No. 20-1422

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,
Appellant,
v.
Safehouse, a Pennsylvania nonprofit corporation, et al.,
Appellees.

Safehouse, a Pennsylvania nonprofit corporation,
Appellee,
v.
U.S. Department of Justice, et al.,
Appellants.

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF APPELLEES

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

Ezekiel R. Edwards
Criminal Law Reform Project
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2610
eedwards@aclu.org

Additional counsel on signature page

Trevor Burrus
Counsel of Record
Clark M. Neily III*
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
tburrus@cato.org

**Not admitted in this court*

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(b) and 28(a)(1) and Third Circuit LAR 26.1, *amici curiae* The Cato Institute, the American Civil Liberties Union and the American Civil Liberties Union of Pennsylvania state that none of them have publicly traded parent companies, subsidiaries, or affiliates, and that they do not issue shares to the public.

Dated: July 6, 2020

/s/ Trevor Burrus
Trevor Burrus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Constitutional Provisions

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato has participated as *amicus curiae* in numerous cases before federal courts. Cato also works to defend individual rights through publications, lectures, conferences, public appearances, and the annual *Cato Supreme Court Review*.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with almost 2 million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Pennsylvania is one of its statewide affiliates. The question before this court is of substantial importance to the ACLU and its members.

This case interests *amici* because the misguided and constitutionally dubious federal drug war has ruined millions of lives and cost trillions of dollars. The government should not and cannot block a supervised injection site, one of the proven ways to combat the harms largely created by drug prohibition.

[1] Pursuant to Fed. R. App. P. 29, counsel for *amici* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amici* made a monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Safehouse wishes to build a supervised injection site in Philadelphia, a city that has been ravaged by the opioid crisis in recent years. Disregarding the fact that no one knows how best to address that crisis and flouting the clear constitutional design to create space for local experimentation when it comes to solving intractable problems like drug addiction, the federal government seeks to block Safehouse's public-health project by misapplying a decades-old law enacted during a more punitive and less enlightened era.

In a country ravaged by the harms of the opioid crisis, new approaches are desperately needed. One of those ideas—supervised injection sites—has a demonstrated track record of success in other countries. Our federal structure of dual sovereignty was designed in large measure both to enable and encourage states, under their historic police powers, to experiment with different policies regarding the health and welfare of their populations. Eschewing both the wisdom and the humility of that design, the federal government seeks to impose a uniform—and, in amici's view, uniformly ineffective—national policy for addressing the ravages of opioid addiction. Tragically, the federal government set the stage for the opioid crisis with a century of prohibitionist policies that have the perverse effect of pushing users toward more potent and dangerous drugs such as fentanyl, which accounts for the vast majority of overdose deaths today. Amici do not fault the federal government

for not knowing how to climb out of the policy hole it helped dig; instead, amici object to the federal government digging the hole even deeper through misguided and impermissible encroachment on states' and cities' authority to seek possible solutions.

Besides being unwise, ineffective, and unfaithful to the Founders' unmistakable preference for committing most policy challenges to local "laboratories of democracy," the federal government's attempt to derail experimentation with supervised injection facilities violates the Constitution because the authority to do so is not plausibly included among the powers delegated to the federal government.

The Supreme Court has consistently held that the Commerce and Necessary and Proper Clauses have judicially enforceable limits. Federal power is finite, and no combination of power-conferring provisions in Article I confers on Congress the authority to regulate—let alone proscribe—whatever local activities arouse its concern. Trying to save people's lives by creating a safer space for them to engage in behavior that has been made vastly more dangerous by the federal government's own failed policies—which is the defining essence of Safehouse's mission—is one such activity.

As suggested above and more fully explained below, there are both prudential and constitutional reasons to reject the federal government's interpretation of

Section 856. This court should reject the federal government's efforts to apply a one-size-fits-all, punitive approach to a public-health tragedy of staggering proportions.

