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## United States v. Safehouse: The Future of Supervised Consumption Sites in Maine and Beyond

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## **United States v. Safehouse: The Future of Supervised Consumption Sites in Maine and Beyond**

### **Cover Page Footnote**

J.D. Candidate, University of Maine School of Law Class of 2023. In memory of Andrew Roderiques, who is missed by his family. I am grateful for the time we had together. Special thanks to Professor Daniel Pi and Katherine Elliot, University of Maine School of Law Class of 2022, for their thoughtful advice and encouragement.

# UNITED STATES V. SAFEHOUSE: THE FUTURE OF SUPERVISED CONSUMPTION SITES IN MAINE AND BEYOND

Jeff Sherman

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*UNITED STATES V. SAFEHOUSE: THE FUTURE OF  
SUPERVISED CONSUMPTION SITES IN MAINE AND  
BEYOND*

Jeff Sherman\*

ABSTRACT

People who use drugs are dying at an unprecedented rate. However, many of these deaths can be prevented. When a person experiencing an opioid overdose is timely treated with naloxone and oxygen the overdose is reversed. Access to a supervised consumption site—a place where people can use pre-obtained drugs in the safety and presence of others—ensures that when a person overdoses, they receive this life-saving treatment. In response to a proposed supervised consumption site in Philadelphia, the Department of Justice sued to prevent it from opening. The government claimed that the facility, called “Safehouse,” would violate 21 U.S.C. § 856(a)(2) which makes it a crime to “manage or control [a] place . . . and knowingly and intentionally . . . make [it] available for use . . . for the purpose of” drug activity.

This Note analyzes that case: *United States v. Safehouse*. In *Safehouse*, the Third Circuit overturned the district court’s decision and held that supervised consumption sites violate § 856(a)(2). The court’s reasoning, and the opinions of the dissent and the district court, centered around statutory construction and *who* must act “for the purpose of” drug activity. According to the majority’s construction, Safehouse would violate the statute as long as the participants of the consumption room act with the requisite purpose. According to the dissent and the district court’s construction, it is Safehouse who must act “for the purpose of” drug activity. Based on their construction, both the dissent and the district court determined that Safehouse would not violate the statute because the purpose of a supervised consumption site is to provide access to live-saving medical treatment and to reduce, rather than facilitate, drug use.

Although the majority contends that its construction is consistent with the plain meaning of the statute, the dissent and the district court’s alternative construction demonstrates that the statute is ambiguous. This Note argues that the alternative construction is more compelling because the dissent and district court resolve the statute’s ambiguity by looking to the legislative history and in doing so avoid the absurd consequences of the majority’s formalistic and mechanistic interpretation. This Note posits that after *Safehouse*, there is hope of a supervised consumption site in Maine. More specifically, it argues that, because of the competing constructions of § 856(a)(2), a proposed supervised consumption site might not be prosecuted by the U.S. Attorney for the District of Maine or could find success in the First Circuit.

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## I. INTRODUCTION

In 2020, more Mainers died of drug overdoses than from COVID-19.<sup>1</sup> In total, Maine lost 504 people to drug overdoses.<sup>2</sup> The annual number of overdose deaths has continued to increase over the last decade,<sup>3</sup> and researchers at the University of Maine estimate that 636 people died in 2021.<sup>4</sup> The vast majority of drug overdose deaths in Maine are caused by a combination of substances.<sup>5</sup> In 2020, the most common drug involved in an overdose death was an opioid.<sup>6</sup> An “opioid” refers to a drug made from the opium plant, such as morphine, codeine, heroin, or a synthetic version with similar effects, such as oxycodone or hydrocodone.<sup>7</sup> In recent years, fentanyl, a synthetic opioid, has become more common.<sup>8</sup> In 2020, 67% of drug overdose deaths in Maine involved the substance.<sup>9</sup> These tragic deaths are certainly not unique to Maine. The Centers for Disease Control and Prevention (CDC) estimated that, in 2020, more than 90,000 people in America died of drug overdoses.<sup>10</sup> Currently, more Americans lose their lives as a result of a drug overdose than from car crashes and gun fatalities *combined*.<sup>11</sup>

