No. 20-1422

In the United States Court of Appeals for the Third Circuit

UNITED STATES OF AMERICA, *Appellant*,

v.

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

SAFEHOUSE, a Pennsylvania nonprofit corporation, *Appellee*.

v.

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

---

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

APPELLEES SAFEHOUSE AND JOSÉ BENITEZ'S PETITION FOR REHEARING EN BANC

Ilana H. Eisenstein
Courtney G. Saleski
Ben C. Fabens-Lassen
Lianna M. Bash
DLA PIPER LLP (US)
1650 Market St., Ste. 5000
Philadelphia, PA 19103
(215) 656-3300

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

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

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

Attorneys for Appellees Safehouse and José Benitez

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

THIRD CIRCUIT RULE 35.1 STATEMENT

District Judge Gerald A. McHugh was the first in the nation to consider whether supervised consumption services—a public-health intervention employed for more than thirty years in over a hundred sites worldwide to prevent overdose death—violate the Controlled Substances Act ("CSA"), 21 U.S.C. § 856(a). 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). Appx004-070. The panel Majority reversed, over the dissent of Judge Roth.[1]

Pursuant to this Court's Rule 35.1, undersigned counsel expresses their belief, based on a reasoned and studied professional judgment, that this appeal involves a legal question of first impression and exceptional nationwide importance. The Majority erred in its interpretation of Section 856(a)(2) by expansively interpreting the statute to hold property owners criminally liable based on the unlawful purpose of third-party visitors, rather than based on the defendant's own purpose, and by establishing a new, ill-defined standard for the significance of drug use needed to

[1] Per Circuit Rule 35.2(a), the judgment and panel's opinions are attached as Exhibit A. A copy of the oral argument transcript is attached as Exhibit B. Citations to the transcript refer to the formal page numbers of the transcript itself—not the ECF-generated page numbers that appear in the top margin.

trigger a criminal violation of that provision. This error not only precludes Safehouse from offering critically needed overdose prevention services, but also will engender significant confusion as to when property owners and operators will face criminal liability for the activities of their visitors and guests.

BACKGROUND

A. Summary of the Facts

This appeal 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.

See 21 U.S.C. § 856(a) (emphasis added).

To prevent overdose deaths, Safehouse has proposed an overdose prevention model that builds upon federally approved and funded methods for fighting the national opioid epidemic—clean injection equipment, on-site medical supervision to ensure urgent access to Naloxone (a proven overdose-reversal medication) and

emergency medical treatment, and the opportunity to encourage and facilitate into drug treatment programs and other essential social services.[2]

The need for overdose prevention services has never been more pressing. In 2017, the U.S. Department of Health and Human Services declared opioid addiction and overdose deaths a nationwide public-health emergency, and in January 2018, the Governor of Pennsylvania similarly declared a statewide emergency. These emergency declarations have continued without interruption.

The overdose crisis has been fueled by potent, new opioids like fentanyl, which have infiltrated the City of Philadelphia 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. Because proximity is so critical to providing lifesaving medical care, Safehouse seeks to offer supervised consumption services for those at high risk of overdose to ensure that a trained medical professional will be available immediately to administer Naloxone, which will reverse an opioid overdose *with medical certainty*. Safehouse has

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

maintained that Section 856(a) does not make it a federal crime to operate a facility that provides this necessary, urgent, and lifesaving medical care to people at grave risk of overdose death.

B. Procedural History

On February 5, 2019, the U.S. Department of Justice ("DOJ") filed a complaint seeking a declaratory judgment that Safehouse's medically supervised consumption services would violate 21 U.S.C. § 856(a)(2). Safehouse filed a counterclaim seeking a declaration that its overdose prevention model is not prohibited by Section 856(a).

In a detailed 56-page opinion, the District Court denied the DOJ's motion for judgment on the pleadings, holding that Section 856(a) does not apply to Safehouse, 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. Appx063. After the parties stipulated to the facts material to the District Court's decision on the pleadings, the court granted Safehouse's motion for a summary declaratory judgment in its favor. Appx004-012.

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

three-judge panel of this Court reversed. The Majority's interpretation of Section 856(a)(2) represents a broad expansion of criminal liability under that provision. Contrary to the District Court's interpretation of the statute, the Majority 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 unknown third parties (*i.e.*, those who come to Safehouse for supervision and treatment). 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." Majority at 18 (emphasis added). 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. Majority at 18-29.

REASONS FOR GRANTING THE PETITION

Public health experts and researchers; prosecutors; people with opioid addiction and their families, many of whom have lost a loved one to opioid overdose; cities and towns on the front lines of the fight against opioids; executive branch officials; and state and federal legislatures are closely following this litigation and seeking this Court's informed guidance on the question of whether supervised consumption sites are lawful. Amicus briefs representing 160 individuals and

organizations—including state and local municipalities, public-health organizations, social service providers, current and former law enforcement officers, and religious leaders—have been filed in support of Safehouse. The question of whether Section 856(a) criminalizes Safehouse's proposed overdose prevention services is a matter of life or death for thousands of Philadelphians and many thousands more throughout the country. The Majority's interpretation of Section 856(a)(2) is incorrect because it wrongly 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, and because it announced a new, undefined standard for the significance of drug use at a premises that triggers a criminal violation. In so doing, the Majority opinion engenders substantial uncertainty and confusion about Section 856(a)'s reach. This Court, *en banc*, should review this legal question of first impression and of substantial public importance.

I. The Majority's Interpretation Is Inconsistent With Section 856(a)'s Text, Purpose, and History

The Majority's interpretation of Section 856(a)(2) is not supported by the statutory text, settled canons of statutory interpretation, its history, or Congress's purpose.

Use of property for an illicit "purpose" is an essential element of Section 856(a), *i.e.*, the "objective, goal, or end." Majority at 27; Appx051. Both

subsections 856(a)(1) and (a)(2) use the identical phrase "*for the purpose of*" in the same manner.

The Majority acknowledges that, as used in Section 856(a)(1), "for the purpose of" refers to the *defendant*'s state of mind, but it reads 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. Majority at 26. 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* Dissent at 4; Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012); *see, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 484-85 (1990).

The Majority's interpretation is not supported by the language of this or any other statute. Section 856(a) is devoid of any reference to the purpose of any third party; rather, it targets those who control and operate property for the purpose of unlawful drug activity. As Judge Roth explains in her dissent, "the Majority has not 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." Dissent at 4.

Avoidance of surplusage does not support the Majority's reading either, 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. Appx034; *cf. United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990). Both subsections impose the same requirement, however, that the defendant act to operate or make the property available "*for the purpose of*" unlawful manufacture, distribution, storage, or use.

The Majority's interpretation is also inconsistent with Section 856(a)'s statutory purpose and history. Congress enacted Section 856(a) to target the owners and operators of "crack houses," drug-fueled "rave" gatherings, and others who use premises to promote drug activity. 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 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." 149 Cong. Rec. S1678; *see* 149 Cong. Rec. S1849 (statement of Senator Grassley that the

legislation targeted events where drugs were sold, in contrast with "drug reduction efforts . . . that would be ***inconsistent*** with criminal intent") (emphasis added).

To the extent doubt remains, criminal law requires *clear* statements and does not "default to criminalization." Appx067 (citing cases). As Judge Ambro noted at oral argument, the statute is hardly a model of drafting clarity as to the crucial questions of *whose* purpose matters and *what* purpose suffices to impose criminal liability. He observed if you put five attorneys in a room, "you'd probably have five different opinions" on its meaning on the relevant question. Oral Argument Tr. at 22:17-23:6. As Judge Roth explains, the statute is "nearly incomprehensible," and the U.S. Attorney for the Eastern District of Pennsylvania conceded at argument that it is "poorly written." Dissent at 3. Ignoring that "legislatures and not courts should define criminal activity," *United States v. Bass*, 404 U.S. 336, 348 (1971), the Majority incorrectly defaulted to the broadest possible reading of the statute.

II. The Majority Opinion's Interpretation of Section 856(a) Creates Confusion About When and to Whom the Section Applies and Leads to Absurd Results

By adopting the DOJ's incorrect and ill-defined interpretation of Section 856(a)(2)—which hinges criminal liability on a third party's subjective intentions and an untested standard for the significance of drug use at any place—the Majority opinion introduced grave uncertainty about the reach of this criminal statute.

Interpreting Section 856(a)(2)'s purpose element to depend on third-party intent creates confusion as to when property owners could be penalized under the statute. Will homeless shelters that admit individuals knowing they might inject drugs now be open to prosecution? What about parents of an adult child suffering from addiction who ask their son to live or use in their home so that someone will be available to administer Naloxone if he overdoses? The parties and the panel grappled with these realistic scenarios at oral argument. Under the Majority's interpretation of paragraph (a)(2), which was advocated by the U.S. Attorney, the boundary between lawful and criminal conduct is hopelessly confused. The Majority asserts good actors like homeless shelters and parents will not be punished because "[t]he drug use in homes or shelters would be incidental to living there" (Majority at 28), but the Majority cannot possibly know these third parties' purposes and provides no guidance on the line between "incidental" drug use at a property (no liability for the property owner) and something more significant (a 20-year felony). 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.

Dissent at 11. 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.

Dissent at 12. 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 associated with illegal activity (e.g. *selling* illegal substance)."[3] The Majority opinion is difficult to square with this federal program guidance.

At oral argument before both the District Court and this Court, the U.S. Attorney could not provide coherent or consistent answers as to whether the statute would apply in such circumstances, advocating instead for an atextual and undefined standard that would impose criminal liability based on "concentrated drug activity"—a term that does not appear anywhere in Section 856 and never has been

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

used in any recorded decision nor asserted by DOJ at earlier stages of this litigation. *See* Oral Argument Tr. at 6, 23-24, 28, 32. In response to question after question posed by the panel, the U.S. Attorney was unable to give a definitive answer to whether Section 856(a) would apply to everyday scenarios that parents, business owners, social service providers, and medical providers will face. *See id.* at 5-7, 18-20, 26-38.

The Majority's interpretation of Section 856(a)(2) will also lead to absurd results. *See United States v. Hodge*, 321 F.3d 429, 434 (3d Cir. 2003) (noting the avoidance of "unintended or absurd results . . . is a deeply rooted rule of statutory interpretation" (quotation omitted)). While it may be up for debate whether parents who permit their opioid-addicted son to live with them violate Section 856(a)(2), under the Majority's reading, "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." Dissent at 11. Under the Majority's reading of Section 856(a)(2), even public and commercial facilities like libraries, coffee shops, or restaurants could be held liable if the owner or operator knows individuals come to the property to use drugs. *See* Majority at 16 ("To break the law, [a defendant] need only 'knowingly and intentionally' open its site to visitors who come 'for the purpose of . . . using' drugs.").

These absurd results have real 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" is not a crime. *See* 21 U.S.C. § 844. The statute was not intended to impose these harsh punishments on innocent actors such as Safehouse. But the Majority opinion does just that.

Compounding these absurdities is the fact that the DOJ admits Safehouse's activities would be legal if its supervised consumption site operated out of a van, rather than in a building, apparently because the former is not "any place." Dissent at 12-13 (explaining that this atextual argument shows DOJ "has followed the statute's text only selectively"); Oral Argument Tr. at 34:4-38:10. In other words, the DOJ (and the Majority) concludes that Safehouse could be prosecuted under Section 856(a) simply because Safehouse uses real property to provide lifesaving overdose reversal services—not because any of its actual activities are illegal. The Dissent rightly highlighted this absurdity:

> [T]he 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. 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.

Dissent at 12.

The confusion and absurdities flowing from the Majority's opinion put individuals at undue risk of unknowingly violating a federal criminal law, and the Majority's opinion will result in dampened efforts to fight the opioid and overdose crisis. This Court should grant rehearing *en banc* and review the Majority's interpretation of Section 856(a)(2).[4]

III. The Full Court Should Resolve the Critical Issue of Statutory Construction Raised in This Appeal

This case presented the first opportunity for the Court to analyze the proper interpretation of 21 U.S.C. § 856(a)(2). A panel of this Court in *United States v. Cole* upheld a conviction under Section 856(a)(2), but that case did not require the Court to interpret Section 856 or the meaning of the phrase "for the purpose of." *See* 558 F. App'x 173, 181 (3d Cir. 2014) (non-precedential). And while other Circuits

[4] The Majority held that, even under Safehouse's proposed interpretation of Section 856(a)(2), Safehouse would violate the statute because it has "a significant purpose that its visitors do drugs." Majority at 28. This holding is incorrect and warrants rehearing *en banc*. Safehouse's undisputed purpose is to save lives otherwise at risk of overdose death and put an end to the opioid crisis in this country. Safehouse's activities and its facility will be entirely directed at carrying out its lifesaving mission. Safehouse will be outfitted with Naloxone, emergency respiratory care, medical treatment bays, and clean, sterile surfaces and consumption equipment designed to prevent disease transmission and infection. It will be staffed by medical professionals and trained drug counselors. It will under no circumstances distribute, administer, or store illegal drugs. Safehouse will be not only in word, but in deed, a place for receiving medical care, drug treatment, and social services—not a "place . . . for the purpose of" illicit drug use. As Judge Roth put it, "[u]nlike drug dealers and rave operators," who the crack house statute was drafted to punish, "Safehouse's motivating purpose is to put itself out of business." Dissent at 18.

have analyzed Section 856(a)(2) on appeal from criminal convictions in a variety of distinguishable settings, those courts did not engage in the exacting statutory analysis necessary to resolve the issues raised in this appeal. *See, e.g.*, *United States v. Chen*, 913 F.3d 183, 185-86, 191-92 (5th Cir. 1990) (applying Section 856(a)(2) to a motel owner where "overwhelming evidence at trial" established the owner promoted and was involved in the rampant illegal drug sales at the motel).

