

**No. 20-1422**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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UNITED STATES OF AMERICA, *Appellant*,

*v.*

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

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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*.

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**TRANSCRIPT OF NOVEMBER 16, 2020 ORAL ARGUMENT**

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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

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**ORAL ARGUMENT-11/16/20**

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1 MONDAY, NOVEMBER 16, 2020

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

6 Mr. McSwain, whenever you're ready.

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

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

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

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

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

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

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

22 JUDGE AMBRO: Look at the words of the  
23 statute.

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

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

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

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

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

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

3 Let's say a landlord knows his tenant is  
4 regularly doing drugs in -- in his house, in the  
5 basement apartment or something like that. Is  
6 856(a)(2) going to cover that? He's -- he knows  
7 it's going on. He's collecting rent as a result  
8 of it. The -- the tenant is using the basement  
9 apartment in order to shoot up. Is that  
10 criminalized by this provision?

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

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



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1 to be covered?

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

11 JUDGE ROTH: Okay. Let me --

12 MR. MCSWAIN: -- shooting up.

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

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

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1 consumption room, because if you look at --

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

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

9 JUDGE ROTH: Right --

10 MR. MCSWAIN: -- the sister  
11 organization.

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

18 MR. MCSWAIN: I think yes, you do.

19 JUDGE ROTH: Okay.

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

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

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

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

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

25 JUDGE BIBAS: How does that fit with the

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1 -- the "the," in the text?

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

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

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

25 MR. MCSWAIN: I would respond to that in

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

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

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

12 JUDGE ROTH: No.

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

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

25 JUDGE ROTH: Well, if -- if you are

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

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

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

10 JUDGE ROTH: Illegally use --

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

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

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

18 JUDGE ROTH: Okay.

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

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

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

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

3 JUDGE ROTH: Okay --

4 MR. MCSWAIN: -- invariably.

5 JUDGE ROTH: But -- but that is  
6 interpreting -- that you've got to admit that  
7 under the statute there is no unlawful use. In -  
8 -

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

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

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

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

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

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

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

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

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

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

14 JUDGE BIBAS: Okay.

15 MR. MCSWAIN: -- I would concede that.

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

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

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

24 JUDGE AMBRO: Like in Raich.

25 JUDGE BIBAS: Uh-huh (affirmative). Not



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1 necessary, but sufficient.

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

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

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

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

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

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

15 MR. MCSWAIN: Absolutely.

16 JUDGE BIBAS: Explain.

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

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

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

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

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

25 MR. MCSWAIN: I think -- I think the

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

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

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

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1 law?

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

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

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

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

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1 you go after the bank under this?

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

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

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

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

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

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

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

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

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

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

24 JUDGE AMBRO: Really? Really.

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

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1 that -- this version is not --

2 JUDGE ROTH: (Indiscernible)

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

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

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



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1 think it means.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 JUDGE AMBRO: All right.

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

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

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

15 JUDGE ROTH: Safehouse employees do not  
16 inject drugs.

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

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

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

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

17 JUDGE AMBRO: Because -- because?

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

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

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

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

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

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

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

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

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1 trigger liability. Again --

2 JUDGE BIBAS: Why not?

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

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

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

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



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

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

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

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

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

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

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

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

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

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1 have over for drugs?

2 MR. MCSWAIN: I think that's --

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

4 MR. MCSWAIN: I think -- we did address  
5 this in our brief in a footnote about the hypo of  
6 the child in the parent's home. I think the word  
7 "intentionally" is what is a check on the  
8 statute, where incidental uses -- incidental uses  
9 that are not the primary use. The child is  
10 living in the home, and it's incidental that he's  
11 --

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

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

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

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

3 (Cross talk)

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

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

22 So that example --

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

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1 picking the words that we're faithful to.

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

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

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

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

14 JUDGE ROTH: Yeah.

15 MR. MCSWAIN: -- in our briefs.

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

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

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1 different places.

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

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

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

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

25 I guess, theoretically, it's possible to

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

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

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

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

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1 about here because then it would be a place.

2 You can't -- I don't think you can be  
3 cute and get around the statute by loading your  
4 RV up with heroin and then parking it outside --  
5 or parking in one particular place and having  
6 concentrated drug activity around it.