ARGUMENT

I. THIS COURT SHOULD NOT LIGHTLY ATTRIBUTE TO CONGRESS AN INTENT TO PROHIBIT LOCAL EFFORTS TO ADDRESS PUBLIC-HEALTH CRISES SUCH AS THE OPIOID EPIDEMIC

Between 1999 and 2017, the overdose death rate per 100,000 went from 6.1 to 21.7. *Drug Overdose Deaths in the United States, 1999–2017*, NCHS Data Brief No. 329, Nov. 2018.[2] The overdose crisis is a public-health emergency for which there is no singular solution. Safehouse proposes one approach that has been used with significant success at saving lives around the world: a supervised injection site. Chloé Potier, Vincent Laprévote, et al., *Supervised injection services: What has been demonstrated? A systematic literature review*, 145 Drug & Alcohol Dependence 48 (Dec. 2014) ("SISs have largely fulfilled their initial objectives without enhancing drug use or drug trafficking.").[3] The federal government, in response, is relying on a pillar of the drug war, the Controlled Substances Act, in an attempt to block one of the most promising known methods for treating compulsive opioid users.

The design of our federal system envisioned states serving as "laboratories of democracy" to experiment with different policies. *United States v. Lopez*, 514 U.S.

[2] https://bit.ly/3ggu3iy

[3] https://bit.ly/2ZEoUdp

549, 581 (1995) (Kennedy, J., concurring) (explaining that "theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *see also New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). While the federal government remains committed to the prohibitionist mindset of the War on Drugs that helped create the opioid crisis, states are seeking new, less harmful methods of regulating marijuana and other drugs. See Part III below.

Even if Congress had the constitutional power to shut down Safehouse's site, which it does not (see Part IV below), prudential concerns compel this court to view with skepticism the federal government's efforts to criminalize local attempts to reduce the risks of a potentially hazardous activity—risks that the federal government not only helped create, but has failed to prevent and exacerbated.

The federal government's attempt to prevent Safehouse from operating—and to discourage the operation of supervised injection facilities more generally across the country—runs directly contrary to the Founders' strongly held preference for local experimentation and innovation. Here the incubators of such innovation, like Philadelphia, have looked to how other countries have succeeded in reducing the

harms from drug use. In Canada, Vancouver's Downtown Eastside was an epicenter of opiate users and overdose deaths in the early 2000s until the supervised injection site Insite started helping compulsive drug users in 2003. Ken MacQueen, "The Science is in. And Insite Works," Macleans, July 20, 2015.[4] Since Insite opened, no one has died of an overdose at the facility. *Id.*[5] Despite encouraging examples of real-world successes and three decades of research into effective harm reduction policies, the federal government continues to push punitive policies have failed for over a century.

II. TREATING ADDICTION AS A CRIMINAL RATHER THAN A MEDICAL PROBLEM IS ONE OF THE DRUG WAR'S MOST HARMFUL FAILINGS

"Trying to end addiction by attempting to eliminate particular drugs is like trying to cure compulsive hand washing by banning one soap after another." Maia Szalavitz, *Unbroken Brain: A Revolutionary New Way of Understanding Addiction* 4 (2016). Addiction is a complex phenomenon that is best thought of as a type of "learned relationship between the timing and pattern of the exposure to substances or other potentially addictive experiences and a person's predispositions, cultural

[4] https://bit.ly/2YZeru5

[5] When Portugal found itself with the worst heroin problem in Europe, with nearly 1 in 100 people addicted, it decided to decriminalize all drugs. *See*, Johann Hari, *Chasing the Scream: The First and Last Days of the War on Drugs* loc. 4624–4850 (2015) (ebook). Now Portugal has the second lowest overdose rate in Europe. Christopher Ingraham, "Why Hardly Anyone Dies of a Drug Overdose in Portugal," Wash. Post, June 5, 2015.

and physical environment, and social and emotional needs." *Id.* at 3. Many of the same "brain circuits are involved in both addiction and obsessive-compulsive disorder (OCD)," *id.* at 62, which makes combating addiction with criminal punishment particularly perverse.