The District Court was the first in the country to address the threatened application of Section 856(a) to a medically supervised consumption site. Currently, only four federal judges in the United States—all in this Circuit—have considered whether Section 856(a) prohibits supervised consumption sites. Those judges are evenly split, with two—Judges Bibas and Ambro—holding the supervised consumption services proposed by Safehouse are illegal, and two—Judges Roth and McHugh—concluding they are not. Given this stark disagreement among 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 the Court *en banc* is warranted to clarify the interpretation of Section 856(a) and its application to Safehouse's proposed overdose prevention services.

CONCLUSION

The Court should grant this Petition and order an *en banc* rehearing of the panel opinion.

Dated: February 26, 2021

Respectfully submitted,

DLA PIPER LLP (US)

By: */s/ Ilana H. Eisenstein*
Ilana H. Eisenstein
Courtney G. Saleski
Ben C. Fabens-Lassen
One Liberty Place
1650 Market Street, Suite 5000
Philadelphia, Pennsylvania 19103-7300
Tel: 215.656.3300

AIDS LAW PROJECT OF PENNSYLVANIA

Ronda B. Goldfein
Yolanda French Lollis
Adrian M. Lowe
Jacob M. Eden
1211 Chestnut Street, Suite 600
Philadelphia, Pennsylvania 19107
Tel: 215.587.9377

LAW OFFICE OF PETER GOLDBERGER

Peter Goldberger
50 Rittenhouse Place
Ardmore, Pennsylvania 19003
Tel: 610.649.8200

SETH F. KREIMER, ESQUIRE

Seth F. Kreimer (PA Bar No. 26102)
3501 Sansom Street
Philadelphia, Pennsylvania 19104
Tel: 215.898.7447

Attorneys for Appellees Safehouse and José Benitez

CERTIFICATION OF COMPLIANCE

I certify the following:

1. This this brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,613 words excluding the parts exempted by Fed. R. App. P. 32(f).

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

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

Dated: February 26, 2021 */s/ Ilana H. Eisenstein*

EXHIBIT A

PRECEDENTIAL

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)

William M. McSwain [ARGUED]
Gregory B. David
John T. Crutchlow
Bryan C. Hughes
Erin E. Lindgren
Office of United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

Counsel for Appellants

Ronda B. Goldfein
Yolanda F. Lollis
Adrian M. Lowe
AIDS Law Project of Pennsylvania
1211 Chestnut Street
Suite 600
Philadelphia, PA 19107

Ilana H. Eisenstein [ARGUED]
Courtney G. Saleski
Megan E. Krebs
Ben C. Fabens-Lassen
DLA Piper
1650 Market Street
One Liberty Place, Suite 5000
Philadelphia, PA 19103

Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003

Seth F. Kreimer
University of Pennsylvania School of Law
3501 Chestnut Street
Philadelphia, PA 19104

Counsel for Appellees

James G. Mann
Pennsylvania House of Representatives
P.O. Box 202228
Suite B-6 Main Capitol
Harrisburg, PA 17120

Counsel for Amici in support of Appellants Republican Caucus of the Pennsylvania House of Representatives and Republican Caucus of the Senate of Pennsylvania

John M. Gore
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

Counsel for Amici in support of Appellants Pat Toomey, Brian Fitzpatrick, Tom Cotton, John Joyce, Fred Keller, Mike Kelly, Daniel P. Meuser, Scott Perry, Guy Reschenthaler, Lloyd Smucker, and Glenn Thompson

Jeffrey M. Harris
Consovoy McCarthy
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209

Counsel for Amici in support of Appellants Drug Policy Scholars and Former Government Officials

Michael H. McGinley
Justin M. Romeo
Dechert
2929 Arch Street
18th Floor, Cira Centre
Philadelphia, PA 19104

Counsel for Amici in support of Appellants 20 Neighborhood Civic Associations and the Fraternal Order of Police Lodge 5

Loren L. AliKhan
Office of Attorney General of District of Columbia
Office of the Solicitor General
400 6th Street, N.W., Suite 8100
Washington, D.C. 20001

Counsel for Amici in support of Appellees District of Columbia, State of California, State of Delaware, State of Illinois, State of Michigan, State of Minnesota, State of New Mexico, State of Oregon, State of Vermont, and State of Virginia

Trevor C. Burrus
Cato Institute
1000 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Counsel for Amici in support of Appellees Cato Institute, American Civil Liberties Union, and American Civil Liberties Union of Pennsylvania

Ezekiel R. Edwards
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, New York 10004

Counsel for Amicus in support of Appellees American Civil Liberties Union

Mary Catherine Roper
American Civil Liberties Union of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102

Counsel for Amicus Appellee American Civil Liberties Union of Pennsylvania

Michael J. Engle
Buchanan Ingersoll & Rooney
50 South 16th Street
Two Liberty Place, Suite 3200
Philadelphia, PA 19102

Counsel for Amici in support of Appellees Dr. Alexis M. Roth, Dr. Stephen E. Lankenau, and 5th Square

Virginia A. Gibson
Hogan Lovells US
1735 Market Street, 23rd Floor
Philadelphia, PA 19103

Counsel for Amici in support of Appellees King County Washington, City of New York, City of Seattle, City and County of San Francisco, and City of Pittsburgh

Ellen C. Brotman
Suite 1500
One South Broad Street
Philadelphia, PA 19107

Counsel for Amici in support of Appellees AIDS United, American Medical Association, 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, Foundation for AIDS Research, Harm Reduction Coalition, National Alliance of State and Territorial AIDS Directors, Network for Public Health, Pennsylvania Medical Society, Philadelphia County Medical Society, Positive Womens Network, Treatment Action Group, and Vital Strategies

Michael D. LiPuma
Law Firm of Justin F. Robinette
Suite 1109
325 Chestnut Street
Philadelphia, PA 19106

Counsel for Amici in support of Appellees Homeless Advocacy Project, Pathways to Housing Pennsylvania, Catholic Worker Free Clinic, Bethesda Project Inc., and St. Francis Inn

Jennifer MacNaughton
City of Philadelphia
Law Department
1515 Arch Street
Philadelphia, PA 19102

Counsel for Amici in support of Appellees Mayor Jim Kenney and Dr. Thomas Farley

Brian T. Feeney
Jessica Natali
Kevin Rethore
Greenberg Traurig
1717 Arch Street, Suite 400
Philadelphia, PA 19103

Counsel for Amici in support of Appellees Philadelphia Area Community Organizations

Mark C. Fleming
Wilmer Cutler Pickering Hale & Dorr
60 State Street
Boston, MA 02109

Daniel Segal
Matthew A. Hamermesh
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square
18th & Cherry Streets, 27th Floor
Philadelphia, PA 19103

Counsel for Amici in support of Appellees Current and Former Prosecutors, Law Enforcement Leaders, and Former Department of Justice Official and Leaders

Catherine M. Recker
Welsh & Recker
306 Walnut Street
Philadelphia, PA 19106

Counsel for Amicus in support of Appellees Professor Randy Barnett

Mira E. Baylson
Cozen O'Connor
1650 Market Street
One Liberty Place, Suite 2800
Philadelphia, PA 19103

Counsel for Amici in support of Appellees Religious Leaders in Philadelphia and Beyond

Thomas A. Leonard, IV
Cozen O'Connor
1650 Market Street
One Liberty Place, Suite 2800
Philadelphia, PA 19103

Counsel for Amici in support of Appellees Friends and Family of Victims of Opioid Addiction

---

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 defendant'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 "manufactur[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 conduct'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.

1. *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.

2. *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 restaurateurs 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.

United States v. Safehouse, et al.
No. 20-1422

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:

clean syringe exchange services, primary

[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.

> 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

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

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

---

[8] *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).
[9] 149 Cong. Rec. S1678 (emphasis added).

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 of

---

[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

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)

---

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).

defendant may receive up to twenty years' 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, whereas

---

[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).

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 let others use it; section (a)(2) would not. Section (a)(2) would

---

[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").

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

[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").

incidental purposes do not 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 comports with *Hayward*, it does not neatly apply to a

[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.").

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 government concedes that Safehouse could provide a Consumption Room in a mobile van

[29] Gov't's Reply at 15.
[30] Nov. 16, 2020 Tr. at 34:4–35:7.

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

---

[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.*

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" does not "create[] a tacit exception."[38] But that begs the question. Safehouse argues

---

[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.

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

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 because they drive up attendance. Thus, in *United States v. Tebeau*,[39] there was ample circumstantial evidence that the campground owner wanted

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

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 (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.

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

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.

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

---

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

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

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

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

[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. 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);

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

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 . . . .").

[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,

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 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

---

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).

[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).

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.

[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).

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*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on November 16, 2020.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the District Court's judgment entered on February 25, 2020, is hereby **REVERSED** and **REMANDED**. Costs will be taxed against Appellees. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: January 12, 2021

EXHIBIT B

No. 20–1422

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

v.

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

SAFEHOUSE, a Pennsylvania nonprofit corporation, *Appellee*,

v.

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

TRANSCRIPT OF NOVEMBER 16, 2020 ORAL ARGUMENT

WILLIAM M. MCSWAIN (ARGUED)
United States Attorney

GREGORY B. DAVID
Assistant United States Attorney
Chief, Civil Division

JOHN T. CRUTCHLOW
BRYAN C. HUGHES
ERIN E. LINDGREN
Assistant United States Attorneys
615 Chestnut St., Suite 1250
Philadelphia, PA 19106
(215) 861-8200

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
Civil Division

ILANA H. EISENSTEIN (ARGUED)
COURTNEY G. SALESKI
BEN C. FABENS-LASSEN
MEGAN E. KREBS
DLA PIPER LLP (US)
1650 Market St., Ste. 5000
Philadelphia, PA 19103
(215) 656-3300

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

GUSTAV W. EYLER
Branch Director
Consumer Protection Branch

ALEXANDER K. HAAS
Director
Federal Programs Branch

Counsel for Appellants

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

SETH F. KREIMER
3501 Sansom St.
Philadelphia, PA 19104
(215) 898-7447

Counsel for Appellees

November 30, 2020

NO. 20-1422

UNITED STATES OF AMERICA,

v.

SAFEHOUSE, a Pennsylvania nonprofit corporation,

et al.

****

SAFEHOUSE, a Pennsylvania nonprofit corporation,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

UNITED STATES OF AMERICA, UNITED STATES 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.

TRANSCRIPT OF HEARING

NOVEMBER 16, 2020

HELD BEFORE:
JUDGE THOMAS AMBRO
JUDGE JANE RICHARDS ROTH
JUDGE STEPHANOS BIBAS

SUMMIT COURT REPORTING, INC
Certified Court Reporters and Videographers
1500 Walnut Street, Suite 1610
Philadelphia, Pennsylvania 19102
(215) 985-2400 * (609) 567-3315 * (800) 447-8648
www.summitreporting.com

APPEARANCES:

Appearing for the Appellants:
WILLIAM M. MCSWAIN, ESQUIRE
OFFICE OF THE UNITED STATES ATTORNEY
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8200

Appearing for the Appellees:
ILANA H. EISENSTEIN, ESQUIRE
DLA PIPER
1650 Market Street, Suite 5000
Philadelphia, PA 19103
(215) 656-3351

MONDAY, NOVEMBER 16, 2020

JUDGE AMBRO: We're hearing oral argument in Number 20-1422, United States v. Safehouse. And we have Mr. McSwain and Ms. Eisenstein.

Mr. McSwain, whenever you're ready.

MR. MCSWAIN: Good morning. Thank you, Judge. May it please the Court and Counsel. I'm Bill McSwain for the United States, and with the Court's permission, I would like to reserve five minutes for rebuttal.

JUDGE AMBRO: That's fine. We'll probably -- time probably won't be much here in this case anyway.

MR. MCSWAIN: Well, I want to start with what I'll call the district court's big idea, and of course, I'm asking you to reverse the district court opinion. Safehouse is asking for you to uphold it.

So I think it's important to talk about the real underpinnings of the decision, and this is what the district court also called its baseline reality. And that baseline reality and that big idea, as I'm referring to it, is the idea that because Congress, at the time that it

passed the relevant section of the CSA, was not specifically thinking about injection sites, that that idea had significance. That idea was really important. And in fact, because of that idea, the district court believed that it couldn't enforce the broad, literal language of the statute.

And something very significant happened after we filed our brief, but before Safehouse filed their brief, and that was the Supreme Court's decision in Bostock versus Clayton County.

Now, Bostock did not announce a new rule of law. It was essentially reinforcing principles that already existed, but it's a very important case because it's from the Supreme Court. And even though it is interpreting a different statute than the statute we have here, the logic of Bostock, I think, is extremely important to this case. And the logic of Bostock essentially says this --

JUDGE AMBRO: Look at the words of the statute.

MR. MCSWAIN: Look at the words of the statute. And furthermore, the big idea that the

district court had that sort of caused it to go down this long tangent, that big idea is absolutely irrelevant.

JUDGE BIBAS: Mr. McSwain, Bostock involved a civil law. This is a criminal law that has very substantial penalties of up to 20 years' imprisonment. Shouldn't we be pretty sure the law is clear? That's a consideration that wasn't at stake in Bostock.