In response to rising overdose deaths, states have tried different methods of treating people who use drugs. Supervised consumption sites<sup>12</sup>—places where

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1. Joe Lawlor, *Maine’s Death Rate Rose by 4.5% Last Year, Driven Largely by COVID-19*, PORTLAND PRESS HERALD (Apr. 25, 2021), <https://www.pressherald.com/2021/04/25/maines-death-rate-rose-by-4-5-last-year-driven-largely-by-covid-19> [<https://perma.cc/59GE-7MJS>] (reporting 422 deaths from COVID-19 and more than 500 deaths from drug overdoses).

2. MARCELLA H. SORG, MARGARET CHASE SMITH POL’Y CTR.: U. ME., MAINE DRUG DEATH REPORT FOR 2020 3 (2021).

3. *Drug Overdose Deaths in Maine*, MARGARET CHASE SMITH POL’Y CTR.: U. ME., <https://mcspolicycenter.umaine.edu/mcspc-research/drug-overdose-deaths/> [<https://perma.cc/FEV2-GXMA>] (last visited May 13, 2022) (showing rise in number of drug overdose deaths from 167 in 2010 to 504 in 2020).

4. Randy Billings, *Maine Shattered its Annual Record for Overdose Deaths in 2021*, PORTLAND PRESS HERALD, (Jan. 19, 2022), <https://www.pressherald.com/2022/01/19/maine-shatters-annual-record-for-overdose-deaths/> [<https://perma.cc/3ZTQ-5CNH>] (noting a 23% increase in overdose deaths from 2020).

5. SORG, *supra* note 2, at 7 (noting that in 2020, 81% of drug related deaths involved more than one drug).

6. *Id.* (noting that in 2020, 83% of drug-related deaths involved either a pharmaceutical or nonpharmaceutical opioid).

7. CARL L. HART & CHARLES KSIR, DRUGS, SOCIETY & HUMAN BEHAVIOR 291, 300 (17th ed. 2018).

8. *See generally* BEN WESTHOFF, FENTANYL INC.: HOW ROGUE CHEMISTS ARE CREATING THE DEADLIEST WAVE OF THE OPIOID EPIDEMIC (2019) (detailing the rise in the manufacture, sale, and use of fentanyl).

9. SORG, *supra* note 2, at 7.

10. Paige Winfield Cunningham, *The Health 202: Overdose Deaths May Have Topped 90,000 in 2020*, WASH. POST (Apr. 7, 2021), <https://www.washingtonpost.com/politics/2021/04/07/health-202-overdose-deaths-may-have-topped-90000-2020> [<https://perma.cc/QK4T-3MEJ>].

11. Roni Caryn Rabin, *Overdose Deaths Reached Record High as the Pandemic Spread*, N.Y. TIMES (Nov. 17, 2021), <https://www.nytimes.com/2021/11/17/health/drug-overdoses-fentanyl-deaths.html> [<https://perma.cc/QGJ3-RQKF>].

12. Supervised consumption sites are also commonly referred to as safe injection sites, overdose prevention centers, supervised injection facilities and drug consumption rooms. *Overdose Prevention*

people use pre-obtained drugs under the supervision of trained staff—are part of the strategy to prevent overdose deaths internationally but face significant obstacles in the United States from federal law enforcement. For instance, in 2018, the Philadelphia-based non-profit “Safehouse” attempted to become the first supervised consumption site in the United States but was prevented from opening as a result of a lawsuit brought by the Department of Justice (DOJ). This Note focuses on that case: *United States v. Safehouse*.<sup>13</sup>

This Note first discusses how the treatment of people who use drugs has evolved over time, the rise of harm reduction, and the promise of supervised consumption sites. Section II of this Note examines the legislative history and enforcement of 21 U.S.C. § 856, the federal law that supervised consumption sites allegedly violate. Section III discusses *United States v. Safehouse*, the first case analyzing whether supervised consumption sites violate federal law and the merits of the Third Circuit’s decision. Section IV discusses policy considerations. Finally, Section V considers the path forward for supervised consumption sites in Maine.

