

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, . Case No. 2:19-cv-00519-GAM
 .
Plaintiff, .
 . U.S. Courthouse
v. . 601 Market Street
 . Philadelphia, PA 19106
SAFEHOUSE, et al., .
 .
Defendant. .
 . September 5, 2019
 . 1:08 p.m.
.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE HONORABLE GERALD A. McHUGH
UNITED STATES DISTRICT JUDGE

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1 THE COURT: This is the United States of America v.
2 Safehouse, et al. Civil matter 19-519. And would counsel
3 please identify themselves for the record.

4 MR. MCSWAIN: Good afternoon, Your Honor, Bill
5 McSwain of the United States. I have with me Greg David, Erin
6 Lindgren and Bryan Hughes.

7 THE COURT: Counsel.

8 MS. EISENSTEIN: Good afternoon, Your Honor. Ilana
9 Eisenstein on behalf of Safehouse and Jose Benitez. I have
10 with me Ronda Goldfein, Megan Krebs, (inaudible) and the
11 remainder of the Safehouse litigation team.

12 THE COURT: All right, counsel. I thought I would
13 begin today's proceeding with sort of a review of what I said
14 at the last proceeding, which is to say that what's pending
15 before this Court is a fairly narrow and technical legal issue.
16 And that is the application of a federal criminal statute to a
17 particular course of conduct. The issue before me is not
18 whether it's good public policy. The issue before is not
19 whether it's good public health. This is certainly not a
20 zoning issue. And where I am to decide where such a facility
21 should be if it were lawful. My job here is to apply a statute
22 to a set of facts. We had an evidentiary hearing earlier, and
23 most of that hearing addressed these broader questions of
24 public policy and public health. In fact, it overwhelmingly
25 addressed those issues, rather than the narrow statutory issue

1 that's in front of the Court.

2 And I think for purposes of public debate, perhaps
3 that's a useful exercise. For purposes of the issue before me,
4 I've concluded that no testimony of any witness should be
5 considered in resolving this motion, because it is a motion for
6 a judgment on the pleadings. And for the nonlawyers present,
7 what that means is the government has filed a case and made
8 certain allegations.

9 Safehouse has answered and made certain allegations.

10 And I'm being asked to accept all of those facts as true. No
11 dispute as to the facts without having evidence or having a
12 trial, and then make a legal ruling based upon the stipulated
13 facts of the parties. And so, for these purposes, I will not
14 consider the testimony at the hearing. Although certainly I
15 got some flavor of the arguments from the hearing. I'd
16 mentioned to counsel when we had a recent discussion, that they
17 should assume the Court would be well-versed in the statute and
18 the applicable legal principles.

19 In fact, I think a lot of what I want to do today,
20 counsel, is to discuss with you questions that have occurred to
21 us, and issues that we think are potentially relevant or
22 important, cautioning everyone not to try to read anything too
23 much into any particular line of inquiry, or any particular
24 question that have occurred to us, and issues that we think are
25 potentially relevant or important, cautioning everyone not to

1 try to read anything too much into any particular line of
2 inquiry, or any particular question. And those lawyers in the
3 room all know how difficult it is to ever understand where a
4 case may be going.

5 And if people are saying well, which way is the Judge
6 leaning? Well, the Judge is worried about getting it right.
7 And so, the questions here are questions that are important to
8 me in grappling with the complicated issues in front of me.
9 The government has brought the motion for judgment on the
10 pleadings, and so they have the laboring oar. And so, who's
11 going to argue on behalf of the government?

12 MR. MCSWAIN: I will, Your Honor.

13 THE COURT: All right, Mr. McSwain. You can stay at
14 counsel table if you like or come to the podium. Wherever
15 you're more comfortable, because a lot of what I'm going to be
16 doing today is asking you questions, all right? So, it might
17 make sense to be at counsel table if you're more comfortable
18 there. But, approach the party if you so desire.

19 MR. MCSWAIN: Thank you, Your Honor. I -- I'd prefer
20 the podium.

21 THE COURT: Wherever you're comfortable.

22 MR MCSWAIN: May it please the Court, counsel, Bill
23 McSwain with the United States. Your Honor, in one very
24 important way, everybody involved in this case, I think, is on
25 the same side. We all want to combat the opioid epidemic.

1 Where we differ is on the methods for doing so. Most
2 importantly, for purposes of today's hearing, as Your Honor
3 already indicated, are the legal issues. And we believe that
4 injection sites are forbidden under federal law. And I think
5 you've summed it up perfectly, both in the prior hearing and in
6 your comments before I came to the podium, about it's your job
7 here to apply a statute to the facts. The statute at issue is
8 21 United States Code Section 856(a).

9 THE COURT: I've actually had that made available in
10 the ELMO (ph), Mr. McSwain.

11 MR. MCSWAIN: Terrific.

12 THE COURT: Ms. Hack (ph), would you bring that up,
13 please?

14 MR. MCSWAIN: With your indulgence, Your Honor, when
15 you bring it up, may I go through the words just quickly?

16 THE COURT: For purposes of the record, yes. But
17 then, I'd like to get some of my questions answered.

18 MR. MCSWAIN: Sure. So, 21 United States Code
19 Section 856(a), now on the screen, makes it a crime to either,
20 number one, knowingly open, lease, rent, use or maintain any
21 place, whether permanently or temporarily, for the purpose of
22 manufacturing, distributing or using any controlled substance.
23 Or, number two, manage or control any place, whether
24 permanently or temporarily, either as an owner, lessee, agent,
25 employee, occupant, or mortgagee, and knowingly and

1 intentionally rent, lease, profit from, or make available for
2 use, with or without compensation, the place for the purpose of
3 unlawfully manufacturing, storing, distributing or using a
4 controlled substance. Your Honor, I think the statute is clear
5 that Congress has made a judgment, and I think I can sum that
6 judgment up very simply as don't set up a place to do drugs.

7 THE COURT: Let me ask you this, Mr. McSwain, the
8 statute in question was passed in 1986 and amended in 2003. Is
9 it the position of the government that safe injection sites
10 were in any respect within the contemplation of Congress at
11 either stage?

12 MR. MCSWAIN: Absolutely, yes. Not just injections
13 sites, but any so-called medical use of heroin and other
14 illegal substances. That's because the statute expressly says
15 there's no medical use of heroine, there can be no
16 prescriptions for heroine, nobody anywhere anyhow is allowed to
17 use heroine under the law. So if I, for example, had a time
18 machine, and I went back to that time that Congress passed the
19 statute. And I said, hey, Congress, listen up. I got an idea.
20 My idea is I'm going to invite people onto my property. And
21 I'm going to invite them to use heroine as much as they want,
22 anytime they want. But, I'm going to have medical personnel
23 on-site, available to combat any overdoses. The answer from
24 Congress with that hypothetical would have been no way.

25 THE COURT: Well, you're channeling Judge Posner now,

1 who basically would say in a situation like this we would go
2 back in time, and we would conjure what it is that Congress
3 might have had in its mind. And he's written about that. And
4 let's say, hypothetically, I don't think there's broad support
5 for that in the case law. And say, hypothetically, I don't
6 think analytically that's the best way to go. And I understand
7 the argument you're constructing here that, because in the
8 Controlled Substances Act there was no lawful use of narcotics
9 that was contemplated, that it necessarily follows, by
10 inference or by logical conclusion, that Congress also meant to
11 address this activity. Fair enough.

12 My question was different and more precise. And that
13 precise question is, if we look at what we'll call the
14 legislative evidence surrounding the passage of the statute in
15 1986, or its amendment in 2003, can you point to any
16 legislative evidence that would suggest that there was specific
17 contemplation of things such as safe injection sites -- keeping
18 in mind your argument about the broad language.

19 MR. MCSWAIN: Well, I would say first off, the best
20 legislative evidence is always the words of the statute.

21 THE COURT: Understood.

22 MR. MCSWAIN: If we look at the words of the statute,
23 for example -- well let me, let me describe my view of the
24 statute broadly and then specifically answer your question.

25 THE COURT: Yeah. I am going to look for a specific

1 answer to the question. Well, we have (a)(1) and we have
2 (a)(2). And I think that what (a)(1) and (a)(2) are doing in
3 conjunction is they are taking that judgment that Congress has
4 made that said don't set up a drug house. And (a)(1) is saying
5 don't do it directly, and (a)(2) is saying don't do it
6 indirectly. And to answer your question directly, I think your
7 concern is most directly addressed by (a)(2), because look at
8 the language of (s)(2).

9 For example, it says, with or without compensation.
10 So it's not a case where Congress is saying that there has to
11 be some money-making drug operation in order for 856(a) to
12 apply. (a)(1) says don't do it directly. Don't open up the
13 house for the purpose of having people, or -- for the purpose
14 of dealing, manufacturing, using drugs and a right (ph) to
15 (inaudible).

16 THE COURT: We can draw numerous inferences as the --
17 as to how the language could be interpreted. And we could even
18 say that one literally reading the words of the statutes could
19 say it would apply to this situation. So, let's assume that's
20 true.

21 MR. MCSWAIN: Okay.

22 THE COURT: Let's also assume that, that may not be
23 enough, for a variety of reasons. Going back to my question,
24 and that is specifically with respect to the concept of safe
25 injection sites, is there any legislative evidence that was

1 within the contemplation of Congress?

2 MR. MCSWAIN: I don't mean to avoid your question,
3 Your Honor. But again, obviously the best legislative evidence
4 is the actual words of the statute.

5 THE COURT: Okay.

6 MR. MCSWAIN: Not just the words of (a)(2).

7 THE COURT: Other than the words in the statute --

8 MR. MCSWAIN: Well, other than the words, other than
9 the words in (a)(2), there's also the other words, talking
10 about how it specifically -- there is no medical exemption for
11 heroine. So I think it does directly address your question.
12 Congress was contemplating all types of situations where
13 heroine might be used in a so-called medical way. Like in
14 treatment centers and hospitals, whatever. And they said no.
15 And what that really --

16 THE COURT: Well, with respect to some drugs. Not
17 heroine, but with others, there were specific conditions that
18 were made for physicians to use them either by way of
19 prescription in clinical trials, or for research purposes. And
20 that was clearly within the contemplation of Congress, and I'll
21 concede all that. So, I take it that the answer to my question
22 is no, you cannot point to anything in the legislative evidence
23 that would show that safe injection sites were specifically
24 within the contemplation of Congress. And if I'm wrong about
25 that, then point to where that would be. Because, I'll be

1 candid with you, I haven't been able to find it. But, I'll
2 also be candid with you, I'm not surprised I was not able to
3 find it, because with respect to the idea of harm reduction,
4 before we even get to safe injection sites, it was an evolving
5 medical discipline, and it's highly unlikely that it would have
6 been within the can (ph) of Congress in 1986 or 2003. And we
7 can -- we can talk about the ways that it's tested later but is
8 there anything specifically -- specific you can point to, sir,
9 in the legislative evidence.

10 MR. MCSWAIN: If you're looking specifically for
11 legislative history?

12 THE COURT: Well, I'm using the word evidence
13 deliberately because I'm trying to keep in mind that the term
14 legislative history is sometimes loaded and misused. And, as
15 we've been analyzing the problem, we've tried to show a lot of
16 discipline in how we approach it and looking at how scholars
17 are approaching what is or is not properly considered, if
18 anything, recognizing that if the government's correct and the
19 language is absolutely clear, we may not get to that. And
20 recognizing that Justice Scalia would say, "I think his word is
21 garbage", one never considers it. I think that the -- there is
22 ample precedent in recently en banc decision from the Third
23 Circuit in Pellegrino, that says in certain instances yes, it
24 is appropriate. So, whether we call it legislative history or
25 legislative evidence, can you point to anything there?