MR. MCSWAIN: Your Honor, I think that's correct. I think we should make sure that the law is clear. And we would submit that it is. And for example, the rule of lenity we don't think applies here because that rule would require grievous ambiguity. I think those are the exact words that the Circuit's law has pointed to, that it has to have grievous ambiguity. And in fact, it has to be something that is really the -- it's almost as if it's the last resort. That's a rule you only go to if there's -- you just can't make sense of the statute at all. And I don't think that's the case here.

JUDGE BIBAS: Could we talk about how far you -- your construction goes? Let's say a

-- I'm going to give you some hypos, and want to know how you read 856(a)(2).

Let's say a landlord knows his tenant is regularly doing drugs in -- in his house, in the basement apartment or something like that. Is 856(a)(2) going to cover that? He's -- he knows it's going on. He's collecting rent as a result of it. The -- the tenant is using the basement apartment in order to shoot up. Is that criminalized by this provision?

MR. MCSWAIN: Your Honor, I don't think it is. And as we explain in some of our briefing, that -- that is incidental use. You could think of it as incidental use. You could also think of it as personal use. Not the kind of concentrated drug activity that the statute was intended to reach.

JUDGE BIBAS: Okay. Let's say a landlord of one of those self-storage units rents out one of those small units. And the person goes from his house to there just to go to shoot up. And the landlord's been in there enough times, seen enough syringes and things. The person goes into the small self-storage unit, shoots up, and leaves. Is that -- is that going

to be covered?

MR. MCSWAIN: These are all a matter of degree. And as you push harder and harder on the hypo, I think we get closer and closer to criminality. In that exact example, certainly the -- if -- if the person is renting the storage locker for another purpose, that also I think would move us towards the line away from criminality. But again, I would say, your hypo has to do with one person --

JUDGE ROTH: Okay. Let me --

MR. MCSWAIN: -- shooting up.

JUDGE ROTH: -- let me ask you another question then. You brought the action for declaratory judgment against Safehouse. You didn't bring it against, "the consumption room." Therefore, in looking at the activity, in looking at the purpose of the activity, do we look at Safehouse, the whole establishment there, or simply at the consumption room?

MR. MCSWAIN: Judge Roth, I think you -- you have to look at Safehouse, and Safehouse is who we brought the action against. But the defining characteristic of Safehouse, in our view, is the consumption of drugs, is the

consumption room, because if you look at --

JUDGE ROTH: In spite of all -- in spite of all the other activities and services that are provided there?

MR. MCSWAIN: Yes. And I would point you towards the activities and services that are provided at, for example, Prevention Point, which is --

JUDGE ROTH: Right --

MR. MCSWAIN: -- the sister organization.

JUDGE ROTH: -- without a consumption room. But Safehouse does have a consumption room. But it also has all the other services. And since you brought the declaratory judgment against Safehouse, don't we have to look at Safehouse as a whole?

MR. MCSWAIN: I think yes, you do.

JUDGE ROTH: Okay.

MR. MCSWAIN: And we -- I don't think we've said anything in our -- in our briefing or our arguments previously that says that Safehouse can't be looked at as a whole. But the defining characteristic of Safehouse that makes it different from Prevention Point or any other

similar organization is the consumption room. So I think that's --

JUDGE BIBAS: Mr. McSwain, I think what Judge Roth is getting at -- the statute talks about the purpose, not a purpose. They have a number of purposes at this site, and you are suggesting in response to my hypos, that well, if the person is storing things there maybe it's different. But don't you have to read "the purpose" to mean it can include a number of purposes? The district court talked about "a significant purpose."

I mean, you have to be able to include multiple purposes, otherwise they've got some other purposes here like providing services and treatment and shelter, and some other things. So you -- you can't satisfy a strict sole purpose requirement. So you've got to read "the purpose" more broadly than that.

MR. MCSWAIN: I think that's right. And I think that the -- the cases do talk about a significant purpose. They talk about a significant purpose as opposed to the one and only purpose. The cases you --

JUDGE BIBAS: How does that fit with the

-- the "the," in the text?

MR. MCSWAIN: Well, it's interesting. Because that is an area where the case law has said that it's not interpreted as the one and only purpose, but maybe one of the purposes. But it has to be a significant purpose. But your -- your question raises another interesting point because at the end of (a)(2), which is what we're talking about here, which is "the purpose of unlawfully manufacturing, storing, distributing or using controlled substance," we're talking about the purpose of the third party.

That's the way five different Circuit Courts have interpreted --

JUDGE ROTH: Okay. You say that. I don't necessarily agree with you on that. I think that -- I think Chen is wrong. I think if you use classic statutory interpretation rules, that "for the purpose of" in "two contiguous sections" is -- should be interpreted in the same way. So when you -- when you're -- when you are assuming that we agree with you on "purpose of," let me just forewarn you that I don't agree with you at all.

MR. MCSWAIN: I would respond to that in

two ways, Judge Roth. First of all, we have to read (a)(1) and (a)(2) to make sense together.

JUDGE ROTH: And I -- I do do -- I realize that, and I do do that. And I still say that they're different. Different, but that "for the purpose of" is the same.

MR. MCSWAIN: If I could respond to that in two ways, first of all, I think that if you read (a)(1) and (a)(2) without looking at the purpose of the third party in (a)(2), you set up a situation that leads to absurd results.

JUDGE ROTH: No.

MR. MCSWAIN: For example, you -- you could be a crack dealer. What would you say then about the situation where you have a crack dealer who says, "My purpose is making money. My purpose is not to -- to sell drugs, or have drugs to use on the property. My ultimate object, my ultimate aim, is to -- is to make money."

If -- if you interpret (a)(1) and (a)(2) in the way that you're suggesting, I don't think that there's any way for there to -- for liability to attach under this statute for a stone cold crack dealer.

JUDGE ROTH: Well, if -- if you are

limiting yourself to "the main purpose," but if you are considering a variety of purposes, I think that your argument doesn't make it.

Let me ask you, since we're talking about this language, where in the Controlled Substances Act is it illegal to use a controlled substance?

MR. MCSWAIN: Well, the language, I think, of (a)(1) and (a)(2) talk about --

JUDGE ROTH: Illegally use --

MR. MCSWAIN: -- using and control -- they talk about using --

JUDGE ROTH: They talk about unlawfully using. Where is it unlawful to use?

MR. MCSWAIN: The statute and the legislative history do talk about possessing sometimes --

JUDGE ROTH: Okay.

MR. MCSWAIN: -- and not necessarily talking about using. But our position is --

JUDGE ROTH: But -- but Safehouse never possesses any drugs, right?

MR. MCSWAIN: Safehouse doesn't. But the people who -- the third party, obviously, does possess. And our position is, you can't possess

-- or I'm sorry, you can't use without possessing. One follows the other --

JUDGE ROTH: Okay --

MR. MCSWAIN: -- invariably.

JUDGE ROTH: But -- but that is interpreting -- that you've got to admit that under the statute there is no unlawful use. In --

MR. MCSWAIN: I don't -- I don't concede that there's no unlawful use. I think that use and possession --

JUDGE ROTH: Okay. Where -- where is it? What -- what -- cite me a -- a section.

MR. MCSWAIN: I think you can look at (a)(1) and (a)(2) for example, and say that it says, "unlawfully using a controlled substance." It's putting --

JUDGE ROTH: So how it's been -- how is it -- how are you unlawfully using if it's not unlawful to use?

MR. MCSWAIN: The -- the statute does make clear -- we're talking about heroin, for example -- that there is no accepted use of heroin. There is no lawful use of heroin. Doctors, for example, can't prescribe heroin. So

if you're talking about using or possessing or anything having to do with heroin, it is automatically illegal.

JUDGE BIBAS: Mr. McSwain, a couple questions. First of all, does the word, "unlawfully," extend all the way down all four of those participles?

MR. MCSWAIN: In (a)(2) are you referring to?

JUDGE BIBAS: In (a)(2), does "unlawfully" modify manufacturing, and storing, and distributing, and using?

MR. MCSWAIN: Yes. I think I -- I am --

JUDGE BIBAS: Okay.

MR. MCSWAIN: -- I would concede that.

JUDGE BIBAS: Does -- does "unlawfully" include violations of state law?

MR. MCSWAIN: Here, it -- we are talking about, here, a question of -- of federal law. We are -- we are --

JUDGE BIBAS: Why couldn't it piggyback on a violation of state law, that at least wherever it violates state law that's sufficient?

JUDGE AMBRO: Like in Raich.

JUDGE BIBAS: Uh-huh (affirmative). Not

necessary, but sufficient.

MR. MCSWAIN: It's a -- it's a path that we didn't go down in our briefs. I guess I would not foreclose it, if it's something that the Court thinks is an important consideration. I certainly wouldn't foreclose that possibility. But I don't think it's necessary.

I think that federal law is being violated here. And if I could, if I could go back quickly to Judge Roth's question about the use of the word, "purpose." I understand that one of the things that I think she's concerned about is that you have the word "purpose" in (a)(1) and you also have the word "purpose" in (a)(2). Why would they be different?

My -- my response is that we're not treating them differently. The definition of "purpose" is still the same in both. But what -- but by looking at the context of all the words in the statute, we think that it's clear that when you're talking about "purpose" in (a)(1), you're talking about the defendant. When you're talking about the "purpose" in (a)(2), you're talking about the third party. And again, the reason to do that is because the statute becomes self-

defeating if (a)(1) and (a)(2) refer to just Safehouse's purpose, just like it would refer to just the purpose of a crack dealer who could say that, "My purpose is to make money."

Safehouse doesn't deal with that hypo in their briefs, and that's something I've been talking about throughout this case. They have no good answer for that. There's no way that (a)(1) and (a)(2) fit together under their reading.

JUDGE BIBAS: Mr. McSwain, let's assume that Judge Roth's skepticism is -- is warranted and you need to prove the first party's purpose, not the third party's purpose. Can you do that here?

MR. MCSWAIN: Absolutely.

JUDGE BIBAS: Explain.

MR. MCSWAIN: And we went -- we went and -- we went into that in some detail in our briefing about how even if (a)(1) and (a)(2) are referring to Safehouse's purpose, that clearly Safehouse has a purpose of -- of seeing that drugs are used at the place because it is a necessary precondition to anything else that is happening at Safehouse. Okay, people are not coming into Safehouse for any -- there's a

necessary precondition of using drugs. There are -- although it's true that there are other services that are provided, other things that are going on in Safehouse just like in Prevention Point. But it is a necessary precondition to use drugs.

And because of that, as we laid in our -- I laid out in our briefing, we think that we win on their -- under either scenario.

JUDGE BIBAS: I think the word "clearly" maybe slides over this. I wonder whether Ms. Eisenstein would dispute that it's necessary. I mean, it might be one draw for people to come in. But you kind of just noted and hesitated that people -- people might come in for treatment. They might come in for other reasons. They might even come in for -- for clean syringes not to use at that location.

So I don't know that it's a precondition. It might be an inducement, but if there are other reasons why some people might come in -- and it's not a necessary precondition -- do you -- do you still win? Or can you still win?

MR. MCSWAIN: I think -- I think the

best way to describe that -- and maybe it's that I'm not being as precise in my language as I should -- it's a necessary precondition for Safehouse to exist. Because there wouldn't be any reason for Safehouse to exist absent the consumption room. Because again, you would have Prevention Point. You would have other places that you could go. And so literally the only reason for it to exist is the consumption room.

Even if, hypothetically, somebody could come into Safehouse and not be there to -- to ingest drugs, I think that is very unlikely. And if you look at the factual stipulations in the case that both parties agreed to, this is not a place that's set up, people to come in to just get treatment. It's a place that's set up for people to ingest drugs. And in fact, even those who were there to get treatment, one thing that Safehouse has said is that treatment, they think, is more effective if people are actually using the drugs.

JUDGE BIBAS: Could I ask you about a couple more hypos? What if a strip mall owner leases a storefront to a medical marijuana dispensary? Is that going to be covered by this

law?

MR. MCSWAIN: That's getting into state law issues. It's my understanding that Congress has made certain appropriations where if you're in a state that has legalized medical marijuana, the Department of Justice cannot prosecute those sort of violations.

JUDGE BIBAS: But it's still illegal. It's -- they may not prosecute it, but it's still against the law. Could they prosecute -- could the Feds prosecute in that situation? I mean, maybe -- maybe what you're saying is they'd be -- they'd be barred. But could you have a civil RICO case or something else that would be brought predicated on that?

MR. MCSWAIN: As a practical matter, Your Honor, I don't think that we can prosecute that because of the way that Congress has done its appropriations.

JUDGE BIBAS: All right. Let's set aside marijuana. Bank owns a mortgage on a cocaine dealer's house, so we don't have the marijuana issue in there. Or a marijuana dealer's house in a state that has no -- no law that complicates that non-prosecution rule. Can

you go after the bank under this?

MR. MCSWAIN: I'm sorry, I got a little bit confused between the two hypos. You're talking about a bank that --

JUDGE BIBAS: A bank -- a bank has a mortgage. It's the mortgagee. It lends money to a drug dealer, and the drug dealer uses the house not -- not as his principal residence, just as a place to deal drugs out of. Can the bank be prosecuted for making that loan, assuming it knows at the time it makes the loan that the guy is a drug dealer and going to be using it for drug dealing?

MR. MCSWAIN: And again, I think the first part is to -- the first step is to look at the statutory language. And if they had the knowledge, so knowingly, and if they had the intention to make the loan knowing that this was going to occur, then theoretically, yes. They could be prosecuted under the statute.

JUDGE AMBRO: Can I just run through with you a series of questions, just almost starting back at the beginning in terms of the interpretation.

