plain purpose.

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

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

I conclude that the proscribed purpose must be a "significant" purpose or "one of the primary" purposes. *See United States v. Soto-Silva*, 129 F.3d 340, 346 n.4 (5th Cir. 1997); *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) (finding that the purpose must be "at least one of the primary or principal uses to which the house is put").[38] This view is consistent with the proposition which multiple courts of appeals have endorsed that the "'casual' drug user does not run afoul of § 856 because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose." *United States v. Russell*, 595 F.3d 633, 642-43 (6th Cir. 2010) (citation omitted); *see also United States v. Johnson*, 737 F.3d 444, 449 (6th Cir. 2013); *United States v. Shetler*, 665 F.3d 1150, 1161 (9th Cir. 2011); *Verners*, 53 F.3d at 296; *United States v. Robinson*, 997 F.2d 884, 896 (D.C. Cir. 1993). Although the user maintains and uses the residence and has, at the time of

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

the use, the purpose of unlawfully using drugs—all within the strict language of § 856(a)(1)—courts have found no violation of § 856(a)(1). As a matter of logic, then, it would seem that one who makes a place available to another for a purpose other than drug use does not necessarily violate § 856(a)(2) even if they know some consumption of drugs therein occurs in addition to that other lawful purpose. Although such a limitation has not been expressly articulated in cases considering (a)(2), it is implicit in the analysis of those circuit courts and is reflected in practice by the fact that cases brought under (a)(2) typically have not involved individuals who allowed casual drug use in their homes.[39] I therefore accept that there is a limitation on the scope of the purpose requirement in that the proscribed purpose must bear a significant relationship to the conduct that Congress sought to prohibit.

The statutory context supports the view that the purpose must be a significant, not incidental, purpose. Looking to the whole statute, a requirement that the purpose be significant enables the statutory scheme to make sense. The severity of the sentence permitted by § 856(a)(2)—up to 20 years in prison—strongly favors such a conclusion. Those who knowingly and intentionally allow use secondary to another lawful purpose would be subject to a far harsher penalty than opioid users whose possession is undisputedly criminal but who would be subject to at most three years if prosecuted for possession under 21 U.S.C. § 844. Such disparity would be

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

inconsistent with the overall statutory scheme, particularly where courts agree that a user in his own home could not be punished under § 856(a)(1). *See Russell*, 595 F.3d at 642-43. I also find this interpretation consistent with the legislative background's focus on predatory actors rather than casual users or friends of users. *See* 149 Cong. Rec. 9383 (2003). The drug-related purpose in § 856(a)(2) must therefore be a significant purpose, even if not the sole purpose, of the actor.

There is the additional question of whether a purpose of unlawful drug use includes any purpose that involves allowing drug use or only purposes to encourage, promote, or facilitate drug use. Safehouse assumes the latter view, while the Government's briefing embraces the former. But the Government conceded an important limitation on the scope of the purpose requirement when, at oral argument, it recognized that not every allowance of drug use on one's property would constitute a purpose of unlawful drug use within the meaning of the statute.

The Government was presented with a hypothetical of parents whose adult child is using drugs, leading the parents to have them move back home. Tr. at 35. The parents then instruct the child to inject drugs there, in the parents' presence, to allow for resuscitation. *Id.* The United States Attorney responded that (a)(2) would not apply, because it was not the parents' "purpose for their son, their adult son or adult daughter to be in the home [] to use drugs." *Id*. As an initial matter, it should be noted that the Government's response to the hypothetical was inconsistent with its embrace of *Chen*, because it invoked the purpose of the parents as the owners

of the property. I do not raise this as a judicial admission, but only to point out that the Government's instinctive response to a specific factual scenario underscores that (a)(2) is most naturally and logically read as I have analyzed it above, and as a panel of the Third Circuit did in *Coles*. It also illustrates how reading (a)(2) as *Chen* did would lead to an absurd result.