1 MR. MCSWAIN: First of all, I'm going to put aside my
2 statutory arguments because you want me to put it aside. And I
3 agree with your mentioning of Justice Scalia, where he thinks
4 of legislative history as like coming into a crowded party and
5 looking across the room to pick out your friends, I think is
6 the way he described it. It's very malleable. And so it's
7 much more important to look at the actual words of the statute.

8 But, there are some statements by Senator Biden. There also
9 are some statements at the time of the amendments to 856 that
10 don't specifically talk about injection sites, but the language
11 and the logic of the statements would apply to injection sites.

12 For example, in the 2003 amendment, Senator Biden
13 said, "The bill targets any venue whose purpose is to engage in
14 illegal narcotics activity." That's very broad. He talks
15 about an idea (ph) it would help in the prosecution of rogue
16 (ph) promoters who not only know that there is drug use at
17 their event, but also hold the event for the purpose of illegal
18 drug use. It doesn't mean that they're selling drugs.

19 THE COURT: He also says it's addressed to predatory
20 behavior elsewhere in his statements about that. He also says
21 that it was meant to have a limited scope which is in part why
22 they address the language in the way that they did. And in (2)
23 not only talked about knowingly, but knowingly and
24 intentionally. So suffice it to say there are many nuggets
25 both ways.

1 And for the benefit of both parties, both parties in
2 their briefs have cited statements by Senator Biden after the
3 enactment of the statute. And again, looking at some of the
4 scholarship on legislative history and indeed some case law,
5 we're loathe to put much weight on post-enactment statements.
6 And so both parties cited those in their briefing. And in
7 terms of how we have tried to exercise discipline and looking
8 anything beyond the words of the statute, we've applied that
9 standard. So, I think it's useful for the parties to know
10 that.

11 MR. MCSWAIN: We didn't do a lot of that in our
12 brief, Your Honor. So there are a couple more statements I'd
13 like to point out that may be helpful to you?

14 THE COURT: Not right at the moment, because I think,
15 for those purposes, we've done a pretty deep dive into the
16 legislative record. And we've tried to parse very carefully
17 what was said when and in what context. Because, again, some
18 of the things that legal scholars have said in looking at
19 legislative evidence is, it needs to come with an appreciation
20 of the Congressional process and Congressional rules. So,
21 indeed it matters greatly at what point in time something is
22 being debated, something is being said and something is being
23 amended. So, we're going to be applying that discipline and
24 looking at it. But, I understand, I think, the position you're
25 taking, that there's a great deal there that could, in an

1 intellectually honest way, be taken both in the words of the
2 statute and in the discussion and applied to Safehouse. That
3 would essentially be your argument.

4 MR. MCSWAIN: I would agree with that, but I would
5 say if there's an express prohibition, that Congress has
6 reached this exact issue when they said, "no medical use." And
7 there is one case that came pretty darn close to analyzing the
8 situation just like that. I'm sure you're familiar with it,
9 the Patel (ph) case in the Eighth Circuit.

10 THE COURT: We're talking -- there was a rock
11 concert?

12 MR. MCSWAIN: Yes.

13 THE COURT: All right.

14 MR. MCSWAIN: Safe stock. They had a musical
15 festival and one of the defendant's arguments was we have a
16 medical facility. That's what they called it. That's what
17 they -- the Court described in the opinion. Eighth Circuit
18 said there is a medical facility in our Actus (ph) Music
19 Festival, and the purpose of the medical facility was to
20 reverse overdoses. And the Court found liability under (a)(2)
21 there.

22 THE COURT: If they found liability on that basis, I
23 think the case had a lot of weight. Because, indeed, when we
24 looked and we said well that's an interesting perhaps parallel
25 here. But when you look at the other overwhelming evidence of

1 the concurrent teen (ph) illegal drug use -- in fact, the
2 concern promoter there actually had different schedules of
3 drugs. You can't use these but you can use those. And that
4 was all part of the jury's deliberation in the evidence of the
5 case, with the first-aid stand being there.

6 MR. MCSWAIN: Yeah.

7 THE COURT: But I don't think central to the evidence
8 that resulted in convictions.

9 MR. MCSWAIN: Sir, I'm not going all forward (ph)
10 with this situation, I agree with you. But it's interesting
11 that, that -- at least that parting even (ph) had been floated
12 before. And it's not -- you're not riding on a complete Tubeau
13 (ph) Rosalyn (ph). You have at least that case, that has
14 looked at this issue, and it's very close to our issue.

15 THE COURT: But I'd go out and study the facts up
16 closely to see how much weight you think you carry. And I
17 thought that was a creative argument by the defense, given the
18 overwhelming evidence against concert (indiscernible) owner who
19 also committed depravity. But I'm not sure that really carries
20 great weight in a situation like this.

21 MR. MCSWAIN: I would agree that there's not any case
22 that's directly linked to this case. But there is language,
23 lots of language in the statute that directly applies to this.
24 And also, I think that Oakland Cannabis Buyers case, the
25 Supreme Court case that you've -- we've talked about some

1 already in the Court, is very applicable. There, they were
2 talking about marijuana as a Schedule I drug, just like
3 heroine. Not talking about Schedule II, like in the Horrity
4 (ph) case, which is different, where you can write
5 prescriptions for Schedule II. Schedule I, can't write
6 prescriptions for it, have no medical use for it, but there's
7 one express exception that's available only for government
8 approved research projects.

9 But that is not a project that was being pursued in
10 that case. It's not a project that's being pursued here. So
11 there are no exceptions. So, Congress has directly already
12 reached this issue and said no. And what that Oakland Cannabis
13 Buyers case really stands for, if you boil it down to sort of
14 the layman's language -- when Congress says no, no means no.
15 That's what that case says.

16 THE COURT: Except Safehouse is not handing out any
17 illegal drugs, correct?

18 MR. MCSWAIN: They're not handing out drugs. But
19 under (a) (2), and under statute 856 that doesn't matter. All
20 that matters is that you're making your place available for
21 use, and --

22 THE COURT: Yeah. No, we're going to get into (a) (2)
23 in a moment, because I'd like to move there next. But I will
24 say this about both that case and Gonzalez v. Argid (ph) that
25 Safehouse is citing, I don't think either of them shed great

1 light on the issue before the Court. I think that part of the
2 Gestalt of the case -- and they give us a perspective on how it
3 is that the Controlled Substances Act takes into account the
4 fact that these substances are used in different ways, and in
5 the background of the problem of drug use, legal and illegal,
6 there's a medical context. But, aside from that, I'm not sure
7 that they directly inform the issue before the Court.

8 I'd like to talk a little bit about (a) (2), and the
9 difference between (a) (2) and (a) (1), because the government
10 does cite an impressive battery of Circuit decisions in its
11 brief. And obviously, we've looked at them very closely. And,
12 in all candor, when I look at those cases, all of them seem to
13 follow the Fifth Circuit's decision in Chen (ph). And they
14 follow the Fifth Circuit's decision in Chen on the point as to
15 whose purpose it has to be in (a) (2). And they do it without
16 any real analysis of what the Circuit did in Chen. And I don't
17 say that in a critical way, because I don't think in any
18 instance the record before those circuits required them to get
19 into a deep analysis of whether Chen was correct in the
20 distinctions that it drew. But, one of the things that I am
21 concerned about is that Chen says, that if we look at (a) (12)
22 and we look at (a) (2), according to the Fifth Circuit, (a) (2)
23 would be redundant. And the only way to make it non-redundant
24 is to apply the rule against surplusage, and to assume that in
25 (a) (2), the purpose has to be the purpose of the actual user of

1 the drugs rather than the possessor of the facility. And I'm
2 probably going to use the word possessor here, just because
3 we've got owners and renters, and all manner of others.

4 And what troubles me about that, Mr. McSwain, is I
5 think you can easily read (1) and (2) not to be redundant,
6 because I think you read (1) to say that's where the possessor
7 themselves are engaging in the activity or -- is engaging in
8 the activity. And (a) (2) is where others are, but their
9 purpose is to have those others engaged in it. So, I didn't
10 share the Fifth Circuit's bafflement as to what the difference
11 between (1) and (2) is. Why can't (1) and (2) be read the way
12 I've suggested? (1) is the possessor themselves is engaging in
13 the activity --

14 MR. MCSWAIN: When you talk about the possessor, do
15 you mean the possessor of the place or of the drugs?

16 THE COURT: The place.

17 MR. MCSWAIN: The place, okay.

18 THE COURT: Place. Possessor of land. I mean --

19 MR. MCSWAIN: Got it.

20 THE COURT: -- and I'm using possessor because we've
21 got owners, we've got lessors --

22 MR. MCSWAIN: I understand.

23 THE COURT: -- we've got operators, we've got
24 squatters. We've got all kinds of folks. So, I'm using
25 possessor. And I think logically, one is written to say the

1 possessor themselves is using the property for that purpose.
2 And (b), the possessor is, for the purpose of allowing others
3 to do it, engaging in that conduct. And I think that the
4 purpose requirement would apply equally to the possessor in
5 both (1) and (2). Chen disagrees. Chen says no. When you get
6 to (2) you don't look at the possessor's purpose, you look at
7 the user's purpose." And I'm having trouble with that
8 proposition, because I'm not baffled in the way that Chen was
9 baffled.

10 MR. MCSWAIN: I think the way Chen -- well, first of
11 all, I don't think that Chen is the only case that really
12 analyzes the issue. Some of the other cases, Tubeau, for
13 example, and other circuits, they're not just saying we follow
14 Chen blindly. They're looking at the same statute and they
15 think there is some meaningful discussion there. But to answer
16 your question --

17 THE COURT: I didn't find it. Just to be candid with
18 you, because we looked for it.

19 MR. MCSWAIN: (a)(1) and (a)(2) can't talk about the
20 same purpose, or the possessor's purpose in the same way
21 because, if they did that, the statute would be nonsensical and
22 self-defeating. And what I mean by that is you can be a stone
23 cold crack dealer, and you could say that my purpose is to make
24 money. My purpose is not for drugs to be used. And therefore,
25 if you look at (a)(1) or (a)(2) I get off scot free. It would

1 be a self-defeating statute. It doesn't make any sense. You
2 have to look at (a) (1) and (a) (2) and first of all assume that
3 Congress was not simply being redundant. They're not going to
4 have an (a) (1) and (a) (2) --

5 THE COURT: I don't think they were redundant. And I
6 don't think (a) (1) and (a) (2) are redundant. And I think if
7 somebody argued as a defendant what you just argued, the Court
8 would say that has no merit. Because we're looking about the
9 use to which the property is being put, either by you as
10 possessor and you doing something there. Or you as possessor
11 intending for somebody else to do something there. So, I think
12 we fundamentally disagree about whether or not they're
13 redundant.

14 MR. MCSWAIN: Well, maybe we're really (ph) talking
15 past each other. In (a) (2), I think the key is that the
16 possessor is making available for use to others, and it's their
17 purpose -- the others' purpose -- that matters, which is the
18 way that Chen interpreted it, which I thought. And you're
19 disagreeing with that?

20 THE COURT: Absolutely.

21 MR. MCSWAIN: Okay. Well, I think if you disagree
22 with that, well then you are running headlong into the absurd
23 situation where a crack dealer could say, "I get off scot free,
24 because my purpose is the only one that matters. And my
25 purpose is to make money."

1 THE COURT: I think that's word play. And I think in
2 court we'd say that it's word play and say that I defend it.
3 No. We're talking about your use of the property. You've got
4 this property and you're using it for this purpose. Or, you've
5 got this property and with the intent to allow others to use it
6 for this purpose, while allowing them to do so. That's what I
7 think a Court would say, and that's what I would say.