What does (a)(1) apply to? What does

(a)(2) apply to? And what is covered by (a)(2) that's not covered by (a)(1)? That's the starting point for me.

MR. MCSWAIN: Under our reading, Your Honor, (a)(1) -- if you can think of it as sort of -- you're not allowed to directly set up a drug house. You, as the owner, or as the person who is leasing it, or renting it out or maintaining it, you can't directly set up a drug house by having your purpose, being the manufacture, distribution or using of the controlled substance.

Whereas (a)(2) says you can't do the same thing, you can't set up a drug house indirectly by controlling it or managing it and knowing that a third party has that purpose of using it --

JUDGE BIBAS: But there's no mention of a third party in the statute. Why didn't Congress spell it out?

MR. MCSWAIN: Well, the statutory drafting, Your Honor, it could have been better, I would say. And it's never --

JUDGE AMBRO: Really? Really.

MR. MCSWAIN: It's never -- I would say

that -- this version is not --

JUDGE ROTH: (Indiscernible)

MR. MCSWAIN: -- this version is not perfect. But I would say that the government's -- I would submit that the government's interpretation is a better interpretation because it is still -- it is faithful, I think, to the plain language. It doesn't talk about specifically a third person there. You're absolutely right, Judge Bibas. But when you look at the statute as a whole, again, it's the only one that makes sense.

And I come back to my hypo about how you could have bad actors escaping liability here if it's not a third party's purpose that matters in (a)(2).

JUDGE AMBRO: If the -- I guess I'll come -- I'll come to it in this way. It seems to me, if we were pre-COVID sitting around just all talking about this, you would have five attorneys in a room and you'd probably have five different opinions. And some would say the text is not ambiguous. Some would say it's ambiguous and here's what it means. Somebody else would say, well, maybe it's ambiguous, but here's what I

think it means.

Doesn't that, in effect, tell us -- you know, normally we try to shy away from legislative history. But doesn't that tell us that we ought to at least take a look and see what the legislative history is here?

MR. MCSWAIN: For purpose of -- purposes of argument, Your Honor, let me -- let me just say, yes. Let's go into that world. And I think that if we were to go into that world, what we find is that Congress was very concerned about concentrated drug activity. And one of our -- Amici, who represent 20 different neighborhood associations as well as the FOP, Fraternal Order of Police, go into this in some detail in their brief about how that was the primary concern of Congress here: the concentrated drug activity and the attendant crime and blight and destruction of neighborhoods that comes with it.

And so this is exactly the type of thing that Congress was concerned about, even though they didn't specifically know about injection sites. And I think that what happened, when Safehouse tried to open up, the disastrous aborted attempt at the beginning of the year to

open up shows exactly the concern here. Because the city, essentially, revolted. Certainly, South Philly revolted, when -- when Safehouse tried to basically sneak this into a neighborhood without giving them the input into whether they wanted it or not. There's not a single neighborhood in the entire city who is ever going to want this in their neighborhood, okay. And that's why you saw such an uproar, and you saw almost the entire Philadelphia City Council also come to the neighborhood's defense. And they were in the process of drafting legislation to say, as a local matter, these sites are illegal, when the pandemic hit and everything got sort of derailed at that point. And then we also got the stay of the decision from the district court.

But to answer your question directly, Congress was concerned about the concentrated drug activity, and all the negatives that come with it. And so even if you look at the legislative history, it counsels, I think, strongly in favor of finding Safehouse's proposed activity to be illegal.

JUDGE BIBAS: Mr. McSwain -- I -- I don't know -- if my colleagues want to stay on

the statute, I don't want to jump ahead. But I do want to get to the Constitutional issues.

JUDGE AMBRO: Yeah. I do too. I -- but I do want to stay on the statute for a bit.

If (a)(2) -- if "knowingly, intentionally, and for the purpose of," apply to Safehouse as opposed to anyone else, do you still win?

MR. MCSWAIN: Absolutely. And I think we've laid that out in some detail in our brief. We talk about how, you know, a significant purpose is clearly something that the use of drugs here is a significant purpose. Again, I would come back to what I've said before about how it's a necessary precondition for the existence, the literal existence, of this -- of this operation. There would be no need for it and there would be no push for it. There would be no call for it, if it didn't have a consumption room.

Prevention Point already exists. So we win under either reading, whether (a)(1) and (a)(2) are both talking about the purpose of Safehouse, or I think a better reading is if (a)(1) is talking about the purpose of Safehouse,

and (a)(2) is talking about the purpose of the third party.

JUDGE AMBRO: Let me ask -- let me ask you, in terms of hypotheticals, let's say this is not South Philly. Let's say the neighbors were not uptight about it. Let's say it's an adjunct to -- pick a hospital -- Penn. And you have a rehab drug facility right there, right outside Penn. Is that rehab drug facility in violation -- and they allow people, as part of the weaning process, to use drugs that are unlawful before they go into methadone or something like that. Would you prosecute that?

MR. MCSWAIN: I would say that that is illegal, Your Honor, and that's why it doesn't exist and never has existed. There's no medical use, accepted medical use of heroin. And we are talking about drug treatment centers. They do not inject people with heroin. Never have, there's no place in the country that does that. This is trying to be the first place in the country anywhere that does this sort of thing.

So I don't have any cases that I can point to that say, we prosecuted that in the past. But the only reason is because the medical

facilities haven't done that. And if they were to do that, yes. They would be exposing themselves to risk under the statute, which is why they don't do it.

JUDGE AMBRO: All right.

JUDGE ROTH: You said they -- let me say, you -- there was -- you misspoke there. You said where -- where they inject. Safehouse does not inject anything, right?

MR. MCSWAIN: I -- the "they" that I was referring to was the -- the rehab facility that Judge Ambro was -- was describing in his hypo --

JUDGE AMBRO: Yeah. Let's say they -- there is a room where --

JUDGE ROTH: Safehouse employees do not inject drugs.

JUDGE AMBRO: Yeah. Not the rehab facility. But rather, they let the -- the person coming in, who's being treated, inject.

MR. MCSWAIN: Yes. And Judge Roth, to be responsive to what you're asking, yes. It's not Safehouse that's doing the injecting. That's -- I agree with you on that. But that doesn't mean that there's not liability under the statute under our view.

JUDGE AMBRO: All right. Let me ask you -- so now -- let's go to a law firm over on -- let's go to JFK Boulevard, and a big law firm has one of its partners who is on drugs. Firm knows that the partner is on drugs. He's become a coke addict. And they're supplying him space, and they -- they don't know what to do. But they give him the space. They know he's using cocaine in his office. Are they -- is the firm liable under (a)(2)?

MR. MCSWAIN: I think that's similar to the hypo where you have parents, for example, in their house and they have their son or their daughter who's using drugs, where we would say, that's not something that would trigger liability in the statute. Again, --

JUDGE AMBRO: Because -- because?

MR. MCSWAIN: Because -- because two reasons. One, it's incidental. That law partner presumably is still there to be a law partner, is still there to be an attorney who's using that space for its original purpose, which is to practice law.

And secondly, it's not concentrated drug activity. But if that law partner were to invite

fellow addicts into his office, or fellow addicts into the firm and suddenly you had the concentrated drug activity, absolutely. That law firm could stand by to be charged.

JUDGE BIBAS: Let me -- let me tweak the hypo, then, okay. So you've said the parent whose kid lives at home, who happens also to do drugs, has this -- the main purpose is to have the kid live here. Let's imagine the kid is -- chooses to be out on the streets, homeless, right. And the parents say, "We're worried about you overdosing; you overdosed once before. At least come over here when you shoot up, okay, so we can watch you and give you Narcan if we need to."

Is that going to be covered? He comes over, just for when he's going to shoot up, and then leaves.

MR. MCSWAIN: So he doesn't live there? He doesn't sleep there?

JUDGE BIBAS: Doesn't live there. He comes over just to shoot up because the parents want to keep an eye on him.

MR. MCSWAIN: That's getting closer to the line. I think that probably would not

trigger liability. Again --

JUDGE BIBAS: Why not?

MR. MCSWAIN: Because -- because it's one person.

JUDGE BIBAS: Let's say he and a friend. He invites a friend over, and they're going to do it together. He says, "I'll only do it if I can do it with my girlfriend."

MR. MCSWAIN: As you add more people to the equation, it becomes closer and closer to the line of criminality. And I'm not trying to be cute here because I think it's a matter of degree, but absolutely, your hypo could lead to liability under the statute, if you get a group of people who are coming to that parents' house and doing that.

And I would tweak the hypo myself a little bit and say, how about this: how about if the parents know that the son or daughter is using drugs in the home, and they know that they have lots of friends who use drugs. And the parents say, you know what, we're going on vacation for 30 days. We're going to be gone, and they know what's going to happen when they're gone. And their son or daughter is going to

invite lots of people over to the house, and it's going to turn into a drug den. Those parents could be prosecuted. That's a little bit -- that's slightly different from your hypo, but I think it shows the point that these things are a matter of degree.

JUDGE BIBAS: All right. Airbnb. There have been some press reports out there. I can't vouch whether they're true or not. Let's just assume that some Airbnbs are being rented for wild parties where things get trashed.

Let's assume some Airbnb customers, known to have had drug-filled parties, had made it into the news in the last few weeks. Is -- I mean, Airbnb is a platform. Assume it comes to their attention, and assume they continue to rent to this person. Those are big ifs, and I'm not saying Airbnb actually does this. But if they did that, would they be liable? Would the host be liable if the host sees this in the person's reviews or ratings and still rents to the person?

MR. MCSWAIN: I think, again, we always have to return to the words of the statute, and if, under the statute, if the Airbnb renter knew what was going on and intentionally --

intentionally rented the space knowing that it was going on, then, yes. I mean, that's very similar to -- since we've opened up the Pandora's box of legislative history here, that's sort of similar to what Congress was talking about with rave parties and other similar gatherings where -- it was one of the reasons why they passed the statute.

Again, it comes down to the words of the statute are most important, and then also what is Congress trying to prevent here - concentrated drug activity. In the hypo you described, really all the hypos you've described, once you get to concentrated drug activity, you have triggered the statute, and you could be prosecuted.

JUDGE BIBAS: What's weird though is your concentrated drug activity only comes from the legislative history. I don't see any text that limits it to that.

MR. MCSWAIN: I would prefer not to go into the legislative history. I prefer to limit to the text.

JUDGE BIBAS: If you want to stay with the text, what in the text would make it be just the -- would exclude the one kid whom the parents

have over for drugs?

MR. MCSWAIN: I think that's --

JUDGE BIBAS: That's what I'm asking.

MR. MCSWAIN: I think -- we did address this in our brief in a footnote about the hypo of the child in the parent's home. I think the word "intentionally" is what is a check on the statute, where incidental uses -- incidental uses that are not the primary use. The child is living in the home, and it's incidental that he's --

JUDGE ROTH: But the parents are saying you aren't living here. Come here to do your drug injections so we can watch you. Now, that's intentional, right?

MR. MCSWAIN: I think that you could -- again, that hypo is getting close to liability. But I would say still that it's incidental use because it's a parent looking out for the child, and there are also things -- I think --

I don't think we can make it quite as clean as the child just comes in the door, injects drugs, and leave. I think you're talking about the family situation. It's more complicated than that. There are other purposes

other than just that purpose of sticking a needle in the child's arm, just trying to --

(Cross talk)

JUDGE ROTH: Let me give you another hypothetical. Instead of doing this in a building, you get a recreational vehicle and park it in front of the building. Now my understanding is the government has said that that would not violate the statute. You parked the vehicle in front of the building for injection and supervision while the drug use is in check. Does that violate the statute?

MR. MCSWAIN: Again, I would return to the words of the statute, and, Your Honor, frankly, the words of the statute are talking about real estate. A vehicle is not real estate, and so if you're being true to the words of the statute, I would say it doesn't reach that conduct. But that's because Congress has passed what Congress has passed, and we need to be faithful to the words of the statute.

So that example --

JUDGE ROTH: Well, we can be more faithful to certain words than I am and vice versa. So it seems to me we are selectively

picking the words that we're faithful to.

MR. MCSWAIN: Well, I'm not trying to be selective about what I'm being faithful to. I'm looking at the statute and seeing words like lease, rent, place --

JUDGE ROTH: You can lease an RV. You can rent an RV. You can own an RV.

JUDGE BIBAS: Is it your position that "place" does not include moveable vehicles; it's just physical locations like real estate?

MR. MCSWAIN: Yes. I think -- we also talked about an example of a mobile van in the district court a little bit, and we --

JUDGE ROTH: Yeah.

MR. MCSWAIN: -- in our briefs.

JUDGE ROTH: And you conceded that it -- it did not fall under the statute.

MR. MCSWAIN: I don't think -- I don't think that, if we're being true to the words of the statute, that mobile van applies, and Congress would have to deal with that situation. But also, if it's a mobile van, it's also moving around. So you're not talking about the concentrated drug activity in one place. Presumably that van is going to be going to

different places.

JUDGE AMBRO: Just a dumb question, but if you manage or control a place inside a motor vehicle or an RV as an owner and knowingly and intentionally make it available for use for people to come into that RV for the purpose of drug activity, why -- why is that different than what we have here, if you just look at the words of the statute?

MR. MCSWAIN: Well, I -- if I followed that correctly, are you adding an explanation?

JUDGE BIBAS: I'm looking at the exact text. They manage -- they control a place, the inside of an RV as an owner, and they knowingly and intentionally make it available for use for the purpose of allowing persons who are doing drugs to have drug activity inside that particular place.