7 Theoretically, that might -- that might violate  
8 the words of the statute, but I think that that  
9 would be a very different case than this is the  
10 point that I want to make.

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

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

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



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

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

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

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

25 JUDGE AMBRO: Yeah. Go ahead. I think

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1 Judge Roth had a question.

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

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

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

7 JUDGE AMBRO: Okay. Judge Bibas, go  
8 ahead.

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

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

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

25 They've said broadly that use of illegal

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

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

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

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

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

3 Because think about what Safehouse is  
4 actually proposing. They're proposing that, you  
5 know, citywide and even outside the city, that  
6 people come to this location and use drugs. And  
7 they're trying to make it as convenient and  
8 accessible and, frankly, as comfortable as  
9 possible for people. And that is going to have  
10 an effect on interstate commerce because that is  
11 going to have an effect on the drug market. And  
12 --

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

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

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

5 JUDGE ROTH: Isn't that --

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

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

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

13 JUDGE ROTH: Yeah.

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

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

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

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1 findings on this when it comes to injection  
2 sites.

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

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

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

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

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

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

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

15 JUDGE BIBAS: Right.

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

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

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

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

6 JUDGE ROTH: For use as opposed to  
7 possession?

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

11 JUDGE ROTH: Possess, right.

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

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

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

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



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

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

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

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

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

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

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

16          MR. MCSWAIN: Thank you.

17          JUDGE AMBRO: We had you up for 47  
18          minutes.

19          MR. MCSWAIN: It felt like 5 minutes.

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

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

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

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

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

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

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

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1 purpose it is?

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

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

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

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

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

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

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

19           Before we get to parsing (a)(2) and the  
20 relevance of the third party's intent, let's  
21 assume we agree with you, and it's -- we're going  
22 to be focusing on Safehouse's own purpose here.  
23 I wonder why that isn't satisfied here. I'm  
24 looking at your stipulation of fact, paragraph  
25 22, Appendix 685. "Safehouse believes that

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

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

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

19 (PART A)

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

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

5 JUDGE BIBAS: Okay.

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

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

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

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

7 JUDGE BIBAS: Okay.

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

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

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

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



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

3 MS. EISENSTEIN: Right.

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

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

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

25 And so providing clean syringes,

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. EISENSTEIN: They're not verbs.

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1 They're gerundive phrases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 JUDGE BIBAS: Right.

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

18 JUDGE BIBAS: Okay.

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



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

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

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

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

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

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

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

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

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

25 So I think that even more informal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 So --

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

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

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

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

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

25 Why are they coming to Safehouse instead



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

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

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

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

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

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

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

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

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

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

16 JUDGE BIBAS: Okay, but --

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

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

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

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

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

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

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

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

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

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1 they have an emergency. So I think that turn of  
2 phrase, "make available for use," you have to  
3 look at with respect to the -- the concept of  
4 856, which is -- which is focused on the control  
5 over property. And also --

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

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

24 But since Mr. McSwain acknowledged --

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

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

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

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

25 MS. EISENSTEIN: Yes. So I think that

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

7 JUDGE AMBRO: But to make --

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

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

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



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

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

16 JUDGE BIBAS: You're fading out.

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

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

20 JUDGE BIBAS: Okay.

21 MS. EISENSTEIN: Can you hear me now?

22 JUDGE BIBAS: That's better.

23 JUDGE AMBRO: Now you're great.

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

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

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

11 MS. EISENSTEIN: Yes.

12 JUDGE BIBAS: Where?

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

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

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

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

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

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

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

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

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

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

22 JUDGE BIBAS: What -- what about  
23 Wickard?

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

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

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

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

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

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

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

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

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

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1 alone, don't touch it.

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

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

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

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

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

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

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



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

12 So the -- the fact that --

13 JUDGE BIBAS: So maybe that's a -- maybe  
14 --

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

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

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

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

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

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

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

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1 primary purpose, and significant purpose test  
2 real weight.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 JUDGE ROTH: No.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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1 reading that we are putting forth.

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

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

20 Thank you very much.

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

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

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

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

13 (HEARING CONCLUDED)

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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**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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UNITED STATES OF AMERICA, *Appellant*,

*v.*

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

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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*

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**SUBMISSION OF TRANSCRIPT  
AND CERTIFICATION OF ACCURACY**

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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