8 MR. MCSWAIN: Well, going down that path, I would say
9 that, if you look at the facts in this case, it is a necessary
10 precondition to Safehouse's stated purpose. I mean, they're --
11 they want to unilaterally say that, "Our stated purpose is to
12 save lives."

13 THE COURT: Mm-hm.

14 MR. MCSWAIN: We prevent overdoses. How do you want
15 -- there's some medical reason. But a necessary precondition
16 to that is the use of drugs. That means that 856 covers it.
17 If you want to talk about word play or semantic play, that's
18 word play and semantic play.

19 THE COURT: Well, we're going to get to purpose and
20 how purpose can operate on many levels, I think, as we get
21 deeper into the discussion. But I'd like to stay on Chen for a
22 moment, okay? To show you the degree to which we've tried to
23 look at this, all right? So, when Chen says GD's (ph) and
24 we're going to read the statute in a different way, they apply
25 a Kemp (ph), right?

1 MR. MCSWAIN: Mm-hm.

2 THE COURT: The rule against surplusage. And, as
3 Professor Lewellyn (ph) said in a famous article years ago,
4 "One of the problems with Chen, which are now in vogue but not
5 so much back in the day, is for every Chen there's a counter
6 Chen". And so, the canon against surplusage is all set by the
7 canon of consistent usage. And that is, if a word is -- a word
8 is presumed to have the same meaning throughout the text. So,
9 here we are. And we've got within the very same subsection of
10 a statute, use of the word "for the purpose of". And the Chen
11 court says well, in (1) it means one thing and in (2) it means
12 another thing. So, in applying the rule against surplusage,
13 they're violating the rule against consistent usage. And isn't
14 that a problem for a court in looking at what, I think, in
15 tableau they talk about the logic of Chen. I'll be honest with
16 you. I'm grappling with the logic of Chen and not quite seeing
17 it. What would your response be to the violation of the rule
18 in favor of consistent usage?

19 MR. MCSWAIN: My response would be to frame it
20 slightly differently. Purpose in both one and two has the same
21 meaning in terms of purpose meaning object, goal, whatever
22 synonym you want to use. But the key is whose purpose?

23 THE COURT: Oh, okay. Yeah.

24 MR. MCSWAIN: So you have to look at -- you have to
25 look at the context of the whole statute and all the words in

1 one and two and the broader statutory scheme to come up with
2 the logical conclusion, really, I think the only logical
3 conclusion is that whose purpose in (a)(2) is the user's
4 purpose and whose purpose in (a)(1) is the possessor's purpose?

5 THE COURT: So Congress without explicitly drawing
6 that distinction uses purpose, you know, one after the other in
7 the same statute and just leaves it to the reader of the
8 statute to then infer that in (2) it's the purpose of the user?
9 I mean, that's what you're really asking me to conclude.

10 MR. MCSWAIN: Well, I'm asking you to conclude that
11 on all of the words in (1) and (2), so here are some of the key
12 differences if I could enumerate them?

13 THE COURT: Well, there's only one I'm interested in,
14 okay? In (2) we have -- in (1) we have knowingly and for the
15 purpose of. In (2) we have knowingly and intentionally for the
16 purpose of. So would you agree with me that if you add
17 intentionally in (2) your -- that's a somewhat perhaps higher
18 standard that would need to be met for purposes of criminality.

19 MR. MCSWAIN: I think that the positioning of
20 knowingly and intentionally in (2) is different, for example,
21 of the positioning of knowing in (1), so let me just -- let me
22 describe for a moment what the differences are between (1) and
23 (2) textually because I think they really are important. And
24 it's important to look at all of them.

25 THE COURT: I'll give you the leeway to do that, but

1 --

2 MR. MCSWAIN: Okay. See if I can convince you.

3 THE COURT: That's what you're here to do.

4 MR. MCSWAIN: In (a)(1) it says knowingly open. That
5 again is consistent with the idea of directly opening a drug
6 house, knowingly open, whereas the beginning of (a)(2) talks
7 about manage or control. It's more indirect. You're not
8 knowingly opening a drug house. You're just managing or
9 controlling a place.

10 And then also you have in (a)(2), very important that
11 you don't have in (a)(1), make available for use. That sort of
12 changes the whole tenor of (2) compared to (1). (1), again, is
13 direct. Don't you open yourself knowingly open directly a drug
14 house. Number two is talking about making available for use.
15 Well, making it available for who? Making available for
16 others. Making it available for the people that Chen was
17 talking about and every other circuit that has looked at this,
18 all five courts.

19 So you also have with or without compensation. I
20 think that's consistent because you don't have with or without
21 compensation in (a)(1). You have --

22 THE COURT: Well, that's because (a)(2) is addressing
23 a wider variety facility, right?

24 MR. MCSWAIN: Correct.

25 THE COURT: Yes.

1 MR. MCSWAIN: But that's also --

2 THE COURT: The rave, the rock concert, et cetera.

3 MR. MCSWAIN: Correct, but that's also consistent
4 with the idea of making available for use to others because in
5 a lot of those situations where you're making available for use
6 for others, you're not making money yourself. You're not in it
7 for the profit. You just happen to know, you have the
8 knowledge that there's drug use at your location and that's why
9 Chen and other courts have said you can't have a willful
10 blindness instruction in (a)(1), but you can have one in (a)(2)
11 because in (a)(1) it's direct.

12 THE COURT: Oh, I agree with that. And candidly I
13 think the Court has tied themselves up in knots to a certain
14 degree because you can still have willful indifference conduct
15 -- a standard instruction even if the purpose in (a)(2) first
16 to the possessor of the land. But let me ask you this. Did
17 Chen say anything about intentionally in its discussion? I
18 mean, did they even mention the fact that intentionally also
19 appears in (a)(2)? Because again, I didn't see it.

20 MR. MCSWAIN: I don't think they discussed that, but
21 I think the fact that knowingly and intentionally is in the
22 middle of (a)(2) and not in the beginning of (a)(2) matters.
23 They're talking about knowingly and intentionally renting,
24 leasing, profiting from or making available for use the place
25 for the purpose. That's consistent with intentionally making

1 available for others, not for yourself, not to set up the drug
2 house yourself, because (a)(1) and (a)(2) are different. We
3 have to assume that Congress didn't just make a mistake and --

4 THE COURT: Well, but --

5 MR. MCSWAIN: -- having it overlap.

6 THE COURT: I actually think Chen may have shed a
7 little light on the argument you're making now and I'd go to
8 Footnote 9. Okay? And this is what Chen says. "Our research
9 reveals at least 16 federal criminal statutes that use the
10 combination of knowingly and for the purpose of. A review of
11 those shows that the purpose requirement clearly goes to the
12 actor in the statute, the one who has the knowledge." Right?

13 And so if based on that review of 16 criminal
14 statutes they said that that requirement would go to the actor,
15 which in this case is the possessor, and it would go to them as
16 (a)(1). Why not (2) as well? I mean, why doesn't the same
17 analysis apply there that it carries all the way through to the
18 actor if in 16 federal criminal statutes where those terms are
19 combined that's the individual to whom it refers? That's why I
20 --

21 MR. MCSWAIN: But you -- you would have to look --

22 THE COURT: -- have a problem with Chen.

23 MR. MCSWAIN: I would say -- I mean, I haven't looked
24 at all 16 of those cases that are cited in Footnote 9, but --

25 THE COURT: It's statutes actually.

1 MR. MCSWAIN: -- or those statutes, but if you're
2 going to look at those statutes, again, we'd have to look at
3 the whole statute. You have to look at all the words in the
4 statute and that would inform whether -- that would inform
5 whether purpose is referring to one person or another. Here we
6 have to do the same thing. When you look at (a)(2) and you see
7 the additional words, "or make available for use," you see the
8 additional words "with or without compensation" we know there's
9 already an (a)(1). The logical conclusion is that (a)(2) is
10 referring to others' purpose.

11 THE COURT: But doesn't it say knowingly and then
12 right after knowingly comes and intentionally? I mean, it
13 follows right after knowingly in (2), does it not?

14 MR. MCSWAIN: Yes, that you knowingly and
15 intentionally make available for use somebody else doing
16 something for their purpose. There's no inconsistency there.
17 There's no barrier you're running into just because they use
18 the words knowingly and intentionally to (a)(2). It has to
19 refer to the possessor's purpose. It can refer to the user's
20 purpose because it's talking about, right after those words,
21 "or make available for use," implying that it's made available
22 for use to others. Otherwise, why would those words be in
23 there?

24 THE COURT: Well, I'm supposed to give meaning to
25 every word, correct? And so I'm supposed to give meaning to

1 the word intentionally. And so you would agree with me that I
2 have to grapple with in (a)(2) Congress has added in addition
3 to knowingly and for the purpose of, knowingly and
4 intentionally for the purpose of.

5 MR. MCSWAIN: I agree. Every word of the statute
6 should have meaning, but here it's easy because Safehouse
7 knowingly and intentionally is making available for use to
8 people who are going to bring heroin onto the property and use
9 it. There's no hard, factual issue.

10 THE COURT: Well, we're going to --

11 MR. MCSWAIN: There's no (inaudible).

12 THE COURT: -- we're going to get to purpose in a
13 moment and I think I'll get off with Chen and his progeny and
14 everything else. But before I do I just wanted to touch on one
15 of the other cases the government cited, and it was the Third
16 Circuit case that they cited. It's a non-precedential case,
17 but it is a case that you cited. And it was written by Judge
18 Schwartz joined by Chief Judge Smith and joined by former Chief
19 Judge Sirica (ph). And so do you have that handy?

20 MR. MCSWAIN: I don't have it in front of me but I'm
21 familiar with the case if --

22 THE COURT: Right, and --

23 MR. MCSWAIN: -- you want to ask me a question about
24 it?

25 THE COURT: Yeah. I mean, I want to look at how the

1 Third Circuit when they were addressing the statute couched it
2 because even though it's a non-precedential case I guess it's
3 persuasive authority like a circuit decision that's not within
4 the Third Circuit. And there you had a conviction under (a) (2)
5 for use of an apartment for purposes of drug dealing. And the
6 Court reviewed the evidence and they upheld the conviction.
7 And in doing so they said accordingly the jury was entitled to
8 infer Bachman (ph), he was the defendant, intended that the
9 property be used for manufacturing and storing controlled
10 substances.

11 Now again, Mr. McSwain, this is under (a) (2) and in
12 that case the Third Circuit looked to the possessor's intent
13 and the possessor's purpose in deciding whether or not the
14 conviction could be sustained. So what am I to make of that as
15 persuasive authority in terms of my concerns with Chen? Hasn't
16 the Third Circuit looked at the statute through the same eyes
17 that I'm looking at it through?

18 MR. MCSWAIN: We cited that case for the general
19 proposition that a statute or a conviction under 856 (ph) was
20 upheld, but it's non-precedential for a reason, honestly, Your
21 Honor. It's not something I think you should rely on. When
22 the Third Circuit issues non-precedential opinions it's for a
23 reason. It's because they don't go through the same kind of
24 vetting, the same kind of analysis, offer much longer opinions,
25 opinions that are then circulated to the whole Court before

1 they're issued where they would have looked much closer at
2 (a) (1) and (a) (2). And I think that language that you're
3 citing is a little bit loose. I don't think that it's
4 accurate. I think that (a) (1) and (a) (2) are different and it
5 was a matter of them upholding the conviction in a short, non-
6 precedential opinion. And the Third Circuit is also very
7 strict about not relying on non-precedential opinions if we're
8 having a Third Circuit argument in this case.