MR. MCSWAIN: First of all, it's not a dumb question. But I don't -- the government -- I would say our position is that we interpret the plain language of (a)(1) and (a)(2) to be talking about real estate in the sense of places, not a car.

I guess, theoretically, it's possible to

say there's a place inside of a car or a place inside something that's mobile that the language could reach. But I think when you talk about -- when you look at the words as whole and you also -- if we're going to talk about legislative history, we're going to talk about real estate --

JUDGE AMBRO: I'm not talking about legislative history. I'm just looking at the words here. I mean -- I mean, what pops in my mind is, when you're in really rural America, there are no doctors' office, and you have physician assistants that go around in RVs helping people who have medical issues.

And so I don't know why the text you're saying has to be a real estate but doesn't have to be -- or is not the inside of an RV.

MR. MCSWAIN: Well, maybe it's something that I just haven't -- honestly haven't thought about enough because it's not a part of this case and not something that we've seen in other cities who have contemplated this sort of thing. But I guess, theoretically, if you had a mobile unit or something like that, that kept putting itself down in one spot, then it would be much closer, I think, to the kind of thing that we're talking

about here because then it would be a place.

You can't -- I don't think you can be cute and get around the statute by loading your RV up with heroin and then parking it outside -- or parking in one particular place and having concentrated drug activity around it. Theoretically, that might -- that might violate the words of the statute, but I think that that would be a very different case than this is the point that I want to make.

Safehouse is a place, or Safehouse wants to be a place. And it's going to be in one spot. That's -- that's part of the --

JUDGE AMBRO: So essentially what you're -- what I'm hearing you say is, look, this is part of the -- part of your job, my -- you're saying part of my job as one who prosecutes. This is either prosecutorial discretion or our interpretation for purposes of how we are going to implement this particular statute.

MR. MCSWAIN: Well, maybe I would put it slightly differently, and I would say that I, as a U.S. Attorney, am only reacting to a set of facts in front of me. And the set of facts here in this case, we have Safehouse, which clearly

wants to be a place. These hypotheticals are important to think about, and there needs to be limiting principles to whatever decision that you come up with. But what we're describing in hypotheticals is very different from this case, very different from what Safehouse wants to do.

JUDGE AMBRO: Yeah. We were giving you so many hypotheticals just because we're trying to see what are the consequences of whatever decision we write here.

MR. MCSWAIN: Well, again, wanting to be just completely candid and straightforward. It's not a perfect statute, and if there's, you know, a problem where there might be a way that -- that mobile vans start popping up all over the place, we'd have to decide whether that's something to prosecute. It might have to be something that Congress would have to address, if Congress thinks it's a problem.

But I think they've clearly already addressed the situation where we're talking about a piece of real estate, Safehouse opening up, having a consumption room that is a defining characteristic of the place.

JUDGE AMBRO: Yeah. Go ahead. I think

Judge Roth had a question.

JUDGE BIBAS: Finish this line. Finish this line. Go ahead.

JUDGE AMBRO: I think Judge Roth had a question. Then I'll come back to --

JUDGE ROTH: No, no. I'm fine.

JUDGE AMBRO: Okay. Judge Bibas, go ahead.

JUDGE BIBAS: Yeah. If my colleagues are done with the statutory issues, I do want to spend some time talking about the Commerce Clause here.

First one is, you know, Safehouse is making this site available for drug use without compensation. Is that economic or noneconomic, and does the word economic or noneconomic mean the same thing as commercial or noncommercial here?

MR. MCSWAIN: I think -- I think what Congress has said is that the drug trade has an effect on interstate commerce. They've said that broadly, and there isn't any exception for what Safehouse describes as local use or noncommercial use or the like.

They've said broadly that use of illegal

drugs is something that impacts interstate commerce. And there's not some canon of doughnut holes to borrow the language from Bostock where you can say, well, if this specific thing is not -- you know, if this jurisdictional element hasn't been pulled out, then it doesn't -- you know, it doesn't violate the Commerce Clause.

JUDGE BIBAS: But I think your adversary's argument is Lopez and Morrison treated differently activity that was noneconomic.

So why, in your view, is this on the other side of the line from Lopez and Morrison? I mean, you know, there's -- there's a connection between gun violence of violence against women and the economy, and guns move in interstate commerce. Why -- why should we put this one in a different basket as -- I mean, should we put it in the basket of economic? Are you saying it's noneconomic, but we should just aggregate the effects? What's your -- what's your argument here?

MR. MCSWAIN: I think -- I think you could put it in both baskets. Even if you think of it as noneconomic, it still has an effect on

the market, but I think in that sense it is economic, right.

Because think about what Safehouse is actually proposing. They're proposing that, you know, citywide and even outside the city, that people come to this location and use drugs. And they're trying to make it as convenient and accessible and, frankly, as comfortable as possible for people. And that is going to have an effect on interstate commerce because that is going to have an effect on the drug market. And --

JUDGE BIBAS: We're not allowed to use a long and speculative chain of inferences. We have to find something has a substantial effect, and we don't have the benefit of congressional findings here. Does it substantially affect interstate commerce, and how do you establish that without having such findings?

MR. MCSWAIN: I think if Congress has said that the market for marijuana, for example, has an effect on interstate commerce, then the market for heroin falls under the principle. Again, there doesn't need to be specific findings on the interstate commerce effects of a safe

injection site. It falls under the larger rubric of anything that affects substantially the market for drugs is going to affect interstate commerce. Here I think it's --

JUDGE ROTH: Isn't that --

MR. MCSWAIN: -- part of the broader principle.

JUDGE ROTH: Isn't that the justification for the Controlled Substances Act, the effect on interstate commerce of drugs?

MR. MCSWAIN: That's a big part of it, Your Honor. I think that's right.

JUDGE ROTH: Yeah.

MR. MCSWAIN: I mean, that's --

JUDGE ROTH: And look at other cases that say, once you have determined that a classification has an effect on interstate commerce, whether it's trivial or for compensation or not for compensation, it falls within the determination that there is an effect of this class on interstate commerce.

MR. MCSWAIN: I would agree with that, and you articulated it much better than I have. I was trying to articulate the broad principle in saying that you do not need to have specific

findings on this when it comes to injection sites.

But, yes, that was one of the primary animating reasons behind the CSA, and it would apply here.

JUDGE BIBAS: I take it that part of your argument is that the CSA is a broader regulatory scheme. But you know, how do we find that this is essential of the CSA? The CSA existed before it. You could have a CSA without it. Maybe it wouldn't work quite as well. But isn't that test of essential pretty demanding, and how -- do you satisfy it? How do you satisfy it?

MR. MCSWAIN: I think it's been satisfied when you look at what Congress has said about marijuana, for example. Heroin is just a different -- a different drug. It's a more expensive drug, and a more powerful drug, and a more dangerous drug. And so anything that they've said about the market for marijuana, local use affecting interstate commerce, same thing I would say applies to heroin or fentanyl or any of the substances that Safehouse is planning to have within its walls.

JUDGE BIBAS: Okay. Congress did not find it essential to have a federal ban on use of these drugs. There's no federal law that prescribes just simple use outside of federal enclaves and the like. So then why is use in the Safehouse context essential if a ban on use more generally isn't?

MR. MCSWAIN: Well, there is a ban on use of heroin, unless I'm misunderstanding your point.

JUDGE BIBAS: Okay. Which -- which statute? (Indiscernible)

MR. MCSWAIN: Well, the CSA says that -- I mean, heroin is illegal.

JUDGE BIBAS: Right.

MR. MCSWAIN: And the CSA says that there is no medically accepted use of heroin.

JUDGE BIBAS: But where's the -- which statute are you relying on as plugging that hole because I think Judge Roth was getting at this, that there's not a federal crime of criminalizing use. You can't prosecute someone for mere use if it's not on a federal enclave or something.

MR. MCSWAIN: You can prosecute people for the use of heroin. I mean, that happens --

doesn't happen a lot because we focus on the federal level, the drug dealing and the more serious offenses, but you absolutely could prosecute someone for the use of heroin, which is the reason why --

JUDGE ROTH: For use as opposed to possession?

MR. MCSWAIN: Again, Your Honor, I think the best answer to that is you -- if you're using, you, by necessity --

JUDGE ROTH: Possess, right.

MR. MCSWAIN: -- are possessing. So the two -- I don't think you can draw distinction between the two.

JUDGE BIBAS: All right. So you're relying on 844 in the simple possession ban then?

MR. MCSWAIN: Yes. I mean, I'm relying on the fact that that is illegal for all purposes and that the CSA specifically says you can't prescribe heroin. There's no medical use for it. Because it's on Schedule I, not Schedule II. So that distinguishes it from the drugs on Schedule II that could be possibly prescribed.

JUDGE AMBRO: Before we have you sit down, one thing -- or we go to Ms. Eisenstein,

why is -- what does the word "intentionally" do in (a)(2) that's different from (a)(1) because intentionally is not in (a)(1)? Why is intentionally in (a)(2) -- let's put it that way -- but not in (a)(1)?

MR. MCSWAIN: I'm looking at the language of the statute. I think that, again, it's -- it's a check on some of the possible excesses that we were talking about in the hypos, where --

JUDGE AMBRO: It would seem if you say that (a)(1) is directly and (a)(2) is indirectly, it's -- as we used to say in rural Ohio, kind of bass ackwards. It would seem that (a)(2) is direct and (a)(1) is indirect.

MR. MCSWAIN: Well, (a)(2) is indirect, the way I was thinking of, Your Honor, because you're talking about a third party that's using the drugs and has the purpose of using the drugs. And I think that (a)(2), when you say "intentionally," it's the intentional act, the intentional act of renting the place. And then the knowingly is that you know what's going on at the place, but the purpose of the drug activity is the third party there.

And there's important words that are in (a)(2) that aren't in (a)(1) that I'd also like to focus on, "make available for use." That does point towards third party. That's not in (a)(1) because, again, we're talking about direct. We're talking about the defendant's purpose.

In (a)(2) you're talking about "make available for use." Make available for use to whom? Well, to somebody. Make available to use a third party who is actually renting and using the space and using it for the purpose of using illegal drugs.

JUDGE AMBRO: Okay. Thank you. Let's hear from Ms. Eisenstein. We'll get you back on rebuttal.

MR. MCSWAIN: Thank you.

JUDGE AMBRO: We had you up for 47 minutes.

MR. MCSWAIN: It felt like 5 minutes.

MS. EISENSTEIN: Good morning, Your Honors. May it please the Court. Ilana Eisenstein on behalf of defendants, Safehouse and Jose Benitez.

Your Honor, Safehouse's purpose is to provide overdose death, and its services do not

fall within 856 because the purpose that it has, preventing overdose death as well as providing medical treatment and services to those suffering from addiction, are not the purpose of -- the purpose of the facility is not unlawful use or unlawful drug trafficking.

And one of the key features that I think you've been talking about throughout this morning is that purpose does matter. It is the essential element of the offense.

JUDGE AMBRO: So you're saying the purpose here is that of Safehouse?

MS. EISENSTEIN: Yes, yes. Exactly, Your Honor.

JUDGE AMBRO: And there's an argument that, does it make any difference whether it's Safehouse's purpose or a drug user's purpose? In other words, if you look at (a)(2), you would manage or control a place or knowingly and intentionally make available for us a place for Safehouse's purpose of the unlawful use of a controlled substance. In other words, they don't have -- they're not the one using it, but their purpose is to allow someone else to do so. So does it really make a difference as to whose

purpose it is?

MS. EISENSTEIN: Well, Your Honor, I think in either event, we have strong arguments that we win, but I think that the operative actor in question in each -- whether you're looking under (a)(1) or (a)(2) is Safehouse. And so let me explain why.

And I think this is -- the question of whose purpose controls it, I know, has been a real question that has plagued the courts because of the multi-layered features of the statutes.

Let me start with (a)(1); (a)(1) - I think we are in agreement with Mr. McSwain that (a)(1), the actor is typically the operator of the property. When you think about the classic crack house -- crack house scenario, which is the prototypical example that 856 was directed at. It is the person on-site operating the property, and that is the person who had opened, leased, or maintained the premises for the purpose of unlawful drug activity.

But under (a)(2), the operative -- the actor does two things. They manage or control the property, and then they rent it out. They lease it out. They profit from or make available

for use to potentially another operator for -- and then there's a series of gerundive of phrases that follow, all of the drug activities that follow.

There are potentially three sets of actors in (a)(2). The statute contemplates that there may be any number of third parties who may be visitors to the site or to the premises. What they're concerned about in each case are the people who control and who own property. This is a statute about the use of property, not about the visitors who may come and go to the property.

JUDGE BIBAS: Okay. So no dispute, (a)(1), the verbs in there don't require the existence of a third party. A sole person can violate (a)(1), whereas (a)(2) has a number of terms that envision there are going to be multiple people involved.

Before we get to parsing (a)(2) and the relevance of the third party's intent, let's assume we agree with you, and it's -- we're going to be focusing on Safehouse's own purpose here. I wonder why that isn't satisfied here. I'm looking at your stipulation of fact, paragraph 22, Appendix 685. "Safehouse believes that

supervised consumption aids potential treatment in that its participants are more likely to engage in counseling and accept offers of medical care after they've consumed drugs or not experiencing withdrawal symptoms."

Now, your response is, "Our purpose is to ultimately lower use of drugs," but maybe in the long-term you want that. But the proximate means you're going to use is to have a purpose of drawing people in to use drugs here so the hope is they won't repeat it as much.

I don't see anything in the law that forbids having multiple purposes, and if you -- I don't think you're arguing you can't have more than one significant purpose. So why shouldn't we read this as one of your purposes is have people use drugs here so that you can then help them so they don't do it too many more times?