The Government's answer is further instructive because it admits there are limitations on the scope of (a)(2) that turn on the actor's purpose vis-à-vis the user. Specifically, the Government replied that, where the actor does not want the drug use to occur or has the goal of "trying to stop that person from using drugs," the statute does not prohibit their actions. *Id.* at 35. In fairness to the Government, it should be noted that the Court's hypothetical also included a statement by the parents that they would prefer the child not use drugs, a fact the Government emphasized because the Safehouse protocol does not reflect that participants will be actively discouraged from use before entering the consumption room.[40] But that fact's relevance pertains to the statute's specific application to Safehouse, a matter I take up below. I raise the Government's response to the hypothetical at this juncture as I consider the *scope* of the statute's purpose requirement. Its response supports a conclusion that a purpose

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

involving some known and intended drug use may nonetheless fall outside the reach of the statute, at least where the actor aims to stop drug use. In short, both parties agree that there is some limit to the scope of the purpose requirement; I now look to the usual tools of statutory interpretation to define that limit.

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

The context of the larger statutory scheme, something the Supreme Court deemed relevant in *Gonzalez v. Oregon*, provides support for both parties' interpretations, albeit to different degrees. On the one hand, as Safehouse points out, the statutory scheme largely permits medical practice and treatment efforts. No provision in the CSA contains a

broad exemption from its prohibitions for all legitimate medical practices, nor did *Gonzales* create any such exemption. But the Supreme Court emphasized that the CSA generally does not regulate medical practice. 546 U.S. at 270. With respect to medical harm reduction efforts in particular, federal law expressly permits a number of tactics that aim to reduce harm and increase access to treatment for drug abuse. See Appropriations Act of 2016 § 520, 129 Stat. 2652 (permitting federal funding to be used for syringe exchange programs that address risk of HIV or hepatitis outbreaks); Comprehensive Addiction and Recovery Act of 2016 § 911(e)(1), 130 Stat. 759 (requiring that the Secretary of Veterans Affairs "maximize the availability of opioid receptor antagonists, including naloxone, to veterans"); Support for Patients and Communities Act § 3201, 130 Stat. 3894 (allowing for greater flexibility with respect to medication-assisted treatment for opioid use disorders).[41]

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

---

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

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

A review of the legislative evidence confirms that the reach of § 856(a)(2) is limited to purposes to facilitate drug use, which would in turn exclude a purpose to curb or combat drug use that may involve some allowance of use. I begin with the last decision-making point related to the text in question: the 2003 agreement to the Conference Report

including the amendment to the crack house statute.[42] The 2003 amendment, originally called the Illicit Drug Anti-Proliferation Act and incorporated into the PROTECT Act, aimed to expand the crack house statute to address events, such as raves, at which promotors encourage use of "club drugs" and other controlled substances by children and teens. See 149 Cong. Rec. 9383. In determining the scope of the amendment, is important to recognize the significance of the amendment being inserted in conference. Under both Senate and House Rules, any addition to a bill in conference must be germane to the subject of the legislation, in this case the protection of children. *See* Senate Rule XXVIII; House Rule XXII.[43] It is for that reason that the joint

---

[42] A conference committee report contains the final proposed text of a bill, which emerges from the conference committee, where members of both houses have resolved differences between versions of the bill passed by the House and the Senate. *Davis, supra* at 1. Each chamber then votes on whether to agree to the conference report. Christopher M. Davis, *The Legislative Process on the House Floor: An Introduction*, Congressional Research Service 9 (2019). The decision to agree to the conference report is therefore the final legislative act with respect to the text, and the debate prior to the vote on whether to agree offers proximate evidence of the legislature's decision. See Nourse, *Misreading Law, supra* at 80.