9 THE COURT: I rarely cite them and I raise it in part
10 because the government did. But it just -- it struck me as
11 interesting that at least on their review of it they seemed to
12 have the same general take that I did. So we'll see what all
13 that means later.

14 Let's sort of, if we can, transition because -- and
15 you've been there already, to the issue of purpose, okay? And
16 Safehouse, I mean, you say this -- the meaning is plain here.
17 And this is illegal and Safehouse is now -- and I'll call this
18 an ordinary meaning argument rather than a plain text argument
19 or a plain meaning because that's fraught with peril as well.
20 And in support of that on the definition of purpose, Safehouse
21 cites the various dictionaries. And I'll begin with the
22 observation I'm not a huge fan of citing to dictionaries, but
23 the supreme Court does so. Did so in Yates and last week the
24 Court of Appeals en banc did so and said we begin there.

25 So Safehouse says, if you look at Black's Law

1 Dictionary, purpose is "an objective goal or an end." And then
2 they cite Merriam Webster and they say purpose is "something
3 set up as an object or end to be attained." So let me just ask
4 you, in your view, what is the objective goal or end that
5 Safehouse is pursuing with this proposed project?

6 MR. MCSWAIN: Well, there are a number of objectives
7 or goals. I don't quarrel -- I don't quarrel with the
8 dictionary definition of purpose. I would say that there's the
9 threshold question of whose purpose matters, but we've already
10 kind of talked about that --

11 THE COURT: Right.

12 MR. MCSWAIN: -- between (a)(1) and (1)(2). But
13 certainly cases -- there are plenty of cases out there that say
14 that as long as a purpose, meaning a purpose, that's enough in
15 (a)(1), that you don't get to unilaterally just say that I have
16 one purpose and I hereby declare what my purpose is. Just like
17 my --

18 THE COURT: That would be silly.

19 MR. MCSWAIN: Right, just like if you're --

20 THE COURT: (Inaudible), right.

21 MR. MCSWAIN: -- the crack dealer and you say that my
22 purpose is just to make money. Well, that's not really going
23 to be good enough. Again, but I think the reason for that is
24 because you have to look at what is a necessary precondition to
25 all the other purposes you might talk about? So if you're the

1 crack dealer and you say I'm just going to make money, well,
2 it's a necessary precondition that there's illegal drug use on
3 your property and you're inviting people to do it.

4 And if you're Safehouse, if you say your purpose is
5 to save lives, that's a laudable purpose, but it's a necessary
6 precondition that you're inviting people onto your property to
7 break the law. And so therefore that purpose, I think, would
8 violate (a)(1).

9 THE COURT: Isn't Safehouse going to get up and say,
10 well, before anybody injects on our premises we first assess
11 them and we've given them an offer of service? And our goal
12 would be to prevent them or dissuade them from using drugs, and
13 we proceed to injection only when that initial purpose has
14 failed. And coincidentally, if they do inject it remains our
15 purpose to dissuade them from using drugs and then in an
16 emergency save their life so that ultimately we hope to
17 dissuade them from using drugs. Is that not --

18 MR. MCSWAIN: They've never said that. They've never
19 said that. It would surprise me if they were to say that.
20 It's directly contrary to what Mr. Benitez said. I know we're
21 not going to get into the testimony, and you made that clear,
22 but for us to say that Safehouse's purpose is to stop people
23 from using drugs and when people come in they're going to give
24 them a speech about don't use drugs --

25 THE COURT: Well, it's not a speech, but they are

1 assessing them and offering them services and services would
2 include medically assisted treatment, correct?

3 MR. MCSWAIN: I think that it would be engaging in
4 make believe for us to say that the purpose of Safehouse is to
5 stop people from using drugs. The purpose of Safehouse -- the
6 purpose of Safehouse is their medical -- they profess to be
7 their medical purpose, but I think that it's clear that a
8 necessary precondition is the use of drugs. And certainly the
9 purpose of the people coming to the facility will be to use
10 drugs.

11 Again, I don't want to belabor Mr. Benitez's
12 testimony, but --

13 THE COURT: Don't.

14 MR. MCSWAIN: -- he was talking about, you know, what
15 -- well, Safehouse in general. I won't talk about Mr. Benitez,
16 but Safehouse in general --

17 THE COURT: We can proceed to discovery in trial, but
18 I mean, I don't think that's what we were here to do.

19 MR. MCSWAIN: Well I would just say that there's no
20 support in the record for the hypothetical that you're
21 describing.

22 THE COURT: All right. So when they say assessment
23 of physical and behavioral health offer of services, what do
24 you take that to mean?

25 MR. MCSWAIN: Could you repeat that please, Your

1 Honor?

2 THE COURT: Well, I'm looking at Exhibit 1 to the
3 government's complaint. And after registration it says
4 "Assessment of physical and behavioral health offer of
5 services." And that's in advance of anybody entering a
6 consumption room.

7 MR. MCSWAIN: I don't think any of those services are
8 designed to stop people from using the consumption room. I
9 think that the reason that they're there and the reason that
10 Safehouse exists is so that people can come and use the
11 consumption room. So again, I think this is going down a path
12 that is just anti-factual.

13 THE COURT: Okay. And then that may be defined by
14 the scope of the Pleadings. And maybe we read the Pleadings
15 differently, but we'll wait and see what Safehouse has to say.

16 Let's say I certainly agree with you that there's no
17 merit to an argument that the sole purpose would have to be
18 unlawful, that -- an unlawful purpose would suffice. Where --
19 is there any limiting principle to the statute that you see?

20 MR. MCSWAIN: Well, there is a limiting principle I
21 think in the Courts that have discussed the idea of a purpose
22 of a purpose being enough under (a)(1), have talked about how
23 it can't just be an incidental purpose.

24 THE COURT: Right.

25 MR. MCSWAIN: It can't be just sort of something very

1 minor and Safehouse cites in their briefs, and I wanted to get
2 into some of these hypos about, say, a child is a drug addict
3 and they come home and they're using drugs in their parent's
4 home and could that possibly be actionable under 856? That
5 would only be an incidental purpose. And presumably --

6 THE COURT: Yeah, that is. I agree with you. Let
7 me give you a different hypo that's similar but --

8 MR. MCSWAIN: Okay.

9 THE COURT: -- but related. And that is it's an
10 adult child, so it's not in loco parentis. They are using. The
11 parent's said don't use and finally said move in. We don't
12 want you to use, but if you're going to use we want you to use
13 right here in our presence and we've got Narcan here. So shoot
14 up but do it while we're here and do it while we can
15 resuscitate you. Would that be reached by (a) (2)?

16 MR. MCSWAIN: I think it wouldn't because of the
17 words you said about "don't use." That's not their purpose for
18 their son, their adult son or adult daughter to be in the home
19 is to use drugs. They're trying to stop that person from using
20 drugs. And let me take your hypo one step further since we're
21 in this grey area --

22 THE COURT: Sure. That's fair.

23 MR. MCSWAIN: -- where if those parents knew that
24 their son or daughter had a major drug problem and knew that
25 their friends had major drug problems and their friends liked

1 to come over to the house and use drugs and then they said to
2 their son or daughter, "Hey, you know what? I'm going to the
3 Bahamas for a month. You know, you know where all the food is.
4 You know the phone book" --

5 THE COURT: You're taking my hypos for Safehouse.

6 MR. MCSWAIN: Right. No, I'm saying, "I'll see you
7 later. I'll see you in a month." And if during that month
8 that house turned into party central that could be a violation
9 of 856.

10 THE COURT: Okay.

11 MR. MCSWAIN: That could be a violation under (a)(2),
12 okay? So now these hypos I think are very useful --

13 THE COURT: Right.

14 MR. MCSWAIN: -- but the initial hypo that you asked
15 me about would not be a violation of the 856 because it's only
16 incidental and the parents are trying to stop the drug use.

17 THE COURT: But let me ask you this very precise
18 question. Is it the government's position that Safehouse is
19 trying to promote the use of illegal narcotics?

20 MR. MCSWAIN: It is the government's position that as
21 a necessary precondition to everything that they want to do
22 that illegal drugs are going to be used, and that is prohibited
23 by Congress expressly.

24 THE COURT: I understand the government's position,
25 but what's your answer to my question?

1 MR. MCSWAIN: Whether they're trying to promote it or
2 not?

3 THE COURT: Yeah, right.

4 MR. MCSWAIN: I think that it is inevitable that they
5 are, in fact, promoting it. And again, they haven't -- they
6 haven't alleged, I don't believe, and without focusing on the
7 testimony, although Mr. Benitez did talk about this, they
8 haven't said that there's going to -- it's going to be more
9 successful getting people into treatment than what we already
10 have in Prevention Point. So the purpose of Safehouse is not
11 to get people into treatment because Prevention Point is
12 already doing that.

13 THE COURT: Right.

14 MR. MCSWAIN: And the testimony is consistent that
15 it's not going to be any more successful at Safehouse than it
16 already is at Prevention Point. So therefore, the logical
17 implication of setting up Safehouse is that there's going to be
18 more drug use. So yes, they are promoting drug use.

19 THE COURT: Okay. But is there going to be more drug
20 use than is occurring outside the door or over at MacArthur
21 Park (ph)?

22 MR. MCSWAIN: I think you can argue either way.
23 Certainly we would argue that there would be. We believe that
24 there would be, but again, you have to come back to the
25 statute. I mean, we've kind of -- we've wandered pretty far

1 away from 856.

2 THE COURT: Oh, I'll -- I'm testing the limits of
3 856.

4 MR. MCSWAIN: If there's more drug use on the
5 property, which is what 856 cares about then it's a criminal
6 violation. What happens in the rest of the neighborhood, what
7 happens in the rest of the city may be theoretically
8 interesting but it's ultimately irrelevant to the question
9 before you.

10 THE COURT: If the question before me is purpose I'm
11 not sure it's irrelevant. Let me try a different hypothetical.
12 We know that already Prevention Point is doing needle
13 exchange. We know that they routinely respond to overdoses.
14 Say Safehouse says we're going to buy a lunch truck and we're
15 going to retrofit it and we're going to have our oxygen and
16 defibrillator and our Narcan there and we're going to pull up
17 to the park where people shoot up every day and open the window
18 and we're going to just assume people will come and shoot up
19 there in front of our emergency vehicle.

20 Literally the statute doesn't apply to that, correct?

21 MR. MCSWAIN: I think that's correct because it
22 doesn't -- they're not knowingly opening a place and they're
23 not manager or control any place. so I think --

24 THE COURT: But yeah --

25 MR. MCSWAIN: -- the statutory language doesn't reach

1 it. And again, that's what matters, the statutory language.

2 THE COURT: They're doing everything but in a mobile
3 unit.

4 MR. MCSWAIN: Well, if they were to have people come
5 into the mobile unit that's different. But if they were just
6 to pull up next to a public park, no, I don't think 856 would
7 reach that. And those distinctions matter.

8 THE COURT: All right. Earlier we talked about the
9 medical background of the Controlled Substances Act, right, and
10 I said I think it's in the background of the case because I
11 don't know that the exemption and the authorization provisions
12 directly apply, although maybe we'll touch on that in a moment.

13 But if you look at the 2003 refinement of the statute,
14 certainly what was on the minds of Congress at that point did
15 not involve any type of provision of medical services. Would
16 you agree with that?

17 MR. MCSWAIN: I'm sorry, could you repeat that, Your
18 Honor? I apologize.

19 THE COURT: Well, we're talking about raves. We're
20 talking about concert venues. We're talking about other venues
21 where people will go for purposes of use of illegal drugs.
22 That's what was within the -- if we look at the debate that
23 consumed Congress at that time those were the subjects on which
24 they focused, correct?