### A. Historical Treatment of People Who Use Drugs

Opioids have been popular throughout American history and were legal until the early 20th Century.<sup>14</sup> When opioids were sold legally the typical opioid user was a middle-class white woman.<sup>15</sup> This use was generally socially acceptable and the user typically treated withdrawal symptoms by taking less expensive and more widely available opioids.<sup>16</sup> Many factors, including racial animus towards black men and Chinese immigrants, led Congress to pass the Harrison Narcotics Act which resulted in, among other things, a restriction in access to legal opioids.<sup>17</sup> By the 1950s, the typical opioid user was a lower-class male who intravenously injected illegal heroin.<sup>18</sup> With this change, the public perception of the people who used opioids devolved from victims who were worthy of sympathy and medical treatment to criminals who deserved punishment.<sup>19</sup>

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*Centers*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/supervised-consumption-services> [https://perma.cc/4DCT-DZV8] (last visited May 13, 2022).

13. *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021).

14. *See, e.g.*, MARTIN BOOTH, OPIUM: A HISTORY 73-74, 191-92 (St. Martin’s Press ed., 1998) (describing opium and morphine use during the Revolutionary and Civil Wars); HART & KSIR, *supra* note 7, at 294-30; CARL L. HART, DRUG USE FOR GROWN-UPS: CHASING LIBERTY IN THE LAND OF FEAR 32 (Penguin Press ed., 2021).

15. HART & KSIR, *supra* note 7, at 295; *see also* Laura I. Appleman, *Opioids, Addiction Treatment, and the Long Tail of Eugenics*, 80 OHIO STATE L.J. 841, 848 (2019).

16. HART & KSIR, *supra* note 7, at 294-95.

17. *Id.*; HART, *supra* note 14, at 33-34. *See generally* Harrison Narcotics Act, Pub. L. No. 63-223, 38 Stat. 785 (1914). The Harrison Narcotics Act did not directly prohibit the use or possession of opioids, and white people “with means or access to a physician” continued to use opioids legally with a prescription. HART, *supra* note 14, at 33-34. Alternatively, those with lower social capital faced increasingly punitive measures. *Id.* at 34.

18. HART & KSIR, *supra* note 7, at 297.

19. *Id.* *See generally* Appleman, *supra* note 15, at 848-51 (“Beginning the early 20th century, the public, recognized face of the typical opiate addict – middle class, middle-aged Anglo-Saxon white female – began to transform into the far more threatening poor urban residents, who were often categorized as street criminals.”).

*B. Harm Reduction*

Throughout the last century, criminalization has been the government's primary strategy for addressing both drug use and addiction.<sup>20</sup> However, in recent years, harm reduction strategies have become increasingly accepted in the United States<sup>21</sup> as a more compassionate and cost-effective method of reducing the adverse health, social, and economic consequences of drug use.<sup>22</sup> Harm reduction strategies prioritize reducing these adverse consequences over abstinence and treatment.<sup>23</sup> This is important because it provides options that would otherwise be unavailable to people who are unable or unwilling to stop using drugs.<sup>24</sup> One common class of harm reduction strategies is syringe exchange programs which provide people who use intravenous drugs access to sterile equipment.<sup>25</sup> Like many states, Maine has implemented harm reduction strategies in combination with efforts in prevention, treatment, and recovery.<sup>26</sup>

Central to Maine's harm reduction strategy is providing access to naloxone.<sup>27</sup> An excessive dose of an opioid or the combination of an opioid and a depressant, such as alcohol, can depress the respiratory centers of the brain, making it difficult or impossible to breathe.<sup>28</sup> Naloxone is an opioid antagonist that quickly reverses respiratory depression by binding to opioid receptors in the brain and displacing the drug in the person's system.<sup>29</sup> To prevent death or other consequences from prolonged respiratory depression, naloxone must be administered "in a timely manner."<sup>30</sup> Thus, Maine has implemented strategies to make naloxone more common at the scene of an overdose and recommends that every person who uses

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20. HART & KSIR, *supra* note 7, at 57-69, 297.