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

explanation to the Conference Report emphasized the amendment's goal of protecting children. Joint Explanatory Statement at 68. Prior to the vote on the Conference Report, then-Senator Biden, sponsor of the original bill, expressly noted that "[t]he bill is aimed at the defendant's **predatory behavior**, regardless of the type of drug or the particular place in which it is being used or distributed." 149 Cong. Rec. 9383 (2003) (emphasis added). This evidence makes clear that, when Congress decided to amend the statute, it expanded the meaning of the law to include a larger category of "predatory behavior" that involved increasing access to illicit drugs at a variety of events, particularly those attracting young people. It broadened the meaning of the statute from targeting crack houses to targeting events, like raves, that encourage drug use and prey on potential drug users.

Although the Government is correct that Congress expanded the statute, that expansion was minimal. The change to the statute clarified that single events as well as ongoing operations were included, that the place involved need not be a building or enclosure, and that renters and lessees could also be liable.[44] *See* Conference Report to S. 151 at 43; 149 Cong. Rec. 9383 (statement of then-Senator Biden). At the introduction of the Illicit Drug Anti-

---

report, and the legislative evidence pertaining to debate on that decision is therefore relevant.

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

Proliferation Act, co-sponsor Senator Grassley commented on the limited nature of the change. 149 Cong. Rec. 1849. He described the amendment as an effort to "update our laws so they can be used effectively against drug dealers who are pushing drugs on our kids." 149 Cong. Rec. 1848. His comments specifically focused on raves and other temporary events. One statement, which referred to "illegal drug use in any location," could lend support to the Government's position, but the remainder of his remarks do not support such a broad interpretation. Senator Grassley referred to "cover activity" created to hide drug transactions and emphasized that the amendment was not designed to hamper "legitimate" activities. *Id*. He noted that § 856 would be a means for law enforcement to target events at which dealers "push their product," and addressed the party drug Ecstasy at length. *Id*. at 1848-49. He specifically referred to drug reduction efforts as an example of conduct that would be inconsistent with criminal intent. *Id*. at 1849. He closed his remarks by characterizing the amendment as a "careful step," with a recognition that drug abuse must be addressed "not only through law enforcement but education and treatment as well." *Id*. at 1849. Similarly, although the legislative evidence includes a description of the statute applying to "any type of event for the purpose of drug use or distribution," 149 Cong. Rec. 9384 (statement of then-Senator Biden), nothing in the legislative record reveals an expansion of the statute's meaning beyond events and operations to facilitate drug use, and certainly

not an expansion to reach activities designed to stop drug use.[45]

---

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

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

But to the extent that the Government focuses on this specific comment, it must be reviewed in the context of Biden's immediately preceding remarks clarifying that his amendment to § 856 in the PROTECT Act did not greatly expand that statute. He sought to emphasize the point that the crack house statute has

always been used, not only against traditional crack houses, but also against "seemingly 'legitimate businesses' used as a front for drug activity," such as motels, car dealerships, and bars. 149 Cong. Rec. 20539. Later in his remarks he referred to the same venues as "non-traditional crack house[s]." *Id.* What Safehouse proposes, whether within the scope of the statute or not, is certainly different from a "non-traditional crack house."

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

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

The legislative focus on making places available for such illicit purposes does not limit the provision's applicability to only crack houses and raves, but it does caution against extending the statute too far beyond similar circumstances. The evidence indicates that the statute targets exploitive behavior like that of crack house operators, rave promoters, and others creating spaces to facilitate drug use and access to drugs. A common denominator among the actions of these individuals is the goal of enabling

---

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

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

drug use and supporting the market for unlawful drugs. To read § 856(a)(2) to apply to medical purposes and efforts to combat drug abuse would take the statute well beyond what it aimed to criminalize. As employed by Congress, the words "for the purpose of unlawfully . . . using a controlled substance" in § 856(a) are properly understood as referring to significant purposes to facilitate, rather than reduce, unlawful drug use.

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

I cannot conclude that Safehouse has, as a significant purpose, the objective of facilitating drug use. Safehouse plans to make a place available for the purposes of reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services. None of these purposes can be understood as a purpose to facilitate drug use.