25 MR. MCSWAIN: Yes, but I don't think you can ignore

1 the rest of the Controlled Substances Act, which I think
2 directly addresses the idea of medical use of heroin which is
3 prohibited.

4 THE COURT: Right, but Safehouse, let's say I'm not
5 enamored of their argument that this is an authorized use, but
6 they do point out that Congress was careful to say that there
7 are certain activities on the part of medical providers that
8 will not be reached by the Controlled Substances Act.

9 And if we're in a situation where explicitly this
10 type of situation is not addressed, is that background
11 relevant? You know, Congress says in some instances we take
12 into account whether it's predatory conduct or whether there is
13 some other purpose being served. What's your reaction to that?

14 MR. MCSWAIN: My reaction is that Congress has
15 expressly ruled on this. It's 21 United States Code
16 812(b)(1)(B) and they have rejected the heroin is safe for use
17 even under medical supervision. Again, what that stands for
18 and then interpreting a very similar situation in the Oakland
19 cannabis case, when Congress says no, no means no. And they've
20 explicitly already addressed this issue even though it's a
21 broader issue than just a debate about injection sites
22 themselves. So the broader includes the lesser.

23 THE COURT: I understand your position, Mr. McSwain.
24 Getting back to this issue of whether or not Safehouse could
25 seek an exemption for the conduct that it wants to pursue, and

1 I'm not sure how much weight this has or that it really has any
2 bearing, but let me turn to the question that I sort of threw
3 out earlier, which is within the statute, at least I didn't
4 detect any mechanism that would allow for them to apply for
5 permission to conduct and activity such as this. Can you steer
6 me to any that exist?

7 MR. MCSWAIN: I don't think there is one that really
8 exists. This is not a research project, for example. But the
9 fact that there isn't one also highlights that they haven't
10 even tried. They haven't tried anything in the state
11 legislature. They really haven't tried anything in city
12 council either and certainly haven't tried. And one of our
13 main arguments, as you well know, is that they're on the steps
14 of the wrong institution. They're on the steps of the
15 courthouse. They should be on the steps of the legislature.
16 They should be asking Congress to change the law and there
17 should be a public debate about that, and we welcome that.
18 Okay?

19 Like I said in the beginning, we're all on the same
20 side here and Congress in the CARA (ph) Act in 2016, and the
21 support Act after that, is laser-focused on the opioid epidemic
22 and they have never approved of injection sites. So this
23 debate needs to happen in Congress. The public policy debate
24 does not belong in the courthouse when it comes to this
25 statute.

1 THE COURT: So I think what Safehouse would say is,
2 well, we're in the courthouse because of A, of the threat of
3 prosecution and then, B, the government decided well, we're not
4 going to prosecute. We'll do this through a declaratory
5 judgment action and that it's the government that should go to
6 Congress because if it's not illegal then we ought to be able
7 to do it.

8 And so -- and I -- look, you're going to disagree
9 with that, but let me put that in the broader conduct --
10 context that you're raising, which is what's the appropriate
11 venue to decide these issues?

12 MR. MCSWAIN: Mm-hm.

13 THE COURT: Because there's no doubt that Congress
14 writes statues and sometimes the Courts are left to apply and
15 interpret. But as I read the law, that happens in the civil
16 arena, so it happens with civil RICO and it happens with Title
17 VII. But I don't see that it happens in the field of criminal
18 law where generally speaking Courts are urged and in many
19 instances do, in fact, exercise restraint saying that when it
20 comes to the criminalization of activities that is uniquely the
21 decision of the legislature.

22 And this sort of, I guess, backs us into the rule of
23 lenity discussion, right, which I know you said doesn't apply.

24 And I think on one level it doesn't apply. But isn't there an
25 institutional separation of powers seen to the case law on the

1 rule of lenity? And haven't -- hasn't the Supreme Court itself
2 repeatedly said that when it comes to criminalization if it's
3 not clear that's the role of Congress. What would your reaction
4 be to that?

5 MR. MCSWAIN: First of all, if you're suggesting that
6 there's no such thing as federal criminal common law, I agree
7 with you. It's sort of one of the starting points that it's
8 all supposed to be statutory.

9 THE COURT: Right.

10 MR. MCSWAIN: So yes, we have to look at the statute.

11 THE COURT: Right.

12 MR. MCSWAIN: But here the statute, I think, is clear
13 and certainly as Your Honor recognized during the last hearing
14 it's sort of self-evident that the people who are coming onto
15 the property would be violating the law, violating --

16 THE COURT: They are. That --

17 MR. MCSWAIN: -- absolutely.

18 THE COURT: No doubt about it.

19 MR. MCSWAIN: Right. So if the people coming onto
20 the property have the purpose of breaking the law and they are
21 breaking the law, and the person is setting up the property so
22 that the law can be broken, are themselves liable. That's very
23 clear and the rule of lenity only applies when courts look at a
24 criminal statute and they literally throw their hands up in the
25 air and say, "I can't figure this out for the life of me. This

1 doesn't make any sense at all." Okay. There's grievous
2 ambiguity as I believe the Supreme Court has described it, so
3 we're going to apply the rule of lenity.

4 That's not the case here at all. And that's why, for
5 example, five circuits have looked at this and none of them
6 have found any grievous ambiguity or any ambiguity at all.

7 THE COURT: Well, none of them has looked at a safe
8 injection site.

9 MR. MCSWAIN: No one's looked specifically at these
10 facts, although again you have Safe Stock (ph), which we
11 already talked about, but they have looked at the statute and
12 the way they've interpreted the statute would clearly cover
13 what we're talking about here. Again, because there's no --
14 there's no question that the people coming onto the property
15 are there to break the law. Now, if that were -- if there were
16 a grey area there I'd have a much harder argument, okay? That
17 would be a totally different situation. Here we've got a slam
18 dunk situation where every single person who's there is invited
19 to come onto that property to break the law. That can't --

20 THE COURT: Oh, yeah.

21 MR. MCSWAIN: -- be allowed.

22 THE COURT: Okay, but again, if you want to look at
23 the overall structure of the statute, right, that person coming
24 onto the site to use will face a year, or depending on their
25 record, three years for use and a nonprofit medical entity with

1 a harm reduction strategy seeking to save their life would face
2 a 20-year penalty.

3 Now, I'm not suggesting that Congress did that, but I
4 am suggesting that it seems improbable to me that Congress
5 would be doing that. And I am suggesting to you that that
6 lends further weight to the suggestion that perhaps this was
7 not within the contemplation of Congress. And that recognizing
8 these divisions of power should a federal court be careful in
9 extending that degree of criminality to this conduct? That's
10 the question I'm asking.

11 MR. MCSWAIN: Well, even Safehouse itself and Mr.
12 Benitez said that they hadn't done this before because they
13 thought they'd lose their building or they basically knew it
14 was illegal. So what has changed over the 11 years that he's
15 been working at Prevention Point? What's changed is that
16 Safehouse has just gotten to the point where they said we know
17 better. We know better. We're going to do this --

18 THE COURT: Well, either that or it's the death toll.

19 MR. MCSWAIN: Well, the opioid epidemic has been
20 going on for years and also we are making a lot of progress. I
21 know we don't want to get into the facts and evidence --

22 THE COURT: And that's the only comment I've made
23 that's gotten beyond this record, but --

24 MR. MCSWAIN: Okay.

25 THE COURT: -- I felt compelled to make it.

1 MR. MCSWAIN: But I think that the way we brought
2 this case, Your Honor, also points to the fact that this
3 shouldn't happen. We shouldn't have the kind of criminal
4 confrontation that you're contemplating. Okay? There's not
5 going to be a -- there isn't going to be a situation, I
6 presume, where somebody faces that sort of liability if the
7 Court, we think properly, says this isn't allowed. And there's
8 a civil case where you can say it isn't allowed. And --

9 THE COURT: And I previously commended you for
10 proceeding in that way.

11 MR. MCSWAIN: Well, thank you. I really -- we're all
12 on the same side here in trying to deal with the opioid
13 epidemic, but Your Honor, I think the hubris here is pretty
14 astonishing from Safehouse.

15 THE COURT: Well, (inaudible) --

16 MR. MCSWAIN: They literally are to the point where
17 they're saying we know better. We're going to do it anyway so
18 we have no choice but to bring this case and we brought a civil
19 case to give you an opportunity to rule. And I don't think
20 that we are the bad guy for doing that.

21 THE COURT: I'm not calling you the bad guy and I've
22 commended you for proceeding in this way, but the -- I have a
23 hard time attacking the motive of folks on the front lines of
24 what you say is (inaudible).

25 MR. MCSWAIN: Well, thank you.

1 THE COURT: So that exhausts my questions unless
2 there's any other burning point you would like to make?

3 MR. MCSWAIN: No, Your Honor, but could I reserve a
4 couple minutes to respond?

5 THE COURT: I'm not going to cut anybody off here. I
6 think you've already seen that with this Court.

7 MR. MCSWAIN: Okay, well, thank you.

8 THE COURT: (inaudible) we're not on that tight of a
9 time schedule. And why don't we just take a five-minute break
10 and then we'll resume. Thank you.

11 THE DEPUTY: All rise.

12 (Off the record at 2:02 p.m.)

13 (On the record at 2:10 p.m.)

14 THE COURT: I have a whole separate kind of questions
15 for you, Ms. Eisenstein.

16 MS. EISENSTEIN: (Inaudible). Good afternoon, Your
17 Honor. If I may make an introductory statement and I think
18 some of this goes without saying, but Safehouse has a singular
19 purpose, which is to save the lives of our loved ones who are
20 suffering from opioid addiction and our community, which as
21 this Court is well-aware, is ravaged by this overdose crisis.
22 And we're accomplishing that mission by keeping people who are
23 at risk of overdose in close proximity to medical care.

24 We strongly dispute the idea that drug use is a
25 necessary precondition to fulfilling our purpose. We want

1 nothing more and the purpose of Safehouse is directed entirely
2 at people ceasing the use of drugs and hopefully entering into
3 treatment. There would be nothing better than for Safehouse to
4 not be needed. Unfortunately, the time that we have between
5 the time that a person consumes and the time that they need
6 rescue from Naloxone or respiratory support and emergency care
7 is preciously slim. And the directive of Safehouse is to close
8 that gap, that very small gap in time that can be the
9 difference between life and death.

10 Federal law in our view does not require we cast
11 people out of the reach of medical care at the time when they
12 are most vulnerable, which is the time of consumption and the
13 immediate time thereafter. And that is the necessary
14 consequence of the government's position here.

15 We believe that if Congress were to intend that it
16 would have said so explicitly and that this statute, which as
17 Your Honor pointed out in the questioning before, was in no way
18 directed at supervised consumption or the overdose crisis that
19 we presently face. It in no way explicitly addresses that or
20 even implies that it was getting at the kind of public health
21 and medical intervention that Safehouse intends to create here
22 in Philadelphia.

23 THE COURT: All right, let's get to the statute.

24 MS. EISENSTEIN: Let's do it.

25 THE COURT: Right under (a) it says "except as

1 authorized by this subchapter," and I really don't follow your
2 argument that unless this activity is specifically prohibited
3 it's authorized. It might be one thing to say, well, unless
4 it's specifically prohibited it's not criminal, but I really
5 don't see how you get to authorized.