21. *Harm Reduction's Road From Fringe to Federal Drug Policy*, TRADEOFFS (Jan. 27, 2022), <https://tradeoffs.org/2022/01/27/harm-reduction-drugs-substance-use/> [<https://perma.cc/FMB5-VSSQ>].

22. *See What Is Harm Reduction?*, HARM REDUCTION INT'L, <https://www.hri.global/what-is-harm-reduction> [<https://perma.cc/H2EQ-ECXF>] (last visited May 13, 2022).

23. *Id.*

24. *See id.*

25. *See* HART & KSIR, *supra* note 7, at 27-28. *See generally* Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 COLUM. L. REV. 1185, 1194-201 (2018) (describing the history and legal structure of syringe exchange programs). In Maine, syringe exchange programs have been part of the harm reduction strategy since 1997. *See* 22 M.R.S. § 1341 (2021). In 2021, this strategy was expanded with the decriminalization of syringes and other safer use equipment like fentanyl test strips. P.L. 2021, ch. 434.

26. *See* GOVERNOR'S OFF. OF POL'Y INNOVATION & THE FUTURE, MAINE'S OPIOID RESPONSE: 2021 STRATEGIC ACTION PLAN (2021).

27. *See id.*

28. HART & KSIR, *supra* note 7, at 305. An overdose death caused by an excessive dose of a single opioid drug represents only about a quarter of all opioid deaths. HART, *supra* note 14, at 35. Although inconsistent testing and reporting obscure the data on overdose cause of death, many more fatal overdoses are caused by contaminated opioids or opioids taken in combination with a depressant. *See id.* at 35, 63-65 ("People are not dying because of opioids; they are dying because of ignorance.")

29. HART & KSIR, *supra* note 7, at 305.

30. *See* Lisa Chimbar & Yvette Moleta, *Naloxone Effectiveness: A Systematic Review*, 29 J. ADDICTIONS NURSING 167, 167 (2018).

drugs carry it, regardless of what drug they are using.<sup>31</sup> Since 2016, naloxone has been available to anyone in Maine without the need for a prescription.<sup>32</sup> Notably, Governor Janet Mills made naloxone distribution a priority in 2019,<sup>33</sup> and since then the state has distributed more than 100,000 doses.<sup>34</sup>

However, distribution alone is not enough. Administering naloxone does not guarantee an overdose reversal and Maine health officials recommend calling 911 for additional assistance before administering naloxone.<sup>35</sup> OPTIONS, an initiative of the Maine Office of Behavioral Health, recommends using drugs in groups to ensure that another person is there to call 911 if there is an overdose.<sup>36</sup> However, fear of arrest and criminal prosecution for possession of drugs often prevents people from calling for help.<sup>37</sup> To encourage 911 calls, Maine's Good Samaritan law grants limited criminal immunity to people who call 911 and people experiencing an overdose.<sup>38</sup>

While the state has experienced some success with this strategy, overdose deaths have not decreased. When naloxone is not available in time, people die. This has led many people, both nationally<sup>39</sup> and in Maine,<sup>40</sup> to advocate for the addition of supervised consumption services to existing harm reduction strategies.

31. See *Safer Drug Use Practices*, OPTIONS, <https://knowyouroptions.me/safer-drug-practices/> [<https://perma.cc/CGR7-HFYU>] (last visited May 13, 2022) (Overdose Prevention Through Intensive Outreach Naloxone and Safety (OPTIONS) initiative).

32. See P.L. 2016, ch. 508 (allowing pharmacists to dispense naloxone “to an individual at risk of experiencing an opioid-related drug overdose”).

33. See Me. Exec. Order No. 2 FY 19/20 (Feb. 6, 2019).

34. MARGARET CHASE SMITH POL’Y CTR., UNIV. OF ME., MAINE NALOXONE DISTRIBUTION INITIATIVE: PROJECT-TO-DATE TOTALS THROUGH JUNE 30, 2021, 2 tbl.1 (2021).

35. *Responding to an Overdose*, OPTIONS, <https://knowyouroptions.me/respond-to-overdose/> [<https://perma.cc/7ZLK-H2T4>] (last visited May 13, 2022).