Yet that is still the overriding philosophy of the federal government's 100-year failed experiment in drug prohibition. Between 1980 and 2015, arrests for drug offenses nearly tripled, rising from 580,900 arrests in 1980 to 1,488,707 in 2015. Human Rights Watch & American Civil Liberties Union, *Every 25 Seconds, The Human Toll of Criminalizing Drug Use in the United States* 28 (2016).[6] Of those arrests, the majority (84 percent) were for possession. *Id.* In fact, in 2018, police made more marijuana arrests than for all violent crimes combined, according to the FBI. American Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 5 (2020).[7]

As with many laws, there are stark racial disparities in how drug laws are enforced. While white people are more likely to use illicit drugs than Black people, Black adults are more than two-and-a-half times as likely as white adults to be arrested for drug possession. *Id.* at 44. In 2014, Black people were nearly six times

[6] https://bit.ly/31QpbwE

[7] https://bit.ly/3griTYe

more likely than white people to be in prison for drug possession. U.S. Bureau of Justice Statistics, Prisoners in 2014, September 2015, Appendix Table 4.[8]

Meanwhile, people have been dying at alarming rates despite—or perhaps in part because of—this country's attempt to arrest its way out of the problem. That has been particularly true in Philadelphia, where since 2009 overdose deaths have increased 200 percent. Office of the Medical Examiner, Philadelphia Department of Public Health. (2018) *Unintentional Drug Related Deaths by Year 2003-2017*.[9] Between 2016 and 2017 alone, Philadelphia saw a 34 percent increase in overdose deaths. City of Philadelphia, Department of Public Health, *Fatal Drug Overdoses in Philadelphia*, 2017, 3 CHART no.1 (Apr. 2018).[10]

The drug war is not working. It has inflicted literally incalculable costs on society, far more than drugs ever could. Federal regulation and prohibition have usurped the states' role and made the problem worse. While states and municipalities have historically also pursued prohibitionist policies—including some policies much worse than the federal government—many jurisdictions today are seeking different, more compassionate approaches to drug use grounded in public health. Philadelphia and Safehouse are perfect examples.

---

[8] https://bit.ly/2VMBfLq

[9] https://tabsoft.co/2ZsJBsw

[10] https://bit.ly/3dZ8bXt.

According to the Center for Disease Control (CDC), Pennsylvania is one of states whose populations has suffered the most during the opioid crisis. "Drug Overdose Deaths," CDC.gov (last accessed July 1, 2020).[11] As documented in Safehouse's Answer, Philadelphia's experience is particularly tragic, with 2,300 people dying in the last two years alone. Instead of blessing such life-saving attempts, the federal government's obstruction will only result in more people dying. At the very least, the federal government should not stand in the way of "laboratories of democracy" seeking solutions to fundamentally local public-health challenges.

III. THE OPIOID CRISIS IS PARTIALLY THE RESULT OF MISGUIDED FEDERAL POLICIES GOING BACK OVER A CENTURY THAT PUSHED USERS TO CONSUME MORE DANGEROUS DRUGS, HARASSED DOCTORS, AND HELPED CREATE THE FENTANYL CRISIS

A. Prohibition Policies Have Made Drugs More Potent, and Thus More Dangerous and Addictive

Prohibition is known to increase violence, Danielle Allen, "How The War on Drugs Creates Violence," Wash. Post, Oct. 16, 2015,[12] and it results in an increase in drug adulteration with unknown substances. *Drug Adulterants and Their Effects on the Health of Users: A Critical Review*, Inter-American Drug Abuse Control Commission, Organization of American States (2019).[13] But one of prohibition's

[11] https://bit.ly/2BpjF9n

[12] https://wapo.st/2NOmZgF

[13] https://bit.ly/2AkWoVC

pernicious and underappreciated effects is that drugs become more potent and dangerous. This phenomenon is called "the iron law of prohibition," and for over 100 years it has reshaped how people consume opiates. *See*, *generally*, Mark Thornton, *The Economics of Prohibition* (1991).