6 MS. EISENSTEIN: Your Honor, I think it derives, and
7 I know you said you aren't too convinced by Argue (ph) v.
8 Gonzalez, but if you'll bear with me in the part of Argue v.
9 Gonzalez where it talks about the general approach of the
10 Controlled Substances Act to medical practice, it references
11 back to one of the seminal cases dealing with the Controlled
12 Substances Act, which was Moore. And Moore was a case that
13 dealt exactly with this except as authorized by language in
14 Title 21 United States Code 841.

15 THE COURT: I'm familiar with Moore.

16 MS. EISENSTEIN: So it was the same language there
17 that Moore evaluated and then Gonzalez evaluated when the
18 Supreme Court in both instances found that Congress does not
19 regulate the legitimate practice of medicine. And that that is
20 not an explicit authorization within the statute but that that
21 is an implicit factor in what the Controlled Substances Act --
22 except -- except, and this is the important part of Gonzalez,
23 the important part of the cannabis buyer's case that the
24 government relies upon and an important part of the Moore case
25 -- except where Congress has said so explicitly.

1 And I'll read to you just for a moment from Oregon.
2 It says, "When Congress wants to regulate medical practice in a
3 given scheme, it does so by explicit language in the statute.
4 And beyond that the statute manifests no intent to regulate the
5 practice of medicine generally." And so but that -- so the
6 reason we put it under that portion of the text was because
7 that was the -- that was where it derived from from Moore and
8 then that was the principle that was articulated from back in
9 Oregon.

10 THE COURT: Well, yeah, let me ask you the threshold
11 question I asked the government then. Is it Safehouse's
12 position that either in 1986 or 2003 Congress contemplated safe
13 injection sites? And when they have had to if you're
14 authorized argument has merit? And I don't think they did.

15 MS. EISENSTEIN: well, Your Honor, what I do think
16 that Congress contemplated is they did contemplate what the
17 scope of medical, appropriate medical care could be. And
18 Congress articulated a scheme that is detailed in extraordinary
19 -- in an extraordinary measure as to the do's and don'ts for
20 medical practitioners in expressly enumerated regimes.

21 And so it regulated medical practice in a very
22 intentional way. And what the Supreme Court held is where it
23 doesn't say that a doctor can't do something a doctor can do
24 those things within good faith within a medical practice. And
25 that's the standard that not only the Supreme Court articulated

1 but that juries day in and day out are applying when it comes
2 to trials of doctors who are allegedly engaged in pill mills or
3 illegal drug distribution.

4 And so Congress did contemplate what doctors can and
5 can't do. And I add --

6 THE COURT: Well, in Gonzalez the Supreme Court was
7 addressing an affirmative regulation of medical practice. And
8 that's really not the situation we have here. We have the
9 government saying there's a criminal statute that bars the
10 activity. And I'm still having difficulty seeing where this is
11 either authorized or it fits within the Gonzalez principle.

12 MS. EISENSTEIN: So there's two parts to the Gonzalez
13 decision. The first part talks about the scheme as a whole and
14 that's where I think the important piece of this puzzle comes
15 in because they (inaudible) the core criticized the Department
16 of Justice for arguing that the Attorney General could
17 impliedly criminalize physician-assisted suicide where the
18 statutes and the regulations hadn't expressly done so.

19 We think the case is even stronger here. In that
20 case the doctor was actually prescribing a controlled substance
21 for an activity that the government deemed to be improper.
22 Here none of the activities that are regulated by the
23 Controlled Substances Act are going to be performed by
24 Safehouse at all. There's no dispensing, administering,
25 prescribing, storing or distributing drugs by Safehouse at all.

1 THE COURT: But on your premises they would be using
2 those prohibited drugs?

3 MS. EISENSTEIN: There would be -- there would be
4 using which is not by my (inaudible) a prohibited act under the
5 statute but possession is something that we're not doing.
6 There's no way in which we could reasonably interpret it to be,
7 let's say, in constructive possession of the drugs that are in
8 the participants' pockets. So what the government wants to do
9 is impute whatever criminal liability might follow from the
10 people who are benefiting from Safehouse's services. They want
11 to impute the criminal liability to us simply because they're
12 on our premises. And I don't --

13 THE COURT: Well, let's go back to the idea of
14 medical practice, right?

15 MS. EISENSTEIN: Yes.

16 THE COURT: I mean, safe injection sites are
17 certainly contemplated in the medical literature.

18 MS. EISENSTEIN: Yes.

19 THE COURT: But as I understand it there has been no
20 state board or -- and there has been no medical professional
21 board that has purported to prescribe standards for the
22 operation of safe injection sites. Is that accurate?

23 MS. EISENSTEIN: I think -- I don't think it's
24 entirely accurate, Your Honor, because recently the
25 Philadelphia Board of Health passed a resolution endorsing the

1 operation and the institution of safe injection sites and
2 overdose --

3 (simultaneous speaking)

4 THE COURT: But that's a far cry from a regulatory
5 scheme within the profession that would deal with the standards
6 for this type of activity. So I mean, again, I understand that
7 in the literature and I understand as well that among some
8 medical associations there's an evolution toward harm reduction
9 strategies and whether this is appropriate. But in terms of
10 regulated medical practice at safe injection sites at least as
11 far as I can tell, there isn't.

12 MS. EISENSTEIN: but, Your Honor, what Safehouse is
13 going to be doing is really no different than what occurs every
14 day when an EMS person appears at the scene and is called to
15 the scene with an emergency medicine physician is presented
16 with someone who has --

17 THE COURT: On the resuscitation end it's no
18 different.

19 MS. EISENSTEIN: Right, right, but all that is
20 happening that is different today, that would be different
21 under Safehouse's proposal than what happens today, I should
22 say, is that instead of walking out the door from the syringe
23 exchange after receiving clean consumption equipment, the
24 person is simply allowed to stay under the close -- in the
25 close proximity of someone with Naloxone and training to

1 administer it and provide respiratory support.

2 THE COURT: And when you say all that happens the
3 government's response would be, yes, but that all that happens
4 falls within the little terms of the statute.

5 MS. EISENSTEIN: Right, and so the -- so the question
6 there is does it fall within the terms of the statute? So one
7 reason why we think it doesn't fall within the terms of the
8 statute is that not only our purpose but our actual activities
9 are directed at providing medical care and as Your Honor
10 pointed out, opportunities at every turn for medical treatment.

11 And I'd like to say a word about that because the
12 government seemed to doubt the idea that we're offering
13 treatment and that treatment is a goal. In their own Pleadings
14 they attach as an Exhibit A our website which specifies not
15 only the treatment options that will be given but also the fact
16 that there is no evidence that offering medically supervised
17 consumption increases the use or rate of use of controlled
18 substances. So in their Pleadings incorporate that standard
19 and we certainly agree with them as well as the -- not only the
20 testimony but what's been recently incorporated into the record
21 in Exhibit 1 certainly makes that clear if it wasn't clear from
22 our Pleadings in the first instance.

23 THE COURT: All right. I want to get off that is
24 authorized (inaudible) I think that the most you can hope for
25 is that it's not prohibited. I'm having a -- I'm still having

1 difficulty with the except as authorized. Let me turn to
2 unlawful use because you argue that this can't apply because
3 the statute doesn't apply -- or rather define the term unlawful
4 using. And again, it -- just taking an ordinary meaning
5 approach, isn't it fairly clear that individuals who would be
6 injecting in a consumption room they themselves would be an
7 unlawful user?

8 MS. EISENSTEIN: Look, I'm not going to -- I'm not
9 going to fight too hard on that point, but I think that the
10 fact that using is not one of the prohibited acts in the
11 Controlled Substances Act does make -- I mean, it is a --

12 THE COURT: You can't lose -- you can't use unless
13 you possess, and --

14 MS. EISENSTEIN: Well, Your Honor, that's not
15 entirely true. You can possess but you're not necessarily
16 possessing unlawfully because there's plenty of circumstances,
17 for example, if somebody had a prescription, right, and they
18 were entirely in lawful possession of the prescription, let's
19 say it wasn't -- they were carrying it home for their husband
20 or their wife, right? And they they decide actually at the
21 last minute I'm going to use this substance, they never were
22 unlawfully possessing the substance, but they may have
23 unlawfully consumed the substance.

24 THE COURT: Well, they were in the instant that they
25 converted it to their own use I think is what the government

1 would argue.

2 MS. EISENSTEIN: Right. And I don't think we need to
3 address that metaphysical problem, but I think --

4 THE COURT: Well, I'm just having trouble --
5 (simultaneous speaking)

6 THE COURT: I just --

7 MS. EISENSTEIN: Yes.

8 THE COURT: I don't see any real ambiguity in
9 unlawful using and --

10 MS. EISENSTEIN: This is where I think the ambiguity
11 comes in, and I think it goes to what is the core issue of the
12 statute and why was 856 passed to include unlawful use when
13 it's not a prohibited activity? Because that's really -- that
14 to me is really the question that's raised by, well, you don't
15 have unlawful using as something that's a defined term in the
16 statute, so why did Congress throw it into 856?

17 And I think that it goes to what is the core concern
18 of Congress when it passed the statute. And this -- when I talk
19 about legislative history I'm not just talking about Senator
20 Biden's statement, which by the way are helpful, but also the
21 interpretation looking at the statute -- the statute's text in
22 its role in the Controlled Substances Act and why it adds to,
23 for example, a drug conspiracy and drug possession and drug
24 distribution offenses.

25 And the courts that have analyzed it have said

1 Congress intended to criminalize the use of property for
2 narcotics distribution. And that it's more than just the
3 simple use or casual use of a property. And court after court
4 -- the Courts that in some cases the government cites, have
5 rejected the idea that simple consumption is enough because --

6 THE COURT: Well, they said incidental use is not
7 enough and the government would say what you have here would
8 not be incidental use. The government would say Safehouse is
9 inviting use on a continued basis.

10 MS. EISENSTEIN: So we would -- I mean, we disagree
11 with that point of view because I think in some senses the only
12 reason that use is being permitted on the premises is to enable
13 the proximity to medical care and treatment. So it is
14 incidental in the sense of the idea is not to promote,
15 facilitate, encourage the use itself. It's to encourage the
16 ability to be resuscitated, saved and treated at the time and
17 immediately after the use.

18 But when Congress enacted why did it include use when
19 it enacted Section 856? It had in mind, if you think about the
20 prototypical opium den or crack house that it had in mind back
21 in the eighties when it enacted the statute. These houses were
22 congregating users as part of a drug operation to create, if
23 you will, a market for dealers and others who were operating
24 drug houses. So it was even though -- even if profit wasn't
25 explicitly an element of the statute, that's the core of why

1 Congress went after use and not just other distribution
2 activities in the statute.

3 THE COURT: Okay. So if you say we need a definition
4 of unlawful use, what's your definition of unlawful use?

5 MS. EISENSTEIN: My definition is tied -- it -- I
6 don't dispute the fact that if someone is using drugs that they
7 possess illegally that that's unlawful use. But where I think
8 the limiting principle comes in in the statute is when you
9 combine that with what the "for the purpose of" when you put
10 those together. And what Courts have said is when it comes to
11 use, and that's why I think they've required what I would say
12 is a plus factor in use cases and actually there are really no
13 use cases and that's another point I'd like to get to in a
14 minute, which is we've scoured -- I'll get to it now -- which
15 is we've scoured the records of the federal records and federal
16 published cases and in 33 years we have never found a case
17 where the government has prosecuted a case involving pure use.

18 And the government has pointed to that.

19 THE COURT: But the --

20 MS. EISENSTEIN: So the prosecutorial history
21 suggests that they don't think that just personal consumption
22 cases, cases where there's no distribution activity, where
23 there's no manufacturing activity beyond just somebody using in
24 a property, that the government has never prosecuted --

25 THE COURT: I know --

1 MS. EISENSTEIN: -- such a case.

2 THE COURT: -- you're missing something but under
3 what federal statute would they prosecute unlawful use as
4 compared to unlawful possession?