The Government contended at oral argument that Safehouse's purpose cannot be to stop or reduce drug use. Tr. at 32-34. But its own Complaint belies that argument. It acknowledges that Safehouse will offer all its participants treatment referrals and on-site initiation of medication-assisted treatment. Pl.'s Am. Compl. at 4. Treatment, along with a variety of other services, will be offered during at least three stages of Safehouse's protocol. Pl.'s Am. Compl. Ex. A at 4-5; *see also* The Safehouse Model, https://www.safehousephilly.org/about/the-safehouse-model (last visited Oct. 1, 2019). One offer of services will be made before any participant enters the consumption room. *Id.* Any participant who then chooses to use the medically supervised consumption room will, in the subsequent medically

supervised observation room, meet with peer specialists, recovery specialists, social workers, and case managers who will specifically encourage treatment. *Id.* The Court is hardly being "anti-factual," as the Government accuses, Tr. at 34, when it construes the pleadings as describing a program that ultimately seeks to reduce unlawful drug use.

Within the consumption rooms themselves, Safehouse will engage in the legal acts of providing sterile injection equipment and administering emergency medical care. The Government has not contended that the provision of medical treatment facilitates or advances drug use. In fact, other federally supported initiatives recognize that such services prevent fatalities from drug use. The use that will occur is subsidiary to the purpose of ensuring proximity to medical care while users are vulnerable to fatal overdose. The Government has conceded that similar harm reduction strategies would be lawful if executed through mobile vans or if Safehouse personnel monitored drug use in public places. The Government seeks to distinguish consumption rooms from the ways in which other entities currently engage in harm reduction (and ways that they could, such as through use of a mobile van) by observing that in those efforts no real property is used, and "what matters [is] the statutory language." Tr. at 39. This is myopic textualism that seeks to avoid the central issue. The statutory language that matters most is "purpose," and no credible argument can be made that a constructive lawful purpose is rendered predatory and unlawful simply because it moves indoors. Viewed objectively, what Safehouse proposes is far closer to the harm reduction strategies expressly endorsed by

Congress than the dangerous conduct § 856(a) seeks to prohibit. Safehouse therefore is not making a place available "for the purpose of unlawfully . . . using a controlled substance" within the meaning of § 856(a)(2).

When pointedly asked — twice — whether Safehouse was promoting drug use, the Government could only respond obliquely. Tr. at 36-37. It replied that because Prevention Point, an existing program run by Safehouse's President and Treasurer, Jose Benitez, is already successfully moving some of its clients into treatment, in the absence of proof that Safehouse will accomplish more, the net effect of Safehouse will simply be more drug use. *Id.* at 37. Specifically, the Government replied that "the logical implication of setting up Safehouse is there's going to be more drug use. So yes, they are promoting drug use." *Id.* In a case that turns on "purpose," the nature of the Government's response is revealing. Rather than attribute any unlawful purpose to Safehouse, it pointed instead to what it presumes will be a deleterious ***outcome***.[46] And as observed at the beginning of this opinion, the wisdom or effectiveness of safe injection sites is not the issue before me. One might criticize the Safehouse model from

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

the standpoint of therapeutic soundness or effectiveness, but again that is not the issue before me.

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

Aside from the legislative record, there is an additional governmental source to consult that sheds light on when safe injection sites became a subject of public debate. The National Center for Biotechnology Information, in collaboration with the United States National Library of Medicine and National Institutes of Health, maintains a searchable database of medical literature, PubMed, which includes articles that cut across multiple disciplines, including public health. The statute here was last amended in April 2003. If one conducts a search

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

At argument, the Government was invited multiple times to point to any legislative evidence that supervised injection programs were specifically considered by Congress, but counsel skillfully avoided giving a direct answer to the question. Tr. at 7-12. The most the Government could offer as to a specific focus on safe injections sites was for the Court to go back in time to reconstruct what Congress *might* have thought had the subject actually been considered at the time. Tr. at 7. This method is mentioned in the scholarly literature and termed "imaginative reconstruction." Posner, *Statutory Interpretation*, supra at 817. Such an approach is inherently

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

speculative and has not been endorsed by case law.[48] As Justice Gorsuch has noted, although new applications of statutes may arise, "every statute's meaning is fixed at the time of enactment." *Wisconsin Central, Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Accordingly, I confine myself to the documented evidence of what Congress did, in fact, mean to accomplish at the time of enactment.