It is easy to understand how the iron law of prohibition works by looking at a college football game. When students smuggle alcohol into a game, they do not smuggle beer, a relatively weak form of alcohol that is bulky. Instead they choose more potent liquors that give more "bang for the buck." Hari, *supra*, loc. 4486–4528.

After alcohol prohibition "Americans' expenditure on distilled spirits as a share of total alcohol sales skyrocketed from around 40% pre-Prohibition to almost 90% directly following[.]" Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 Int'l J. of Drug Pol'y. 156 (2017).[14] The cost of beer increased an estimated 700 percent over its pre-Prohibition price compared to an estimated 270 percent increase in the cost of spirits. *Id.* Where moderate or heavy drinkers could once easily consume low-potency alcohol, after Prohibition they were left with essentially only hard spirits, increasing the dangers and harms to alcohol users who could previously moderate their alcohol consumption with low-potency drinks.

[14] https://bit.ly/3ijGOui

The same effect resulted from the first federal laws regulating opiates. The Smoking Opium Exclusion Act of 1909 was passed after a wave of anti-Chinese fervor and increased attempts to foster international cooperation on drug control. David F. Musto, *The American Disease: The Origins of Narcotic Control* loc. 535–641 (1999) (ebook). In the wake of the importation ban, the price of smoking opium sharply increased from about $70 to about $200 for a high-quality tin. *Id.* at loc. 1090. Addicted opium smokers began to look elsewhere, "and there was always morphine and in some places heroin, both of which were considerably cheaper[.]" *Id.* Over a relatively short period of time addicted smokers were pushed to use more potent opiates:

> From 1910 to 1915 most white smokers who had held out against a variety of state and local measures finally capitulated to the increased risk and higher price engendered by national legislation; the Chinese smokers remaining in America would follow in the 1920s, 1930s, and early 1940s. Capitulation did not take the form of the renunciation of opiates, as some reformers had hoped, but rather in the adoption of new and more potent varieties.

Id. at loc. 1127.

This trend continued after the Harrison Narcotics Act went into effect in 1915. David T. Courtwright, *Dark Paradise: A History of Opiate Addiction in America* loc. 1391 (2001) (ebook). On its face, the law was not meant to prohibit opium and cocaine and their derivatives. In the words of Dr. Hamilton Wright, a principal supporter of the law, the law would only "bring this whole traffic and use of these

drugs into the light of day." Rufus King, *The Drug Hang-Up: America's Fifty-Year Folly* 21 (1972). ("The Harrison Act was not in any sense a prohibition statute, but rather a mild regulatory measure consisting of registration and record-keeping requirements to which a moderate federal tax was added in 1919.").

The Harrison Act appeared to allow doctors to prescribe opiates to users: "Nothing contained in this section shall apply . . . to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." Harrison Narcotics Tax Act, Public L. No. 63-223, 38 Stat. 785 (1914). A debate ensued between public-health professionals and the government over the words "professional practice only" and whether that entailed a doctor prescribing "maintenance" opiates to compulsive users. Many doctors set up clinics to help compulsive users who lost legal access to opiates after the Harrison Act, but the Department of Treasury would soon shut them down. King, *supra*, at 28–39. An editorial in the *New York Medical Journal* published just six weeks after the Act's effective date described the situation:

> As was expected . . . the immediate effects of the Harrison antinarcotic law were seen in the flocking of drug habitués to hospitals and sanatoriums. Sporadic crimes of violence were reported too, due usually to desperate efforts by addicts to obtain drugs, but occasionally to a delirious state induced by sudden withdrawal. . . .

> The really serious results of this legislation, however, will only appear gradually and will not always be recognized as such. These will be the failures of promising careers, the disrupting of happy families, the commission of crimes which will never be traced to their real cause, and the influx into hospitals to the mentally disordered of many who would otherwise live socially competent lives.

Mental Sequelae of the Harrison Law, 102 N.Y. Med. J. 1014 (1915).