5 MS. EISENSTEIN: The use of a property. What I'm
6 saying is they've never used 856 --

7 THE COURT: Oh, so it's use of a property.

8 MS. EISENSTEIN: They've never gone and found a group
9 of people who are using an apartment to use drugs and prosecute
10 it under 856. They've never gone to any other location. They
11 haven't, you know, they've looked at rave parties, for example,
12 which is under the 2003 statute. But how does a rave party
13 differ from your everyday rock-n-roll concert that we know is
14 excluded from the statute? It has to do with the degree and
15 the reason for the use. And the use, what I call the plus
16 factor, is that simple consumption, even where the owner or the
17 operator or the manager or control knows about this unlawful
18 consumption, they see the clouds of smoke. They know what's
19 going on. That's not enough. That is not enough under
20 multiple Courts of Appeals' decisions.

21 And there's a reason for that because that would have
22 no limiting principle under the statute. So I think when you
23 combine unlawful use with for the purpose it becomes clear that
24 when there's a use case there needs to be something more.

25 THE COURT: Well, that's a different argument.

1 That's a different argument than saying the statute can't be
2 applied because unlawful using is not defined. So you're --
3 that goes more to context and you're mirroring some of the
4 government's argument that you look at these words in
5 combination with the other words.

6 With respect to the contention that the use is
7 incidental, say in the first three months of operation if no
8 one used the safe consumption rooms, would that make the
9 project a failure?

10 MS. EISENSTEIN: I think it would because hopefully
11 that meant that people were coming to Safehouse. And if no one
12 came to -- it's a public health intervention so if no one
13 avails themselves of the opportunity to get care there, then it
14 is not effective in that sense. But at the outset of someone's
15 arrival the hope is they never would reach the supervised
16 consumption room. The hope is that they come to the
17 registration desk and they go right into treatment or they get
18 the other types of medical care that they need and that they
19 never reach that place where they need to be part of the
20 supervised consumption site.

21 Unfortunately, in the case of people suffering from
22 opioid use disorder that's just not realistic in terms of the
23 statistics for the vast majority of people who are suffering
24 from the type of addiction that this service is designed to
25 serve.

1 THE COURT: All right. We've been skirting around
2 purpose. I'd like to move to purpose under (a)(2) now and you
3 argue at one point in your brief that it's the property's
4 purpose that controls. And how can the property have a
5 purpose? Isn't it the possessor or the owner that has to have
6 the purpose? I'm having difficulty, again, conceptualizing how
7 this inanimate object has the purpose.

8 MS. EISENSTEIN: Right. So look, I think that there
9 is two facets to the statute. There's the mens rea (ph) which
10 Your Honor was focused on with respect to both (a)(1) and
11 (a)(2), which is knowingly with (a)(1) and knowingly
12 intentionally with (a)(2). And then there's a place for the
13 purpose of. And I'd argue that you're right that in some
14 respects purpose is something driven by people, but it's not
15 exclusively driven by people. For example --

16 THE COURT: How so? How so?

17 MS. EISENSTEIN: For example, if you were to walk
18 into this courtroom and there were no people in it, you would
19 readily discern that this was a place for the purpose of
20 holding court. You would know that because of the way it's set
21 up and what it's designed to do. And in the same respect, if
22 you were to walk into Safehouse you would see that it is a
23 place designed for the purpose of providing medical care
24 because you would see all of the medical equipment and the rows
25 of Naloxone and the defibrillator and the oxygen resuscitation

1 and --

2 THE COURT: Well, isn't that just a factor relevant
3 to a determination of purpose than a technical statutory
4 argument that the purpose only applies to the place? Because
5 clearly if you have a rave, a rave is often in a warehouse and
6 so to take a prototypical example from 2003, and during the day
7 the warehouse may have one use and then at night it turns into
8 a drug-infested party scene on a persistent basis, right? So
9 there --

10 MS. EISENSTEIN: Right.

11 THE COURT: -- you would have a nondescript purpose
12 not tied uniquely to the use of narcotics.

13 MS. EISENSTEIN: Right, and I think the way that Your
14 Honor put it when -- and some of the Courts have put it this
15 way is what is the purpose to which the premises is put? And I
16 think it's a good way to put it because it's not exclusively
17 driven by the people who enter that property. It is also
18 driven by the features of how the facility is set up itself.
19 So I think that in that sense it is important to look at both
20 factors.

21 And I think I would also point out that, you know,
22 first of all, I, you know, was -- agree with Your Honor's
23 analysis entirely that when you look at the same language in
24 the statute, place for the purpose of, that it has the same
25 meaning in both instances. And I think our reading, which is

1 is the premises being put to criminal use is really the key
2 question as to the purpose of PRAN (ph). And under the
3 government's reading, the government would like us to read this
4 statute, (a)(2) to criminalize any time someone manages or
5 opens a property and knows that there's drug use going on.
6 Knows that because every time there's drug use going on
7 presumably the person using the drugs have the purpose of using
8 it in that place.

9 Well, that reads for the purpose, place for the
10 purpose of directly out of the statute. So not only, you know,
11 the other canon of statutory interpretation is you do have to
12 give every piece meaning and the government's interpretation
13 would make that piece, the purpose piece devoid of meaning.
14 And I think purpose takes on particular importance when you're
15 talking about a medical intervention, and I think it takes on
16 particular significance when you're talking about personal
17 consumption because the Court -- and I can just go through the
18 Courts here because they are so strong on the fact that in
19 Lancaster, for example, it said Section 856 cannot reasonably
20 be construed to criminalize simple consumption of drugs in
21 one's home.

22 Stetler (ph) said that you must have evidence beyond
23 manufacture for personal use to sustain a conviction. And
24 Russell (ph), which is 2010, which is a Sixth Circuit, each
25 court to have addressed the issue has agreed that the casual

1 user does not run afoul of 856 because he doesn't maintain his
2 house for the purpose of drug use but rather for the purpose of
3 a residence.

4 So they've made those distinctions. There's
5 additional distinctions in terms of what for the purpose of in
6 the context of use to create a limiting principle in the
7 statute, one that is rationally applied and that can provide
8 notice to people who are operating -- who are trying to conform
9 to the statute, but also to make clear that you're not going to
10 have liability every time you simply know that someone who is
11 using is simply using on the property. It is there.

12 THE COURT: But wouldn't the government say you're
13 constructing a facility with a consumption room specifically
14 designed to be a consumption room and that takes us beyond the
15 casual use in a residence? What would your response be to
16 that?

17 MS. EISENSTEIN: So I think that it is not a
18 residency and it is not casual but it is personal consumption.
19 And I think that the additional facet of having simply clean
20 tables and sterile -- a sterile location isn't facilitating the
21 use in any greater way than is already in existence in current
22 programs. We're already providing all of the consumption
23 equipment through federally endorsed syringe exchange programs.
24 And right now we have to show people the door. The only
25 difference between our proposal and what exists under federally

1 endorsed scheme is that we're allowing people to stay within
2 our facility.

3 So I dispute a little bit about the idea that we're
4 inviting people for drug use. I think we are inviting people
5 to stay in order to be proximate even at the time of drug use.

6 THE COURT: Well, let me test the proposition that
7 provision of medical support and resuscitation that takes it
8 outside the statute. But we'll get back to the famous Wayne
9 and Garth of Saturday Night Live, and every Friday they invite
10 their friends over to shoot up and say and it's a good place to
11 come because we've got the Naloxone right there. Regular
12 event, and that's what they're doing. Statute apply?

13 MS. EISENSTEIN: So they invite their friends --

14 THE COURT: Right.

15 MS. EISENSTEIN: -- for the purpose of using drugs.

16 THE COURT: But they're there with the Naloxone.

17 Does Naloxone change the mix or not?

18 MS. EISENSTEIN: No, and I think that actually brings
19 us to the Safe Stock example and as the sort of stark contrast
20 between safe stock, which was the Tubeau medical tent or the
21 Naloxone at the drug party that Wayne and Garth host and what
22 Safehouse is purporting to do. Safehouse is providing the type
23 of medical services that would be available if someone showed
24 up in the ER or if an EMS or if an emergency medical personnel
25 showed up on the street corner in somebody's house in response

1 to an overdose. But they're allowing the proximity to someone
2 who's already planning to use. They've accepted -- they've
3 taken the consumption equipment from the syringe exchange
4 program. There's someone who has been known and registered and
5 suffering from existing addiction. And the reason that we're
6 allowing them to do that is not to have a party, is not for
7 recreational use, is for the simple reason of being there to
8 provide urgent life-saving care in the event of an overdose
9 rather than having to wait the critical minutes it would take
10 if we had to run out behind a -- even behind a closed door and
11 a runner into the street or blocks down to an apartment --
12 unknown apartment.

13 THE COURT: And the government, I think, is saying
14 all right. To make the omelet you need to break some eggs.
15 And breaking the eggs, in this instance consumption, is what
16 violates the law. And so we agree we want to make an omelet
17 but a necessary step in between is unlawful. And then they go
18 on to cite cases that say another motive does not excuse the
19 violation of the law. So how does Safehouse respond to that?

20 MS. EISENSTEIN: Yeah. Well, it's not a noble motive
21 here. Purpose is an element of the statute so that's one of
22 the critical differences. The cases they cite for purpose
23 doesn't matter are, like, cases where a --

24 (simultaneous speaking)

25 THE COURT: They're heavy civil disobedience. I'll

1 grant you that.

2 MS. EISENSTEIN: Pardon?

3 THE COURT: They're heavily into civil disobedience
4 line of cases.

5 MS. EISENSTEIN: Well, they're more than civil
6 disobedience. One of the cases was a case that they cite where
7 a war protestor goes in and destroys military equipment on a
8 government facility for the purpose of saving lives. Well,
9 that's nothing like what we're doing here. We're not engaging,
10 in our view, in any illegal activity because if you look at
11 what is -- what is Safehouse doing? What is the activities
12 that Safehouse is offering and the services that Safehouse is
13 offering. They are all directed at treatment, at life-saving
14 care and at providing primary medical care and social services
15 to a vulnerable population in need. It's nothing -- this isn't
16 -- the activity that we're doing is not the -- we're not
17 consuming drugs. We're not destroying property.

18 So I think that the motive there and the purpose, the
19 aim and the objective are critically important in part because
20 of what the statute -- in large part because it's an element of
21 the statute itself. And the government -- an element that the
22 government wants to read right out of the statute. So I think
23 here purpose is important and I think that if you look at some
24 of the concerns that the government suggested, well, a crack
25 dealer could just say, well, my purpose isn't really dealing

1 drugs. It's to provide for my family and --

2 (simultaneous speaking)

3 THE COURT: Well, I sort of dismissed that as word
4 play, but I don't dismiss the argument that an actual physical
5 space which contemplates the use of drugs on a consistent basis
6 could fall within the terms of the statute.

7 MS. EISENSTEIN: Right. And so I just want to point
8 out that the concern that courts articulated with respect to
9 these alternative purposes is that they -- someone would
10 propose a legitimate cover as a potential excuse or immunity
11 from liability under the statute, you know, if they had a
12 nightclub or a bar or a car dealership that that should
13 inoculate complaints against liability in the statute. But
14 what we're offering here is very different. This is a -- this
15 is -- they can't doubt, particularly given that this is on the
16 judgment for a Pleadings, that this is, and as the facts is
17 pleaded, that this is designed to be a medical and public
18 health intervention. And so this is not some kind of cover
19 story for actually trying to secretly promote drug use where,
20 you know, where we're claiming that it's really a medical use.