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

---

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

and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

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

A consistent theme in the Government's case is what it describes as the "hubris" of Safehouse in seeking to open its safe injection site without first securing some form of official approval from federal authorities. There is, however, no mechanism under the CSA for seeking review from any governmental entity for the activity that Safehouse proposes, which the Government conceded at oral argument. Tr. at 43. Physicians and researchers can seek exemptions from the prohibition against administering Schedule I and Schedule II drugs. Safehouse does not seek to administer prohibited drugs but rather to ameliorate the harm from their unlawful use. In the Government's view, Safehouse literally needs an Act of Congress to proceed. But that begs the question. The question is whether current law

criminalizes Safehouse's proposed conduct. As Justice Rutledge memorably phrased a core tenet of federal law, "[b]lurred signposts to criminality will not suffice to create it." *United States v. C.I.O.*, 355 U.S. 106, 143 (1968) (Rutledge, J., concurring).

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

---

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

interpretation of § 856(a)(2) appropriately defers to Congress to engage in this debate and determine whether and how it wants to criminalize the conduct of medical providers and recovery specialists who seek to manage safe consumption facilities. A narrow interpretation of § 856(a)'s purpose requirement and restrained application of that statute also protects the important separation of powers principles discussed above. Such principles are one of the foundations of the longstanding rule of lenity,[50] which Safehouse invokes here. I do not rely on the rule of lenity as the basis for this decision. Nonetheless, the separation of powers principles underlying the rule carry substantial weight in this case, where the Executive has invited the Judiciary to expand the reach of a criminal statute to include conduct that I am convinced was never contemplated by the Legislature.

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

The Government has only brought this action under (a)(2), but in its Counterclaim Safehouse

---

Curiae Mayor Jim Kenney and Health Commissioner Dr. Thomas Farley.

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

seeks a declaratory judgment as to § 856(a) as a whole. However, no motion for relief on that aspect of the Counterclaim is pending before me.

VII. Religious Freedom Restoration Act

Because I have determined that § 856(a)(2) does not apply to Safehouse's proposed conduct, I need not consider whether the Government's effort to enforce the statute violates Safehouse's rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb. In connection with that claim, Safehouse sought: (1) a declaration that any prohibition or penalization of Safehouse would violate RFRA and (2) an injunction permanently enjoining the Third-Party Defendants from enforcing or threatening to enforce 21 U.S.C. § 856 against Safehouse. Defs.' Answer at 43-44. Because I have concluded that § 856(a)(2) does not criminalize Safehouse's proposed actions, the RFRA claim is now moot.

VIII. Conclusion

Both sides skillfully argue that Congress's meaning in § 856 is consistent with their own, and further argue that to conclude otherwise would be a judicial usurpation of legislative power. Here, however, the Government asks the Court to apply statutory language to a set of facts beyond the comprehension of Congress when the bill was passed. I find the most conservative, circumspect approach to favor the original, ordinary meaning of the statute. On the record before me, having applied multiple tools of construction, I find that the purpose at issue under § 856 must be a significant purpose to facilitate drug use, and that allowance of some drug use as one component of an effort to combat drug use will

not suffice to establish a violation of § 856(a)(2). The ultimate goal of Safehouse's proposed operation is to reduce drug use, not facilitate it, and accordingly, § 856(a) does not prohibit Safehouse's proposed conduct.

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

/s/ Gerald Austin McHugh
United States District Judge