On the question of whether doctors could prescribe maintenance doses, the Internal Revenue Bureau of the Department of Treasury took the position that "a physician who issued a prescription to an addict for the sole purpose of maintenance was not acting within the bounds of the law[.]" Courtwright, *supra*, at loc. 1400. Treasury's position was challenged at the Supreme Court more than once. In *Webb v. United States*, 249 U.S. 96, 99 (1919), the Court dealt with the question of whether a doctor can "provid[e] the user with morphine sufficient to keep him comfortable by maintaining his customary use." The answer was shockingly conclusory: "to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required." *Id.* at 99–100.

The Court repudiated this only six years later in *Linder v. United States*, holding that the Harrison Act "says nothing of 'addicts' and does not undertake to prescribe methods for their medical treatment." 268 U.S. 5, 18 (1925). Despite the Court's ruling, it did not change much:

> By 1925, strong language from the Court was not enough to change the pattern. The trick had worked. The medical profession had withdrawn completely from the field, and the doctors never permitted the addict to

> re-approach them. The peddler had moved in and taken over, and his profits soared as enforcement efforts kept reducing his competition and driving his customers ever deeper into the underworld, where they were easy prey.

King, *supra*, at 46.

Despite its beginnings as what many perceived as a relatively harmless record-keeping law, the Harrison Narcotics Act grew teeth and eventually pushed users toward more dangerous, high-potency drugs. The law had a "marked impact on the addict in the street and on the kinds of drugs he used." Courtwright, *supra*, at loc. 1400. Whereas users could once obtain a variety of low-potency opiates, heroin became "the illicit opiate par excellence" because "dealers and their customers came to appreciate its black-market virtues," namely, its potency and the "ease with which heroin could be adulterated." *Id.* at loc. 1409.

B. The Current Fentanyl Crisis is Largely a Result of Prohibition

Fast-forward a century, and, over the last decade, deaths from the synthetic opioid fentanyl have skyrocketed. *See*, Josh Katz, "First Count of Fentanyl Deaths in 2016: Up 540% in Three Years," N.Y. Times, Sept. 2, 2017.[15] In 2018, the CDC reported more than 31,000 deaths from overdoses of synthetic opioids. "Synthetic Opioid Overdose Data," CDC.gov (last accessed July 1, 2020).[16] "[I]ncreases in synthetic opioid-involved deaths are being driven by increases in fentanyl-involved

[15] https://nyti.ms/31yllbg

[16] https://bit.ly/2VyiDic

overdose deaths, and the source of the fentanyl is more likely to be illicitly manufactured than pharmaceutical." *Id.*

As discussed *supra*, the iron law of prohibition dictates that traffickers and dealers will prefer the most potent form of a drug due to the ease of smuggling. Fentanyl is a synthetic opiate that is 50–100 times more potent than heroin. "Fentanyl," CDC.gov (last accessed July 1, 2020).[17] A lethal dose of fentanyl is estimated to be between 2–3 milligrams, or the size of about four grains of salt. *Fentanyl Signature Profiling Program Report*, Drug Enforcement Administration (Oct. 2019).[18] That means that in a single gram of the drug there are several hundred lethal doses.

Fentanyl's increasingly deadly presence in America's drug supply is not a demand-driven phenomenon. In one qualitative study that interviewed compulsive opiate users, "nearly every regular heroin user who claimed to have personal experience using illicit fentanyl or fentanyl-contaminated heroin reported a strong dislike for its effects." Jennifer J. Carroll, et al., *Exposure to Fentanyl-Contaminated Heroin and Overdose Risk Among Illicit Opioid Users in Rhode Island: A Mixed Methods Study*, 46 Int'l J. Drug Pol'y. 136 (2017).[19] Interviewees indicated "that

[17] https://bit.ly/2ZnvtRB

[18] https://bit.ly/3eQw58A

[19] https://bit.ly/2ZnourQ

fentanyl exposure has led to frequent, often fatal overdose within the heroin using community and has spurred heightened levels of perceived risk." *Id.* Moreover, "the majority of interviewees consider fentanyl highly undesirable." *Id.*

Simply put, prohibition helped create the opioid epidemic. In the decades since the Smoking Opium Exclusion Act and Harrison Narcotics Act pushed users towards more potent and dangerous substances while shutting down avenues for medical treatment, the iron law of prohibition worked its inexorable logic by keeping low-potency opiates out of the black market and reaching its apotheosis in the form of fentanyl—which the federal government has neither the manpower nor the technology to stop—resulting in tens of thousands of overdose deaths each year.