21 THE COURT: I think I've covered most of the question
22 I wanted to cover, but are there other points that you want to
23 make, counsel?

24 MS. EISENSTEIN: There is an important point that I
25 think we should cover because it goes to how do you evaluate

1 this statute, which is, you know, we've looked at the words of
2 this statute and we've looked at the words and we've
3 (inaudible) the (inaudible) Act and this also comes from the
4 Gonzalez, the Roy and Gonzalez about Congress is explicit when
5 it wants to regulate medical practice.

6 I think it's important of what Congress has done. So
7 the U.S. Attorney described the CARA Act, which included
8 federal funding for Naloxone. And it awards federal grant
9 money for entities providing Naloxone treatment. It provides
10 that they should, quote, "maximize the availability of opioid
11 receptor antagonists, including Naloxone, to veterans." And it
12 recognizes good Samaritan statutes that provide immunity for
13 people who provide Naloxone.

14 But here's the crux. Naloxone only works if there's
15 somebody else there to administer it, somebody who is right
16 there. Without Safehouse, if Naloxone is administered only by
17 happenstance, if a first responder or a good Samaritan or a
18 Prevention point staff member can run fast enough, is the first
19 -- can find the person quickly enough, is just by chance close
20 by --

21 THE COURT: All right, so let's take CARA and let's
22 go back to the government's argument and they would say agreed.

23 Why don't you then say to Congress let's amend CARA to deal
24 with what we propose to do? What would your response to that
25 be?

1 MS. EISENSTEIN: My response would be that there's no
2 need to amend the statute to do what Congress has not
3 prohibited. We have -- we are -- we are permitted to
4 administer Naloxone. We're permitted to provide critical
5 medical care to people suffering from opioid use disorder and
6 Congress has recognized that opioid use disorder is a disease
7 that needs treatment and intervention, particularly this
8 intervention, which is Naloxone. What we are doing is exactly
9 what Congress has asked -- has provided funding for, which is
10 allowing individuals at high risk of overdose death to be in
11 close proximity to the Naloxone that it is funding. It would
12 be ineffectual and it is ineffectual, unfortunately, under the
13 current system where we wait and respond. That's why,
14 unfortunately, we have lost so many people in this crisis.

15 What Safehouse has purported to do is to close that
16 gap, and it's really not a gap in the statute, Your Honor. It
17 is a gap in care. It is a gap in care in the current model
18 based on the fear of prosecution that has prevented us from
19 closing that gap and providing Naloxone when it is most
20 urgently required.

21 THE COURT: All right, thank you, counsel.

22 MS. EISENSTEIN: Thank you, Your Honor.

23 THE COURT: Mr. McSwain, I think I've channeled many
24 of the government's arguments in my questions to counsel for
25 Safehouse, but by all means if you want to -- and then I'll

1 grant the same right to Safehouse.

2 MR. MCSWAIN: Just very briefly, Your Honor?

3 THE COURT: Certainly.

4 MR. MCSWAIN: I think when you're looking at the
5 statute it's really important for us to be clear about how the
6 statute here is not silent about the important points having to
7 do with supposed medical use of heroin. Similar to, again, the
8 open cannabis case, here what Safehouse is purporting to do has
9 been explicitly prohibited again, based on the citations that I
10 talked about in my first presentation, our Congress has said
11 there is no medical use for marijuana. When Congress says no,
12 it means no. So we're not in an implied situation. We're not
13 in a situation where you have to try to guess at what Congress
14 is saying. There's an explicit prohibition.

15 Similarly, there's an explicit prohibition about
16 using your place for the purpose of drugs. When they talk
17 about, you know, this is the same as EMS, I mean, it's not the
18 same as an EMS intervention. All that's different here is that
19 you're actually using a place which means in other words all
20 that's different is you're actually violating a criminal
21 statute. So it is an important additional step, a distinction
22 that matters. That is the illegality.

23 And then lastly I would just say it seems like
24 Safehouse is starting to try to change sort of on the fly what
25 they're actually doing. I mean, let's be real. What they are

1 doing is they're inviting people onto their property to use
2 drugs. They're not inviting people onto their property just to
3 get treatment or whatever other services they're offering. The
4 whole purpose here is for people to use drugs.

5 And what's going to get people to come to Safehouse
6 as opposed to Prevention Point and other places? They can get
7 all that other stuff at Prevention Point. The marketing, the
8 important additional aspect to Safehouse is come here and use
9 the drugs. So when they say that they're not inviting people
10 to use drugs, they're not facilitating drug use, and talking
11 about the purpose of the users is not necessarily to use drugs,
12 I mean, that's just bizarro world. That's not reality.

13 If this opens up, the whole point of it existing is
14 for addicts to come and use drugs. So I don't think that we
15 can obscure that fact by pointing to the other services that
16 they will be providing. That's all I had, Your Honor, unless
17 you had any questions for me.

18 THE COURT: You really were brief, Mr. McSwain, thank
19 you.

20 MR. MCSWAIN: Thank you.

21 (Laughter)

22 THE COURT: Ms. Eisenstein, anything you wish to say
23 in response?

24 MS. EISENSTEIN: No, Your Honor.

25 THE COURT: All right. I thank counsel for their

1 briefing and presentation today. And as the saying goes, we'll
2 take this case under advisement.

3 MR. MCSWAIN: Thank you, Your Honor.

4 UNKNOWN PARTICIPANT: Thank you, Your Honor.

5 THE DEPUTY: All rise.

6 [END 2:44:42]

7

8 THE CLERK: All rise. The United States District Court for the
9 Eastern District of Pennsylvania is now in session, the
10 Honorable James Knoll Gardner presiding.

11 THE COURT: Sit down. Good morning, ladies and
12 gentlemen.

13 MR. FISHER: Good morning, Your Honor.

14 MS. CRAWLEY: Good morning, Your Honor.

15 MR. FISHER: He will.

16 THE COURT: You may swear the defendant.

17 NIYAZ SAINUDEEN, DEFENDENT, SWORN

18 THE COURT: All right, please be seated. It's before
19 the court for a hearing on a motion under 28 USC Section 2255,
20 to vacate, set aside, or correct sentence by a person in
21 ties, that would be better addressed by the presence

22 THE COURT: All right. Then you may call your first
23 witness, Mr. Fisher.

24 DEFENDANT'S EVIDENCE

25 MR. FISHER: Thank you. Defense calls Mr. Sainudeen.

1 THE COURT: And he can testify from the stand,
2 please.

3 All right. Remain standing to take the oath.

4 NIYAZ SAINUDEEN, DEFENDENT, SWORN

5 THE COURT: You may be seated. And I'm sorry I made
6 you take the oath twice. I already gave you the oath. But two
7 times is not necessary, but not a fatal flaw.

8 All right. You may proceed, Mr. Fisher.

9 DIRECT EXAMINATION

10 BY MR. FISHER:

11 Q Would you state your name, and spell your last name for
12 the record, please?

13 A My first name is Niyaz. Last name is Sainudeen. Last
14 name is spelled S-A-I-N-U-D-E-E-N.

15 assessment of \$400, as well. Is that correct?

16 A Exactly.

17 Q All right. Now --

18 THE COURT: Yeah, Mr. Fisher. I believe your client
19 said, when you asked him, did you plead guilty, if I heard him
20 correctly, I believe his answer was, "Yes, there was a guilty

21 THE COURT: All right. Attorney Crawley, you may
22 cross-examine.

23 CROSS-EXAMINATION

24 BY MS. CRAWLEY:

25 Q Good morning, Mr. Sainudeen.

1 A Good morning, Miss.

2 MS. CRAWLEY: May I approach, Your Honor?

3 THE COURT: You may.

4 BY MS. CRAWLEY:

5 THE COURT: All right. You may redirect.

6 REDIRECT EXAMINATION

7 BY MR. FISHER:

8 Q While you were in the courtroom, did you tell Mr.
9 Goldberger not to file an appeal for you?

10 A No, I did not.

11 Q And he never consulted with you after that?

12 A No, he did not.

13 MR. FISHER: Thank you.

14 THE COURT: Any recross?

15 MS. CRAWLEY: Yes, Your Honor, briefly.

16 RECROSS-EXAMINATION

17 BY MS. CRAWLEY:

18 Q So that I understand correctly, you're saying you did not
19 tell Mr. Goldberger that you did not want to appeal? You made
20 that decision. You kept it to yourself?

21 MR. FISHER: Yeah. I would like to call Attorney
22 Goldberger.

23 THE COURT: All right. You may do so.

24 PETER GOLDBERGER, WITNESS, SWORN

25 THE CLERK: Please be seated. State and spell your

1 name for the record.

2 THE WITNESS: My name is Peter Goldberger. My last
3 name is spelled G-O-L-D-B-E-R-G-E-R.

4 DIRECT EXAMINATION

5 BY MR. FISHER:

6 Q And Attorney Goldberger, you are licensed to practice law
7 in the Commonwealth of Pennsylvania?

8 THE COURT: You may proceed.

9 I misspoke. I meant any cross-examination. You
10 haven't crossed yet.

11 MS. CRAWLEY: No. May I approach, Your Honor?

12 THE COURT: You may.

13 CROSS-EXAMINATION

14 BY MS. CRAWLEY:

15 Q Mr. Goldberger, I've placed before you what has been
16 marked as Government Exhibit 1, with today's date. Do you see
17 that, sir?

18 A Yes, I do.

19 A On Thursday, yes.

20 Q -- 2/25/2015?

21 your attention to the 2/27/2015 --

22 MR. FISHER: Very briefly. I will keep it brief.

23 THE COURT: All right.

24 REDIRECT EXAMINATION

25 BY MR. FISHER:

1 Q Just so we're clear, Attorney Goldberger, there's the
2 April 3 e-mail, in which you remind -- between Ms. Sainudeen
3 and yourself.

4 THE COURT: All right. You may call your witness.

5 ABIDHA ABI, WITNESS, SWORN

6 COURTROOM DEPUTY: Please be seated. State and spell
7 your name for the record.

8 THE WITNESS: My name is Abidha Ali. Last name, A-L-
9 I.

10 DIRECT EXAMINATION

11 BY MS. CRAWLEY:

12 Q Good afternoon, ma'am.

13 A Good afternoon.

14 THE COURT: You may proceed. You may proceed.

15 MS. CRAWLEY: Yes, Your Honor.

16 Q Are you married to the defendant, Niyaz Sainudeen?

17 A Yes.

18 Q BY MS. CRAWLEY:

19 thinking.

20 BY MS. CRAWLEY:

21 Q You can answer.

22 A Can you repeat the question?

23 Q You discussed an appeal with your husband long before the
24 last e-mail you wrote to Peter Goldberger on April 15th, 2015,
25 correct?

1 government can make its closing argument thereafter. Each of
2 you two argue from the podium, please.

3 DEFENDANT'S CLOSING ARGUMENT

4 MR. FISHER: Please the court, I would note, for the
5 record, that in his pro se motion, Mr. Sainudeen raised a
6 number of other issues. I am not going to address them. The
7 record speaks on all of those other issues, so I will only

8 All right, Attorney Crawley, you may make your
9 closing arguments for the government.

10 PLAINTIFF'S CLOSING ARGUMENTS

11 MS. CRAWLEY: Yes, Your Honor. Well I will be brief,
12 since I agree with a great deal of what my friend, Mr. Fisher,
13 had to say.

14 MR. FISHER: Thank you.

15 THE CLERK: The honorable court is adjourned.

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C E R T I F I C A T I O N

We, ASC SERVICES, LLC, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.



DATE: September 6, 2019