(PART A)

MS. EISENSTEIN: Your Honor, I want to say two things about that aspect of the stipulation of fact. First, I think that is one facet, which is the susceptibility or the greater susceptibility to treatment of people suffering from addiction at the time when they're not

actively in withdrawal. But that -- that really is a secondary purpose. The urgent need for Safehouse is the overdose crisis that we are facing.

JUDGE BIBAS: Okay.

MS. EISENSTEIN: It is the imminent and -- contrary to Mr. McSwain's argument, the necessary precondition of Safehouse's existence is consumption. The necessary precondition of Safehouse's existence is the overdose crisis, whereby people are dying --

JUDGE BIBAS: And let me go into that. And let me grant you -- maybe it's not a necessary precondition. He may have over -- overstated it or -- but even if he did, you're not disputing that you can have multiple purposes. Most criminal statutes can be violated by someone who has several purposes, at least if they're significant purposes. You don't -- you don't take issue with the district court on that?

MS. EISENSTEIN: I don't, Your Honor. I think that there can be multiple purposes, but particularly when it comes to use cases -- and this is just even in a residential context -- prior to this type of unique medical and public

health crisis that we are in today, whereby someone can face rapid death by virtue of their addiction without close proximity to medical care. But even before that time, Courts had treated unlawful use cases with caution and had required a primary or significant purpose to be --

JUDGE BIBAS: Okay.

MS. EISENSTEIN: -- to be the unlawful drug activity.

JUDGE BIBAS: What I wonder though is whether you are -- you're saying, well, our real purpose is to prevent overdose. And that is a purpose, but it also seems like you're saying, well, that's a benevolent motive. And of course, you know, motive is neither here nor there. You can have a purpose of drawing someone in to use drugs in service of another purpose of preventing overdose deaths, and I don't understand why they're not both significant purposes of yours.

MS. EISENSTEIN: Because you have to look at the nature of the facility and the type of services that Safehouse is providing.

JUDGE BIBAS: You're providing syringes so that people can use them on-site. You're then disposing of the syringes afterwards. This is not

some fluky or accidental thing that's going to happen on Safehouse's premises.

MS. EISENSTEIN: Right.

JUDGE BIBAS: You're providing the equipment, and this is equipment that's not for people, diabetics using insulin. This is for people shooting up heroin. How is that a tangential or arbitrary or fluky or incidental purpose if you're giving them the syringes and taking care of them afterwards?

MS. EISENSTEIN: So, Judge Bibas, I think your example of syringes for diabetics is a very good example because Congress recognized when it passed CARA and in subsequent legislation; the Department of Health and Human Services recognized; the CDC has recognized that addiction is a disease.

And so -- in fact, Congress recognized in the 2016 appropriations bill that syringes and syringe exchange services could be federally funded, precisely because treatment of addiction and those who suffer from addiction and its consequences is part of medical treatment recognized by Congress.

And so providing clean syringes,

providing a sterile location where people can receive treatment for the consequences of addiction -- so this is, in a sense, your example of the diabetic who receives clean syringes. You wouldn't say that someone gives someone clean syringes for the purposes of their diabetes. You would say it's to treat the diabetes, and that's exactly --

The key distinction here for Safehouse compared to some of the other examples that the government has put forth is that the goal of Safehouse is to treat the aftereffects of consumption, which is part and parcel of the disease of addiction that is, in fact, killing unnecessarily our neighbors, our citizens here in Philadelphia.

And so rather than under the current model, a person who receives the syringes at a place like Prevention Point is forced to leave. They are cast out at the very moment when they're at greatest risk of overdose death.

And so Safehouse proposes to allow them to stay in close proximity to Naloxone, to respiratory support, and the kind of medical care that can keep them alive with certainty. So that

is the core purpose of Safehouse. Yes. Is the means by which they're able to provide that care to allow people to consume in their place in close proximity? It is.

But I think Mr. McSwain's argument that the necessary precondition of Safehouse's operations is consumption has it reversed. The problem is that the necessary feature of the disease of addiction is the inability to stop consuming, notwithstanding the grave risk of death and harm to oneself. And Safehouse tries to resolve that problem by keeping the -- allowing people to stay in close proximity to the services that it's offering, which are access to Naloxone, respiratory support, and then indeed, when -- when or if a person stays within the Safehouse walls, to provide the kind of treatment and rehabilitation and access to rehabilitation services.

JUDGE BIBAS: Ms. Eisenstein, maybe we can go to this issue about whether it is a third party's purpose. When I look at (a)(1), you've agreed, there's nothing in (a)(1) that really involves a third party. So the using looks naturally like it's the person who is opening,

leasing, renting, using, or maintaining the place who is using in (a)(1).

MS. EISENSTEIN: Well, directly, I disagree. There are two parties here not -- there are -- there is a third party contemplated in (a)(1) too. The actor is the person who opens, leases, rents, or maintains the property, and then there may be any number of third parties who are engaged in drug distribution activity or use of the properties.

JUDGE BIBAS: Maybe. But it doesn't require it for violation of (a)(1).

MS. EISENSTEIN: It doesn't require it, but contemplate the sort of prototypical example of a crack house. The operator of the crack house may or may not be dealing drugs. The operator of the crack house may or may not be -- they are maintaining the property for the collection of people to potentially use.

JUDGE BIBAS: The verbs -- the verbs "manufacturing, distributing, or using" don't -- don't, on their face, necessitate or call for a third party, even though you could have a third party involved.

MS. EISENSTEIN: They're not verbs.

They're gerundive phrases.

JUDGE BIBAS: Gerundive phrases, okay. But the gerundive phase -- my point is, if I can get onto (a)(2), the gerundive phrase that is being used as a verb, has a verbal use here, you know -- it's the object of the earlier verb -- is using a controlled substance, whereas in (a)(2) the gerundive phrase ends with, you know, "making available" -- knowingly and intentionally -- sorry, the verb "make available for use for the purpose of."

So the purpose in both cases could refer back to use, but in the second one it's one person's making available for some distinct use. That's -- that's -- why isn't that a salient distinction that says (a)(2) is really directed towards third parties in a way that (a)(1) isn't.

MS. EISENSTEIN: So, again, I think (a)(2) involves potential -- again, focus is on the use of property. So there might be two different entities or levels of actors with respect to property. There's the person who manages or controls, which typically (a)(2) -- just think of the landlord scenario -- it's typically the owner or the landlord, someone who

is distant from the property, who then rents it, leases, profits from, makes available for use in the sense of giving control of property.

This isn't -- the term "make available for use" is a really awkward one in this -- in this particular practice.

JUDGE BIBAS: But it is the most salient distinction in the list of the verbs in (a)(2). And so Congress wrote (a)(1) involving using directly, and (a)(2) is making available for use, textually contemplating an additional level of remove in (a)(2) of someone else using.

MS. EISENSTEIN: Right. I agree. And so in the "make available for use" context though, I think you still have to look at it in context of the other words from the statute, which include rent, lease, profit from, all suggesting giving over the control of property.

And so, actually, (a)(2) is really inapposite to Safehouse at all because (a)(2) is not giving over the use of property to anyone. Safehouse will be the operator of the property. Safehouse staff will be the only one providing -- operating its facilities and providing its services.

Yes. There will be invitees who come in and people who are participating, but those people are not the ones who have operative control over the use of property or the purpose of the facility.

And that makes sense because it would be extremely odd for a statute about the intentional knowing and purposeful use of property to depend on the various people who come and go and the reasons that they come and go from the property.

JUDGE BIBAS: Ms. Eisenstein, could we talk about surplusage. I think one of the strongest arguments for the government is it's really hard to come up with examples of conduct that on your reading violates (a)(2) that isn't already criminalized by (a)(1). Please tell me what additional reach (a)(2) has beyond (a)(1).

MS. EISENSTEIN: All right. So the verbs and the actions in the statute are totally different. In (a)(1), it is the person who is maintaining the property, open, leasing, renting. They're the ones using the property.

(a)(2), as I said, typically you think of it as going after the owner or landlord of the property. It's the person who manages or controls

the property and then rents it out, leases it out, profits from, or makes the property --

JUDGE BIBAS: Why wouldn't that person be covered by (a)(1)'s reference to lease or rent? Why couldn't that person be prosecuted under (a)(1) already?

MS. EISENSTEIN: Your Honor, I think, if you look at the way the district court treated those verbs, I think it's very telling. So lease and rent have two different potential meanings.

JUDGE BIBAS: Okay. It could encompass both in (a)(1).

MS. EISENSTEIN: It could be the lessee, or it could be the lessor.

JUDGE BIBAS: Right.

MS. EISENSTEIN: Right. The person who rents it out or the person who rents the property.

JUDGE BIBAS: Okay.

MS. EISENSTEIN: And I think that the better reading of the statute, based on the way in which it's been utilized and developed is that the terms "rent" and "lease" in those two statutes are, generally speaking, referring to two different activities because you're managing and controlling the property as owner, lessee, agent,

employee, occupant, mortgagee. And then rent, lease, profit from, or make available for use. It's an outward baseline verb.

JUDGE BIBAS: Maybe my question wasn't clear. Give me the factual hypo that you submit is not prosecutable under (a)(1) but is prosecutable under (a)(2) on your reading.

MS. EISENSTEIN: I think it's the distant landlord, who is not at the property, who -- who leases the property to a third party with the knowledge and intention that the property is going to be used for the purposes of unlawful drug activity.

JUDGE BIBAS: Let's say that we think that the words "knowingly leased for the purpose of" in (a)(1) cover that activity. Is there any other activity? I mean, you're having to constrict the meaning of the verb "rent." Is there any other activity that is covered by (a)(2) that isn't covered by (a)(1)?

MS. EISENSTEIN: Yes. I think that it's somebody who has that management and control. I mean, look, I think is there overlap? Surely there is. But I think that -- that there is -- the statutes are directed at a different class of

actors. So I think that -- I'm not disputing that there are two classes of actors in (a)(2) -- well, actually, three classes of actors in (a)(2).

I think the difference between Mr. McSwain and our position is, in (a)(2) there are two potential classes of actors - the operator and the third parties.

JUDGE BIBAS: Why did Congress add this in? If Congress did not have (a)(2) in, there would be no reason to constrict the verbs "lease" or "rent" not to reach the landlord, the -- you know, “maintain” would get the property managers. It's just not clear to me why (a)(2) is in there at all on your reading.

MS. EISENSTEIN: Well, I think that -- well, let's just say they didn't lease or rent. Let's just say they made it available for use. So, for example, you are the owner of the apartment, and you just allow your boyfriend to run a crack operation while you're at work. That would be covered by (a)(2), but I would think not by (a)(1) because you haven't been the one who is using it for that purpose, who is maintaining it for that purpose; and you didn't lease or rent it.

So I think that even more informal

arrangements are covered, but still the term "for the purpose of" has to go to the actor. So under either scenario -- and by the way, Chen, which the government relied heavily on, looked at 16 statutes that used the phrase "knowingly for the purpose of," and in each case came to the same conclusion, that the purpose goes to the actor, not -- not to various other third parties who might be downstream.

It's a nonsensical result to have the criminal liability turn on the actions of third parties that are not those of the actor themselves.

And here, I think it's important that Safehouse is not a distant owner. They are the operator.

JUDGE ROTH: Is there any criminal statute that actually makes the intent of a third party an element of the prosecution of the offender?

MS. EISENSTEIN: Your Honor, I'm aware of none.

JUDGE BIBAS: Isn't there commonly Pinkerton liability based on a coconspirator doing something with an intent? You can be liable for

someone else's crime as if you're the principal without having had that intent yourself.

MS. EISENSTEIN: Your Honor, I think that when you talk about a conspiracy, it requires a meeting of the minds and to have a common criminal purpose. So I disagree that -- from a conspiracy under Pinkerton liability hinges on the third party's intent. It requires your own purpose to join in the objects of the conspiracy and sometimes an overt act and further --

JUDGE BIBAS: But if you join knowingly and intentionally, it could be the other person who has the purpose, the purpose of the subsidiary crime.

MS. EISENSTEIN: I don't know that I agree with you, and I think it would be particularly unusual to have a conspiracy involving purpose. So I think some of the Pinkerton liability cases are not ones where purpose is an actual element of the offense. And I think that's really -- not only is it a key distinction, I think that this provides the limiting principle that as your hypotheticals display, that the government was unable to articulate. So in each of your hypotheticals

there were answers like it's a matter of degree, which, by the way, is not consistent with how the government has prosecuted 856, which includes even single-time drug distribution events.

But our interpretation of primary purpose, first of all, going to the actor who manages and controls and operates the property, which is us. And second of all, requiring a significant or primary purpose, effectuates Congress' intent -- if I can, just point you to some of the case law that has discussed that.

So we cite in our briefs the Shetler case, the Verners case, the Lancaster case. And Judge Reinhardt in Shetler noted that Congress' purpose, when it enacted 856 was to target those who use their property to profit from drug sales. And while it's not limited to commercial drug transactions, when it comes to possession cases, the Court held they require evidence beyond manufacture for personal use to sustain a conviction.

In Verners, the Tenth Circuit held the same thing, that the statute is designed to punish those who use their property to run drug businesses. And therefore, those who just

involved pure personal use isn't going to suffice. The same thing was true for every other court to evaluate this, and there's a good reason for it.

JUDGE BIBAS: What about the five Circuits cited by -- by the government here. I mean, don't the Circuits mostly line up on this position that it is, in fact, the third party's purpose?