36. OPTIONS, *supra* note 31.

37. KARLA D. WAGNER ET AL., POST-OVERDOSE INTERVENTIONS TRIGGERED BY CALLING 911: CENTERING THE PERSPECTIVES OF PEOPLE WHO USE DRUGS 3 (2019).

38. 17-A M.R.S. § 1111-B (2021); P.L. 2022, ch. 724 (protecting the person who calls for assistance, any person “rendering aid,” and the person experiencing a drug-related overdose from arrest or prosecution for all crimes except those enumerated in § 1111-B(1)(A)); see also 22 M.R.S. § 2353(5) (2021) (extending civil, criminal, and professional immunity to a person who injures another person while administering naloxone).

39. See, e.g., Press Release, Am. Med. Assoc., AMA Wants New Approaches to Combat Synthetic and Injectable Drugs (June 12, 2017).

40. See, e.g., *An Act to Prevent Overdose Deaths: Hearing on L.D. 949 Before the J. Standing Comm. On Health and Hum. Servs.*, 129 Legis. (2019) (testimony of Meagan Sway, ACLU of Maine) (testimony of Kenney Miller, Health Equity Alliance) (testimony of Taryn Hallweaver, Maine People’s Alliance) (testimony of Caitlin Corrigan, Preble Street); Editorial Board, *Our View: With New Maine Law, Harm Reduction Comes First*, PORTLAND PRESS HERALD (Oct. 20, 2021), <https://www.pressherald.com/2021/10/20/our-view-with-new-maine-law-harm-reduction-comes-first> [<https://perma.cc/6Y LX-JXXC>] (“We should also consider safe injection sites . . .”). In 2021, many of these same activists in Maine advocated to decriminalize drug possession for personal use. See, e.g., Megan Gray, *Bill to Make Drug Possession for Personal Use a Civil Violation Fails After Senate Vote*, PORTLAND PRESS HERALD (July 1, 2021), <https://www.pressherald.com/2021/07/01/maine-senate-rejects-bill-that-would-make-drug-possession-for-personal-use-a-civil-violation> [<https://perma.cc/CE7Y-V7CB>]. See generally L.D. 967 (130th Legis. 2021). Although a decriminalization bill passed the House of Representatives, it failed to pass the Senate and faced opposition from members of Governor Janet Mills’ administration. Gray, *supra*; see also *An Act to Make Possession of Scheduled Drugs for Personal Use a Civil Penalty: Hearing*

*C. Supervised Consumption Sites*

A supervised consumption site ensures that naloxone and oxygen are present during an overdose by allowing people “to consume pre-obtained drugs under the supervision of trained staff.”<sup>41</sup> Staff trained in overdose prevention and resuscitation using naloxone can ensure that overdoses are responded to immediately.<sup>42</sup> Additionally, supervised consumption sites aim to lower disease transmission, reduce drug use in public places, and offer people who use drugs access to treatment, counseling, and other social services.<sup>43</sup>

The first supervised consumption site opened in 1986 in Bern, Switzerland, and since then, approximately 120 supervised consumption sites have opened in eleven countries.<sup>44</sup> In 2003, the first North American supervised consumption site opened in Vancouver, British Columbia.<sup>45</sup> Notably, there have been more than 3.6 million visits to the site and 6,440 overdose interventions, yet there have been *zero* reported deaths.<sup>46</sup> An unsanctioned supervised consumption site in the United States has operated since 2014 with similar success.<sup>47</sup> However, the American site has been operating in secret, without the ability to integrate other services.<sup>48</sup> Despite the lack of services available at the secret site, there has yet to be a reported death.<sup>49</sup> While disagreement exists on the degree of effectiveness of these sites, studies have generally found that supervised consumption sites save lives, reduce disease, and have positive impacts within the community.<sup>50</sup> Importantly, supervised consumption sites accomplish these goals without increasing drug use.<sup>51</sup>

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*On L.D. 967 Before the Comm. On Crim. Just. And Pub. Safety*, 130th Legis. (2021) (testimony of Aaron Frey, Attorney General) (testimony of Roy McKinney, Director of the Maine Drug Enforcement Agency).