Against this backdrop, the government now seeks to shut down Safehouse's proposed supervised injection site, designed to ameliorate the lethality of this problem and one of the few proven methods for saving lives during the opioid crisis. Fortunately, the government has no such authority, as the reach of the Controlled Substances Act does not extend to Safehouse's supervised injection site.

IV. SAFEHOUSE'S PROPOSED SUPERVISED INJECTION SITE IS AN INTRASTATE, NONECONOMIC ACTIVITY THAT CANNOT BE REGULATED UNDER THE "SUBSTANTIAL EFFECTS" TEST DERIVED FROM THE COMMERCE AND THE NECESSARY AND PROPER CLAUSES

Under the Commerce and Necessary and Proper Clauses, Congress cannot regulate intrastate, noneconomic activity. This includes, for example, parents

allowing their son to consume drugs in their home under supervision to reduce the risk of fatal overdose, or the host of a party allowing a longtime friend with a history of drug overdoses to use the bathroom to take drugs rather than heading out into the streets. Safehouse seeks to provide a similar service, constitutionally speaking. As the Court originally articulated in *Wickard v. Filburn*, 317 U.S. 111 (1942), and confirmed in *Lopez*, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

The Commerce Clause authorizes Congress "[t]o regulate Commerce . . . among the several States[.]" U.S. Const. art. I, § 8, cl. 3. Combined with the Necessary and Proper Clause, the commerce power allows Congress to regulate those things that are "necessary and proper to carrying into execution" the Commerce Clause. U.S. Const. art. I, § 8, cl. 18.

Providing a place to consume drug *without compensation* is not a "channel of interstate commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964). Nor is it an "instrumentalit[y] of interstate commerce, or persons or things in interstate commerce." *Lopez*, 514 U.S. at 558. Nor is it the regulation of an economic activity that has "a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 559.

Congress is forbidden from regulating intrastate, noneconomic conduct with only the most attenuated connection to interstate commerce. That attenuation is not determined by a complex, case-by-case judicial judgment—asking judges to, in some sense, "measure" whether something has an effect on interstate commerce—but rather it is determined categorically. The Court made this clear in *Lopez* when it declined the government's invitation to perform a complex analysis of the economic effects of guns in school zones and instead ruled that the Gun-Free School Zone Act regulated a category of behavior the commerce power cannot reach:

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.

Id. at 564. Notably, the Court lists activities that unquestionably have immense effects on interstate commerce, much larger than a gun in a school zone, but are nevertheless outside of congressional jurisdiction. It is not the effects *simpliciter* that count, but whether those effects flow from the type of conduct that it is necessary and proper for Congress to regulate under the Commerce Clause.

While *Lopez* found that aggregation could apply only to economic activity, it was in line with the decision in *Wickard*: "Even *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity,

involved economic activity in a way that possession of a gun in a school zone does not." *Id*. at 560. *Wickard* involved the production of wheat, while in *Lopez*, and here, nothing is being produced. *Wickard*, 317 U.S. at 114–15. And in *United States v. Morrison*, the Court held that gender-motivated violence is not economic activity and thus that the substantial effects doctrine was inapplicable. 529 U.S. 598, 613 (2000). The Court thus clarified the "substantial effects" doctrine by setting the regulation of intrastate economic activity (in certain contexts) as the absolute limit of federal power under the Commerce and Necessary and Proper Clauses. "Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added).