MS. EISENSTEIN: So in Chen -- in Chen that's a question of whose purpose. I was talking about the question of what purpose, and the requirement that the primary purpose have particular weight when it comes to simple possession, in particular because of the severity of the crime.

So mere possession is a misdemeanor -- misdemeanor. So what is the line by transforming the use of -- the simple use of drugs at a property from a simple misdemeanor into a 20-year felony?

JUDGE BIBAS: Okay. Except under the guidelines, this would be a zero to six months for your -- for Mr. Benitez.

MS. EISENSTEIN: Well, it's not -- that type of differential is significant and one that

the Court looked at in Bond. The Court has looked at in Smalls.

And the prosecution history, I think, is significant, you know, with respect to those issues too, which is that this would be -- the idea of prosecuting a pure use case. Until this declaratory judgment was brought, in 33 years, the government could cite no examples of a simple use case. And so if you look at Bond and Smalls, that is significant.

But let me go back to Your Honor's question about whose purpose because I think these five Circuit cases are worth focusing on.

I do think Chen made a misstep, but it was one that wasn't important to the resolution of the case. Because in Chen, the owner, if you recall, was an owner of a motel that -- where cocaine, the testimony was, could be purchased in every room of the -- of the motel. And indeed, she was encouraging those drug sales in order to enable the drug dealers to supply their rent or their leasing to her.

So --

JUDGE BIBAS: Isn't that analogous here? You're encouraging the use here so that you can

provide the services. It's noneconomic. Maybe that goes to Commerce Clause, maybe not, but people are coming here, not to shoot up their diabetes insulin. They're going to be coming to shoot up heroin and other controlled substances.

MS. EISENSTEIN: So I disagree that we are encouraging them to use. We are encouraging them to use there, to receive medical treatment. And I think that's an extremely important distinction. The only reason why we are permitting people to stay in proximity in the place is for the purpose of giving them sufficient proximity to care for it to be effective.

JUDGE BIBAS: You have the benevolent motive. You have a good purpose. But the -- that purpose is piggybacking on a purpose of having people come in to use drugs so that you can fulfill these other purposes.

MS. EISENSTEIN: Well, you know, I -- I respectfully disagree, because even as to the people who are coming in -- and I want to get back to Chen if -- but let me just make this one point about the people coming in.

Why are they coming to Safehouse instead

of remaining where they are, instead of being in their home, instead of remaining in whatever place they are out on the street?

Mr. McSwain suggests it's because they're more comfortable. But the distinguishing feature of Safehouse is the availability of lifesaving care. People are coming to Safehouse because they don't want to die of addiction, and from the addiction from which they're suffering. Because they suffer from a condition that is compelling them to use drugs notwithstanding the grave risk that they may die.

And Mr. McSwain keeps talking about heroin. Unfortunately, the drug supply in the city is primarily Fentanyl, and Fentanyl can kill someone within minutes, whereas if Naloxone is immediately present and the access to respiratory care, which is what Safehouse is providing, they will survive with medical certainty. That was the testimony of (indiscernible) --

JUDGE AMBRO: The point -- the point here is, you're right. The lives may be saved. And there's a really wonderful motive behind

what Safehouse is doing. But we're -- we're stuck with the words of the statute, and so often, you know, as we've mentioned -- it was mentioned in the argument of Mr. McSwain about Bostock. Or you look at Sedima, which is you know, Congress passes RICO. And the person at the Notre Dame Law School who drafted the statute said that obviously it applied to organized crime.

Fifteen years later, the Supreme Court says, well, it applies to civil RICO even though that was never the intent, because that's what the words say. So we're stuck with the words here.

And when I get to these words, I'm trying to figure out what -- why is "intentionally," the word, "intentionally," in (a)(2) but not in (a)(1)? Let's start with that.

MS. EISENSTEIN: So, Your Honor, the term "intentionally" can have a couple of meanings under criminal law. But generally speaking, the word "intention" can be synonymous with "purpose," but it can also mean the specific intent, the reason for the activity.

And so I think it underscores the idea that purpose is a critical element of the statute.

And contrary -- I absolutely agree that benevolent motive is insufficient, Judge Bibas. But keep in mind that motive and purpose are different, and our purpose is still -- is part of the terms of the statute. It is the -- this is the -- this is the element of the statute. And if you listen to the DOJ and Mr. McSwain's position, they keep reverting back to situations where you know drug activity is occurring. But they fail to, each time, state "for the purpose of." Because actually, 856 is a fairly narrow statute. It's directed at maintaining premises for the purpose of drug activity.

JUDGE BIBAS: Okay, but --

MS. EISENSTEIN: It is directed at the type of locations where drug operations are promoted and where there is -- where the premises are being used to advance drug -- a for-profit drug --

JUDGE BIBAS: But I -- I wonder if there's a connection. So you're -- you're agreeing the "intentionally" has something to do with the -- you've agreed that (a)(2) is

different from (a)(1) in that (a)(2) really is -- is geared towards third parties. Even though (a)(1) could involve some third parties, (a)(2) has a bunch of terms that really are about third parties.

And the other difference in terminology is, (a)(2) has this "intentionally". So might the "intentionally" refer to -- you know, it's being deliberate and not by accident that the other person has the purpose? I mean, the "intentionally" seems to have something to do with the presence of the third parties. And I'm wondering what your read is of what "intentionally," you know, it often means deliberately; it often means absence of mistake or accident. How is "intentionally" doing work in (a)(2) here, that explains its presence there?

MS. EISENSTEIN: I think it's a question of specific intent, and I think it underscores the point that we're making about purpose. But I do want to talk to -- to your point about Chen and these other cases. Because I think when we talk about the -- the scenario in Chen, it highlights the three levels that are present in (a)(2).

The motel operator was the manager and controller. She was giving the use of the rooms to drug -- drug traffickers. And then there was a third group of people, the people coming and going to purchase drugs from the facility. They were not the operative -- their purpose in coming and going was not the operative question, right.

So even though I think Chen made a misstep, actually it was not necessary for Chen because of the nature of the activity going on in the rooms and the people operating it, and because there was in fact three roles by three different people.

A difference here is, Safehouse is not making available for use its facility in the operative sense of the word, in the sense of giving over, relinquishing dominion and control of its facility, to any third parties. The people who are coming -- let me use an example.

If you have an emergency room, you wouldn't say that you make the emergency room available for use for the patients. An emergency room, a hospital makes the emergency room available to the doctors who have admitting privileges to treat the patients who come in when

they have an emergency. So I think that turn of phrase, "make available for use," you have to look at with respect to the -- the concept of 856, which is -- which is focused on the control over property. And also --

JUDGE AMBRO: But -- but might it not be as simple as this? Intentionally make available for use a place for the purpose of persons coming in and using a controlled substance illegally. Just simple as that.

MS. EISENSTEIN: But I think if that were the interpretation of the statute, Your Honor, then Mr. McSwain's answers to the hypotheticals about the parent who allowed their child to come use at their residence, or the storage facility where someone was using there, would be different. So I think that in order to resolve and to provide a limiting principle where a homeless shelter who allowed people who use drugs to -- to use in their -- in their houses, or a parent who allowed their child to use in front of them, would have to be resolved differently if that were the case.

But since Mr. McSwain acknowledged --

JUDGE AMBRO: As your -- as your -- as

the great Ed Becker, your former judge you clerked for would say, that's the next case.

MS. EISENSTEIN: Well, it's not the next case, because -- because, Your Honor, this is not a hypothetical. I don't think that the obligation of medical practitioners to their patients, the obligation of social service providers to those that they care for, is any different than allowing those in their care to stay right in front of them so that they can provide care, instead of the current situation which is being forced to put people out into the street. Literally that is what happens today, where they're out of the reach of care.

JUDGE BIBAS: Ms. Eisenstein, I don't know if my colleagues want to stay on the statute but I do want to make sure we talk a little bit about the Commerce Clause. When Gonzales versus Raich, which is the most recent and maybe most apposite precedent, defines economic opportunity as production, distribution, consumption of commodities, isn't this consumption of commodities -- how is -- how is Safehouse's conduct not economic?

MS. EISENSTEIN: Yes. So I think that

the key part, it goes back to the use of property. So this -- this is not a statute about consumption. The activity is not about consumption. It is about the maintenance and use of property. And that is entirely local. It is local and noneconomic. And so it's --

JUDGE AMBRO: But to make --

MS. EISENSTEIN: -- as Your Honor had --

JUDGE AMBRO: -- but the maintenance and use the property for, among many other things, people coming in from Philadelphia, okay -- that -- intrastate. People coming in from New Jersey, not. People coming in from Delaware, not. Getting Fentanyl strips wherever they come from, across state lines. I mean, this seems to be almost quintessential interstate as opposed to intrastate. And even if it is intrastate, you've got Raich.

MS. EISENSTEIN: So let me say something about the intrastate. There's no jurisdictional element to the statute. Drug use is not an economic activity. In fact, Congress specifically excluded drug use when it was making its findings. It made findings more in -- with respect to possession.

JUDGE BIBAS: Except that the findings in the CSA, 801, you know, 3(C), 4, and 5, and 6 in the footnote 20 I think of Raich, talks about the ways in which interstate drug possession is tied to interstate commerce. Why -- you know, there aren't findings in this statute, but can't the government piggyback on those -- on those findings? I mean, I think your response is, well, this isn't about money. But in Raich, both of the -- the challengers to the law, one of them was growing for her own use. The other one was getting it for free. That was no more economic than this use.

MS. EISENSTEIN: The other, I think -- in this respect (indiscernible) --

JUDGE BIBAS: You're fading out.

MS. EISENSTEIN: Okay. So this (indiscernible) --

JUDGE ROTH: I -- I can't hear at all.

JUDGE BIBAS: Okay.

MS. EISENSTEIN: Can you hear me now?

JUDGE BIBAS: That's better.

JUDGE AMBRO: Now you're great.

MS. EISENSTEIN: Okay. So -- so this goes back to the purpose as well. They're --

it's a concept of whether or not Safehouse, which is providing the medical services that it provides, facilitates drug use or drug possession in any way above and beyond what is already contemplated by Congress and the rest of the federal scheme. So we talked about clean syringes as being something that's federally permissible and --

JUDGE BIBAS: Is there anything that carves clean syringes out of the criminal law?

MS. EISENSTEIN: Yes.

JUDGE BIBAS: Where?

MS. EISENSTEIN: Congress has -- Congress has appropriated funds -- first of all, it's not -- it's not --

JUDGE BIBAS: That's an appropriations bill. Give me a citation to a criminal law that carves out syringe exchange.

MS. EISENSTEIN: The entire CSA is specific about what it prohibits. And it does not prohibit provision of clean syringes or consumption --

JUDGE BIBAS: Okay. Cite -- if you do have a citation as to why that's not aiding and abetting.

MS. EISENSTEIN: (Indiscernible) is that criminal law doesn't default to criminalization. It defaults to legality. So unless it's strictly prohibited, it's permitted. And in fact, Congress in the 2016 appropriations act, in Section -- I believe it's 518, actually allowed for federal funding of clean syringe programs.

So I think it's clear that clean syringes are permitted. And it is clear that all of the other activities -- (indiscernible) Narcan is -- Narcan and Naloxone are federally funded and permitted under the CARA, the Comprehensive Addiction and Reform Act. And so you're allowed to -- so the activities that Safehouse is doing is not facilitating drug use in any way above and beyond what Congress contemplates in the necessary activities to treat the disease of addiction.

And yet -- so that goes back to your Commerce Clause argument, Your Honor. Because here, the use of the property is not promoting or facilitating or enabling the possession. The possession can be illegal, and no one is saying it's not. No one is saying that it is somehow permissible under federal law to possess drugs

that are otherwise unlawful or prohibited under 844. The question is not whether the participants violate that law by walking in with a small personal-use quantity of drugs that they obtained elsewhere, in order to obtain medical care in the event they need it.

So -- so there is no facilitation of that possession and therefore the use of property for a medical purpose -- and I think you can look at Oregon and Gonzales -- versus Gonzales for this, that the presumption is not that Congress seeks to regulate the practice of medicine. Quite the opposite, unless the controlled substances say so.

And I think Jones is really the better case than Raich to look at. Jones was the arson, dealt with the arson statute. And -- and it said, "hardly a building in the land would fall outside the federal statute's domain," if that arson statute were read as broadly as the federal government suggested. And the --

JUDGE BIBAS: What -- what about Wickard?

MS. EISENSTEIN: -- same is absolutely true here.

JUDGE BIBAS: What about Wickard? Wickard said, you know, growing grain for yourself, no money exchange, feeding it to your own animals, winds up affecting the market.

MS. EISENSTEIN: Right. So that's possession, and -- right. I agree, home-grown wheat in Raich is about possession. But this is about the use of property, not about possession. And that's why I think Jones, not Raich, is the better reading.

And as Your Honor pointed out in the questions, Judge Bibas, the -- the use here, which -- which lacks the limiting or economic or commercial linkage to the activities that Safehouse is engaged in, is determinative. There's certainly no jurisdictional element that involves some kind of interstate commerce.

So I think in terms of constitutional avoidance, certainly the federalism principles suggest that regulating local use of property to provide medical care in a noncommercial way to people who have merely possessing drugs and using them, something that Congress made no findings on, suggests that our reading of the statute is the superior reading.

JUDGE AMBRO: Let me see if I understand Raich. Was Raich (indiscernible) that the marijuana use was intrastate, and therefore it was not a -- it does not implicate the Commerce Clause? Is that correct?