41. DRUG POL’Y ALL., *supra* note 12.

42. Alex Kreit, *Safe Injection Sites and the Federal “Crack House” Statute*, 60 B.C. L. REV. 413, 421 (2019).

43. *Drug Consumption Rooms: An Overview of Provision and Evidence*, EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION (July 6, 2018), [https://www.emcdda.europa.eu/system/files/publications/2734/POD\\_Drug%20consumption%20rooms.pdf](https://www.emcdda.europa.eu/system/files/publications/2734/POD_Drug%20consumption%20rooms.pdf) [<https://perma.cc/5UE7-EAD8>].

44. DRUG POL’Y ALL., *supra* note 12 (including Australia, Canada, Denmark, France, Germany, Luxembourg, Norway, Spain, Switzerland, the Netherlands, and the United States).

45. Mehmet Zülfü Öner, *An Overview of Drug Consumption Rooms*, 4 HUM. RTS. REV. 87, 115 (2014). See generally TRAVIS LUPICK, FIGHTING FOR SPACE: HOW A GROUP OF DRUG USERS TRANSFORMED ONE CITY’S STRUGGLE WITH ADDICTION 257-83 (2017).

46. *Insite User Statistics*, VANCOUVER COASTAL HEALTH, <http://www.vch.ca/public-health/harm-reduction/supervised-consumption-sites/insite-user-statistics> [<https://perma.cc/3YU9-NDWE>] (last visited May 13, 2022).

47. See Peter J. Davidson et. al., *Using Drugs in Un/safe Spaces: Impact of Perceived Illegality on an Underground Supervised Injecting Facility in the United States*, 53 INT’L J. DRUG POL’Y 37, 38 (2018).

48. *Id.* at 42.

49. *Id.* at 38.

50. See Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 49, 62-65 (2014); BEAU KILMER ET AL., CONSIDERING HEROIN-ASSISTED TREATMENT AND SUPERVISED CONSUMPTION SITES IN THE UNITED STATES xxii, 31-38 (2018).

51. Potier et al., *supra* note 50, at 63. Even without supervised consumption sites, less than one-third of the people who use heroin become dependent. Olga J. Santiago Rivera, *Risk of Heroin Dependence in Newly Incident Heroin Users*, 75 JAMA PSYCHIATRY 863, 864 (2018). The risk of developing an opioid-use disorder increases when a person is young, lacks social support, experiences childhood adversity, or suffers from a mental health disorder. Lynn R. Webster, *Risk Factors for Opioid-Use Disorder and*

International success led many United States cities and states to seriously consider supervised consumption sites as a strategy to prevent overdoses. For example, in 2021, Rhode Island became the first state to officially sanction a plan.<sup>52</sup> Additionally, in November 2021, two supervised consumption sites opened in New York City with the support of city officials.<sup>53</sup> In Maine, organizations like the Church of Safe Injection have continuously advocated to state and local officials to take a more humane approach towards people who use drugs.<sup>54</sup> For instance, in 2019, State Representative Michael Sylvester proposed legislation to create two supervised consumption facilities in Maine.<sup>55</sup>

In 2018, a Philadelphia-based nonprofit was founded with the goal of becoming the country's first supervised consumption site, which it later named "Safehouse."<sup>56</sup> Similar to exemplary international models, Safehouse planned to integrate its supervised consumption room with other resources such as social services, legal services, and housing resources.<sup>57</sup>

Despite local interest in testing the success of these sites, efforts to open supervised consumption sites were met with federal hostility under the Trump Administration. For example, in response to several proposals across the country, then Deputy Attorney General Rod Rosenstein called supervised consumption sites "taxpayer-sponsored haven[s] to shoot up" and promised to meet the opening of any

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*Overdose*, 125 ANESTHESIA & ANALGESIA 1741, 1743 (2017). By integrating other services, supervised consumption sites aim to reduce these factors.