Adopting such a categorical distinction between economic and noneconomic activity allowed the Court to determine whether legislation is "necessary" under the Necessary and Proper Clause without involving it in complex, potentially insoluble evaluations of the "more or less of necessity or utility" of the challenged law. Alexander Hamilton, "Opinion on the Constitutionality of a National Bank" (1791), in *Hamilton: Writings* 619 (J. Freeman, ed., 2001). This distinction limits congressional power when regulating intrastate economic activity to activities closely connected to interstate commerce, thus withholding from Congress any unconstitutional police powers, *see, e.g.*, *Lopez*, 514 U.S. at 567, preserving the role

of states in the federalist system, and minimizing the degree of judicial involvement in utilitarian considerations that are outside the courts' expertise.

Gonzalez v. Raich preserved the distinction drawn in *Lopez* and *Morrison* by finding that the cultivation of marijuana is an economic activity— indeed, a type of "manufacture," 545 U.S. 1, 22 (2005)—that Congress could prohibit as a necessary and proper means of exercising its commerce power. "Our case law firmly establishes Congress's power to regulate *purely local activities that are part of an economic 'class of activities'* that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added).

Providing a space to consume drugs as safely as possible without compensation, whether parents in relation to their child or Safehouse in relation to residents of Philadelphia, is not a type of economic activity that can be reached by the Commerce and Necessary and Proper Clauses. While drugs themselves can be regulated by Congress as a type of commercial good, *id.* at 25–28, it does not follow that Congress's powers over interstate commerce reach into every local activity involving drug use.

CONCLUSION

The government's unconstitutional overreach to stop Safehouse's supervised injection site should not be entertained by this Court.

Date: July 6, 2020

Respectfully submitted,

By: /s/ Trevor Burrus
Trevor Burrus
Counsel of Record
Clark M. Neily III*
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
tburrus@cato.org

**Not admitted to this court*

Ezekiel R. Edwards
Criminal Law Reform Project
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2610
eedwards@aclu

Mary Catherine Roper
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215 592 1513 ext. 116
mroper@aclupa.org

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

2. This brief also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Fed. R. App. P. 29(d), because this brief contains 4,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. The text of the electronic version of this Brief filed on ECF is identical to the text of the paper copies filed with the Court.

4. The electronic version of this Brief filed on ECF was virus-checked using ESET Cyber Security, Version 6.8.300.0, and no virus was detected.

Dated: July 6, 2020

By: /s/ Trevor Burrus
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
tburrus@cato.org

Attorney for Amicus Curiae Cato Institute

LOCAL RULE 28.3(d) CERTIFICATION

I hereby certify that at least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court.

Dated: July 6, 2020

By: /s/ Trevor Burrus
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
tburrus@cato.org

Attorney for Amicus Curiae Cato Institute

Ezekiel R. Edwards
Criminal Law Reform Project
American Civil Liberties Union
125 Broad St, 18th Floor
New York, NY 10004
Telephone: (212) 549-2610
eedwards@aclu.org

Attorney for Amicus Curiae American Civil Liberties Union

Mary Catherine Roper
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215 592 1513 ext. 116
mroper@aclupa.org

Attorney for Amicus Curiae American Civil Liberties Union of Pennsylvania

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2020 I caused to be filed the foregoing document with the United States Court of Appeals for the Third Circuit, via the CM/ECF system, which will provide notice to all counsel of record.

Dated: July 6, 2020

By: /s/ Trevor Burrus
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
tburrus@cato.org

Attorney for Amicus Curiae Cato Institute

Ezekiel R. Edwards
Criminal Law Reform Project
American Civil Liberties Union
125 Broad St, 18th Floor
New York, NY 10004
Telephone: (212) 549-2610
eedwards@aclu.org

Attorney for Amicus Curiae American Civil Liberties Union

Mary Catherine Roper
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215 592 1513 ext. 116
mroper@aclupa.org

Attorney for Amicus Curiae American Civil Liberties Union of Pennsylvania