MS. EISENSTEIN: Yes, Your Honor, it was homegrown marijuana, because it found that the market -- much like Wickard versus Filburn -- found that the market for, whether it's intrastate or home-grown, was promoting the market. If you're using and possessing and growing it locally, it's still promoting the market, in effect, in the interstate market.

But that same can't be true for a facility that doesn't in any way promote or facilitate even the possession, but rather just provides care and treatment for people who are using.

JUDGE AMBRO: But when you -- but when you go back, and I go back way before -- before you do -- but when I was in law school, we always were taught that Wickard was the high water mark of interstate commerce, and is sort of parked in the corner like the relative at Thanksgiving. You just put him in the corner and leave him

alone, don't touch it.

And then you see this case in '05, which brings it out front and center. And when you do that, and it talks about Congress expressly found that the drug has no acceptable medical uses -- uses -- and if -- so any purpose, even this intrastate facility, it implicates the Commerce Clause. How do I get around that?

MS. EISENSTEIN: Well, actually, Raich was really about the Necessary and Proper Clause. I mean, it did look at Wickard and brought that front and center, but it found that it was also necessary and proper to the overall scheme in order to do that -- basically you couldn't distinguish the homegrown possession from the rest, and that it -- as well as the cumulative effect.

The same was its kind of findings were not made with respect to 856, which, by the way, was enacted separately from the rest of the Controlled Substances Act.

JUDGE AMBRO: So that -- that leads to this question. If it's necessary and proper that you enforce 856(a)(2), the consequence of not doing so, one could argue in this case, is that

so many other entities or persons would come out and say, my purpose is not to have some type of illegal drug use. My purpose is, as Safehouse says, to make sure that anybody who really has an addiction is safe. My purpose is to make sure that people are off the street. My purpose is to be sure that the -- the safety of Downtown Philadelphia, or South Philly, is protected by having these people off the streets. Who knows?

And then when you get those, you start getting into policy. And that's why I keep coming back to the words of the statute, because the one thing that's sort of drilled into us is not to get involved in policy.

MS. EISENSTEIN: So, Your Honor, I think that the policy that is -- you know, I don't agree that this is about policy. I think the courts have uniformly treated with caution cases involving just mere possession and mere personal use, inside of any facility that's not an overt crack house or something that is directed at commercial drug operations. Because the reverse is going to be true, Your Honor, which is, how will you limit the government from prosecuting every mother and father who tries to treat their

child? How are you going to stop the government from prosecuting the homeless shelter that allows people who -- to use or even directs their activities towards people suffering from addiction, and doesn't, knowing that they would use and are using in the facility. And that's the Housing First program, that by federal policy -- federal policy, this is HUD's own regulations and guidance -- say that someone should not be evicted from a federally-funded HUD facility even if you know they are using drugs within it.

So the -- the fact that --

JUDGE BIBAS: So maybe that's a -- maybe --

MS. EISENSTEIN: -- it's occurring --

JUDGE BIBAS: -- maybe that's a reason to worry about the word, "intentionally." But maybe -- maybe Mr. McSwain, you know, bites that bullet and says, “Yeah. Maybe they could all be prosecuted and it's a matter of prosecutorial discretion.” I mean, I guess the question is, what's the ambiguity in the text that makes it at least ambiguous such that the text tells us to construe it narrowly? Because I -- I don't understand that you know, just because something

was said in the legislative history that we would -- or because it's bad policy that we would narrow it.

MS. EISENSTEIN: I don't -- I'm not saying that, Your Honor. I think --

JUDGE BIBAS: What's the phrase in the text that you think get -- narrows it?

MS. EISENSTEIN: I do think -- ambiguous -- I actually don't think it's ambiguous, because the text makes perfectly clear that the purpose of the actor, the person maintaining the property, is an essential element of the statute. That's exactly the piece of the statute that the DOJ repeatedly ignores in their arguments. And in fact, the very first page of the summary of their argument says that if a person knows drug use is occurring, according to DOJ, that's sufficient for prosecution.

No. Congress, right there in the statute, limited 856. They did not intend 856 to be this kind of broad-scale regulation of any property where drug use occurs. It requires that the purpose of the property be for drug activity, for unlawful drug activity. And when it comes to simple possession, courts have -- give that

primary purpose, and significant purpose test real weight.

So for example, I mean, the D.C. Circuit stated that Section 856 cannot be reasonably construed to criminalize simple consumption of drugs in one's home. That is the uniform view. In Russell, the Sixth Circuit said each court to have addressed the issue has found the same way. That was in 2010. The Seventh Circuit in Church came to the same conclusion. Congress intended to create a distinct offense aimed specifically at criminalizing the use of property for narcotics-related purposes.

So when you look at Safehouse -- and I think Judge Roth's question to Mr. McSwain about, you have to look at the side of the room where Safehouse's staff and facility are operating. Mr. McSwain wants you to focus on the users. But you have to focus on the actor, which is the person maintaining the property and the collection of services, and the nature of the facility. This is a medical facility, and so Judge Ambro, to address your concern, of course there will be cynical people out there who will try to disclaim that their purpose was to -- to -

- to promote drug use. They may say a whole range of excuses.

Well, that is a common occurrence in criminal law when someone says they don't have the mens rea sufficient for the statute. That is a question of evidence and proof. And here, we have stipulated facts and we have really a lack of dispute on the part of the parties that Safehouse's -- Safehouse's purpose is, one, to provide lifesaving care to people suffering from the disease of addiction, not --

JUDGE ROTH: Let me ask you a question. If -- excuse me. If Safehouse could only have the consumption room without the other facilities that are part of Safehouse, would they open just a consumption room?

MS. EISENSTEIN: So, Your Honor, I think -- I think not, because I think it's the -- because Safehouse is a not only medical but public-health-driven approach to overdose prevention services, which is -- which is informed by the -- the medical experts and public health experts who have helped form it. So keep in mind, Safehouse didn't come -- wasn't an idea out of nowhere. This was an idea -- this was a -

- this is a concept that has been in existence for 30 years. It's been studied extensively, and it came out of specific recommendations of experts in the field who -- who believe that the collection of services is what makes Safehouse an effective intervention.

But even if it were, when you talk about the consumption room, what is going on there? There are -- yes, there are people who may be using drugs, but for what reason? Because they want to stay alive. Because they are suffering from a disease that is compelling them to use the substance that may kill them, and they want to stay right where care is available.

Think about an emergency room, where someone came in with an imminent heart attack. And if the doctor said to them, "Sit right there in the waiting room and in case you have a heart attack I'll be right there to help you," you wouldn't say the waiting room was for the purpose of having a heart attack. You would say it was for the purpose of being proximate to the emergency care.

And the same is true here, but the purpose of the participants and the purpose of

Safehouse is to provide that urgently-needed care if someone were to overdose, stop breathing, and need rescue medication.

So -- so I think that when you look at -- you know, even the consumption room in a vacuum, I think that there's still a strong and valid argument that the purpose of it is for that lifesaving care, not for consumption.

And I just want to say one more thing about a matter of degree, which is, you know, Mr. McSwain argued that if there was one kid in the house who came there to shoot up so the parents could observe them, that would be okay. And maybe two. Well, that doesn't really answer the question for Safehouse.

If we had a facility that only had room for one person, we would do it, because one life is worth saving. And so if it were one person at a time, then fine. We will -- we will do it one person at a time. But I submit to you that that is not how the statute -- what the statute turns on when it comes to defining and examining the primary purpose of the facility.

This is a public health and medical intervention designed to mitigate the severe

harms of opioid addiction, not in any way the type of facility that was contemplated by Congress when they passed Section 856, which are predatory activities that try to promote for-profit drug operations.

JUDGE AMBRO: Thank you. Thank you very much. Any further questions from my colleagues?

JUDGE ROTH: No.

JUDGE AMBRO: Okay. Thank you. That was almost 48 minutes.

Mr. McSwain, we're going to keep you to your five minutes, no more.

MR. MCSWAIN: Thank you, Your Honor. I'll be brief.

Actually, something that you said really struck me when you were talking about how this is a statutory interpretation case. You have to look at the words of the statute.

And what I heard in Safehouse's argument, which I think is consistent with what they've been saying throughout this case, is they are making policy arguments. They are talking about what they consider to be an emergency. They are talking about the need for overdose prevention. They are talking about, for example,

that you can die if you take Fentanyl within just a few minutes.

I don't disagree with any of that. And what we tried to be clear about throughout this case is that we're on the same side of Safehouse in that we're very concerned about the opioid epidemic, and trying to do everything we can to -- to fight back against that and to save people's lives as well. But it has to be done within the bounds of the law. And all those arguments that I hear about emergency and the like, it's all about the urgency. It has nothing to do -- it has nothing to do with the words of the statute. It has nothing to do with interpreting the language. And I don't think I'm being cynical by saying that. I think I'm doing my duty by saying that.

And when you look at the words of the statute, there's no way to interpret (a)(1) and (a)(2) the way Safehouse wants to, in a way that makes any sense. They just completely overlap. It leads to all sorts of absurdities.

Again, my example of the crack dealer who could say, "I'm doing this because I want to make money." Under Safehouse's reading, that

crack dealer goes free under the statute. That doesn't make any sense.

On the point about, can you have a third party's intent matter under criminal statute? I mean, the answer to that is absolutely. I mean, think about the example of conspiracy. You need to have a meeting of the minds. If you don't have a meeting of the minds, then -- and you need both parties to be thinking of something to -- or the two, the defendant and a third party be thinking the same, having a meeting of the minds, there's not going to be any liability.

You could also think of victims of crime. There's all sorts of crimes that don't become crimes if the third party, the victim, doesn't have the right mental state. If somebody consents to something, for example, it's all sorts of economic crimes. There's all sorts of sexual crimes. It wouldn't be crimes, depending on the mental state of somebody other than the defendant.

Another point I want to make is about this idea of necessary precondition. If Safehouse doesn't like those words, or if the Court doesn't like those words, then another way

to think of it instead of "necessary precondition" is "defining characteristic." It is a fact that the defining characteristic of Safehouse is the consumption room. That's just -- that's just undisputed. There's no reason that Safehouse would exist without the consumption room. Again, everything that they are planning on doing already exists at Prevention Point except for -- except for the consumption.

And then lastly, I would say, you know, what work is the word "intentionally" doing? That's come up a lot. Judge Ambro, you've been focusing on that. And I think it does do some work, but I think we don't need to overthink it.

Like you described, it could be that -- that it's -- it means that the person who is managing or controlling the place, Safehouse, does something intentionally. They intentionally rent, lease, or make available for use -- because you were talking about a third party -- the place for the third party's purpose of -- of drug use. And they do that knowingly. So, "knowing" does work as well.

So I think that "intentionally" does do work in the statute under the -- under the

reading that we are putting forth.

And one final point -- and I'm at four minutes so I'll try to finish up quickly -- is, these hypos are all very interesting and they're all very important. And I think I do have a reasonable answer for all of them. I certainly did my best to deal with them. But as Judge Ambro said, that's not this case, okay. This case is not a hypo where you have somebody in a home, one person doing drugs. And also, I don't think it's realistic to say that Safehouse is just going to serve one person. You know, that's not at all what we're talking about. That's not the factual record that you're talking about.

Safehouse is inviting scores of people to come into one place, one piece of real estate, and to -- to inject themselves with heroin or fentanyl or what-have-you. And that, in our view, is illegal.

Thank you very much.

JUDGE AMBRO: Thank you very much. I would ask that a transcript be prepared of this oral argument and split the cost, if you would. And -- or actually, would the government mind picking up the costs for the transcript?

MR. MCSWAIN: That would be fine, Your Honor. Happy to do that.

JUDGE AMBRO: Okay. We'll just have the government do that.

It's -- both of you make me feel old. I remember when both of you were clerks, and it didn't seem that long ago. And -- but you -- as they say in South Philly, you done good, both of you. And thank you very much for extremely-well-presented arguments. We'll take the matter under advisement. And again, you have our appreciation.

(HEARING CONCLUDED)

CERTIFICATE OF TRANSCRIPTIONIST

I certify that the foregoing is a true and accurate transcript of the digital recording provided to me in this matter.

I do further certify that I am neither a relative, nor employee, nor attorney of any of the parties to this action, and that I am not financially interested in the action.

Julie Thompson, CET-1036

No. 20–1422

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

v.

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

SAFEHOUSE, a Pennsylvania nonprofit corporation, *Appellee*,

v.

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

SUBMISSION OF TRANSCRIPT
AND CERTIFICATION OF ACCURACY

On behalf of all parties in Case No. 20-1422, undersigned Liaison Counsel certifies that the attached is an accurate transcript of the audio recording of the oral argument held before this Court on November 16, 2020, in the above-captioned matter. I have also caused three copies of the transcript to be delivered to the Clerk of Court via hand delivery.

Respectfully submitted,

WILLIAM M. McSWAIN
United States Attorney

/s/ Erin E. Lindgren
ERIN E. LINDGREN
Assistant United States Attorney

Dated: November 30, 2020

CERTIFICATE OF SERVICE

I certify that on November 30, 2020, I electronically filed the foregoing transcript with the Clerk of this Court using the appellate CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

I further certify that I have caused three copies of the transcript to be hand delivered to the Clerk of Court.

/s/ Erin E. Lindgren
ERIN E. LINDGREN
Assistant United States Attorney

Dated: November 30, 2020

CERTIFICATE OF SERVICE

I, Ilana H. Eisenstein, hereby certify that on February 26, 2021, the foregoing was filed with the Clerk of the Court of the United States Court of Appeals for the Third Circuit using the appellate CM/ECF System. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF System.

/s/ Ilana H. Eisenstein