52. 2021 R.I. Pub. Laws 324; see also Julie Wernau, *Rhode Island Set to Be First State to Pilot Safe-Injection Sites for Drug Users*, WALL ST. J. (Oct. 24, 2021), <https://www.wsj.com/articles/rhode-island-set-to-be-first-state-to-pilot-safe-injection-sites-for-drug-users-11635067801> [<https://perma.cc/Y9C2-RM2M>].

53. Jeffrey C. Mays & Andy Newman, *Nation's First Supervised Drug-Injection Sites Open in New York*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html> [<https://perma.cc/RAD9-PWBF>]; see also Jennifer Peltz, *A Look Inside the 1st Official 'Safe Injection Sites' in US*, ASSOCIATED PRESS (Mar. 9, 2022), <https://apnews.com/article/inside-nyc-supervised-drug-injection-sites-7ad93117d1566fda53909c0f70984d1b> [<https://perma.cc/QT5-729H>] ("In their first three months, the sites . . . halted more than 150 overdoses during about 9,500 visits – many of them repeat visits from some 800 people in all.")

54. Jesse Harvey, Opinion, *Maine Voices: Church of Safe Injection Treats Drug Users as Jesus Would Have Done*, PORTLAND PRESS HERALD (Oct. 18, 2018), <https://www.pressherald.com/2018/10/18/maine-voices-church-of-safe-injection-treats-addicts-as-jesus-would-have-done/> [<https://perma.cc/A4HF-E5KP>]; Editorial, *Our View: A 'Church' That Wants to Save Lives, Not Souls*, PORTLAND PRESS HERALD (Nov. 2, 2018), <https://www.pressherald.com/2018/11/02/our-view-a-church-that-wants-to-save-lives-not-souls/> [<https://perma.cc/R5WK-KJC7>].

55. L.D. 949 (129th Legis. 2019). Notably, this legislative effort was opposed by Roy McKinney, Director of the Maine Drug Enforcement Agency, who testified against the legislation on behalf of the Department of Public Safety. *An Act to Prevent Overdose Deaths: Hearing on L.D. 949 Before the J. Standing Comm. on Health & Hum. Servs.*, 129th Legis. (2019) (testimony of Roy McKinney, Director of the Maine Drug Enforcement Agency).

56. Aubrey Whelan & Jeremy Roebuck, *Philly's Journey to a Supervised Injection Site Spans Years as Overdose Rates Soar*, PHILA. INQUIRER (Feb. 10, 2022), <https://www.inquirer.com/health/opioid-addiction/supervised-injection-site-overdose-crisis-philadelphia-timeline-20220210.html> [<https://perma.cc/2YVQ-VQC8>].

57. *The Safehouse Model*, SAFEHOUSE, <https://www.safehousephilly.org/about/the-safehouse-model> [<https://perma.cc/V4WM-2F3W>] (last visited May 13, 2022).

facility with “swift and aggressive action.”<sup>58</sup> Because users supply their own drugs and staff do not directly handle drugs themselves, it is unlikely that supervised consumption sites violate federal drug possession or distribution laws.<sup>59</sup> The DOJ, however, warned that supervised consumption sites and their staff would violate 21 U.S.C. § 856(a)(2),<sup>60</sup> a rarely used provision of the Controlled Substances Act of 1970 that imposes criminal and civil penalties for making property available to others “for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”<sup>61</sup> In light of these comments, it was unsurprising when the United States Attorney for the Eastern District of Pennsylvania filed suit against Safehouse seeking a declaration that supervised consumption sites violated § 856(a)(2).<sup>62</sup>

## II. 21 U.S.C. § 856: THE “CRACK HOUSE” STATUTE

### A. Crimes Established in 21 U.S.C. § 856

Formally titled “[m]aintaining drug-involved premises,” 21 U.S.C. § 856(a) establishes two separate crimes, making it unlawful to either:

(a)(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; [or to]

(a)(2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>63</sup>

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58. Rod J. Rosenstein, Opinion, *Fight Drug Abuse, Don’t Subsidize It*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> [<https://perma.cc/XXH6-VGZT>]; see also John W. Huber & David Backman, *Uncivil Disobedience: A Selfish Threat to the Rule of Law*, 67 DOJ J. FED. L. & PRAC. 47, 47-49 (2019) (describing supervised consumption sites as “an emerging threat to the rule of law” and vowing that the DOJ would act as the “primary resistance” to efforts to open sites).

59. Kreit, *supra* note 42, at 417.

60. Press Release, U.S. Att’y’s Off.: Dist. of Colo., U.S. Dep’t of Just., Joint Statement of the U.S. Att’y’s Off. & the Denver Field Off. of the Drug Enf’t Admin. Regarding the City & Cnty. of Denver’s Proposal to Create Supervised Locations to Inject Heroin & Other Illegal Drugs (Dec. 4, 2018); see also Press Release, U.S. Att’y’s Off.: Dist. of Vt., U.S. Dep’t of Just., Statement of the U.S. Att’y’s Off. Concerning Proposed Injection Sites (Dec. 13, 2017) (outlining the “ramifications under federal law” if local officials pursued a proposal to open a supervised consumption site); Andrew Lelling, Opinion, *Safe Injection Sites Aren’t Safe or Legal*, BOS. GLOBE (Jan. 28, 2019), <https://www.bostonglobe.com/opinion/2019/01/28/opinion-andrew-elling-safe-injection-sites-aren-safe-legal/T5OhtHD3b7jR0a5kGP8mtL/story.html> [<https://perma.cc/4VYK-VHKD>] (“These sites are a terrible idea and, more important, they are illegal.”). Andrew Lelling was the United States Attorney for the District of Massachusetts at the time of writing. *Id.*

61. 21 U.S.C. § 856(a)(2).

62. Complaint at 2, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519-GAM).

63. 21 U.S.C. § 856(a)(1)-(2).

Violating this law triggers both criminal and civil penalties. Criminally, an individual who violates either provision under § 856(a) can face up to twenty years in prison and a fine of up to \$500,000.<sup>64</sup> Any entity charged criminally with violating this statute can face a fine of \$2,000,000.<sup>65</sup> If convicted of a civil violation of this statute, a person is subject to penalties up to \$250,000 or two times the total sales “from each violation that is attributable to the person,” whichever is greater.<sup>66</sup>

### *B. Anti-Drug Abuse Act of 1986*

21 U.S.C. § 856 was first enacted as part of the Anti-Drug Abuse Act of 1986.<sup>67</sup> The statute is often referred to as the “crack house” statute because it was passed “during the moral panic surrounding crack cocaine” with the aim of addressing so-called “crack-houses.”<sup>68</sup>

By targeting crack houses, § 856 gave politicians an opportunity to appear tough on drugs, meeting the political moment.<sup>69</sup> General fears over the rise in crack cocaine turned into congressional action after college basketball star Len Bias died from a suspected crack cocaine overdose.<sup>70</sup> Although later reports revealed that Bias had used powder cocaine on the day he died,<sup>71</sup> the momentum for sweeping legislation was already directed towards crack cocaine.<sup>72</sup> As a result of the media attention surrounding Len Bias’ overdose,<sup>73</sup> a “hysterical” electorate influenced by “inflammatory claims” about the risks of crack cocaine,<sup>74</sup> and federal legislators

64. *Id.* § 856(b).

65. *Id.*

66. *Id.* § 856(d).

67. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841, 100 Stat. 3207, 3207-52 (1986). The Anti-Drug Abuse Act of 1986 is remembered most for establishing mandatory minimum sentences that “required 100 times more powder cocaine than crack cocaine to trigger the more severe minimum sentence.” LISA N. SACCO, CONG. RSCH. SERV., DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 9 (2014).

68. Kreit, *supra* note 42, at 429. By 1986, crack cocaine, a significantly cheaper alternative to powder cocaine, had become increasingly accessible in large U.S. cities. DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIV. LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1 (2006).

69. See Alex Kreit, *The Opioid Crisis and the Drug War at a Crossroads*, 80 OHIO STATE L.J. 887, 903 (2019) (arguing that § 856 did not “fill a real gap in the law” because drug manufacturing and possession were already federal crimes).

70. Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 25-26 (2010).

71. *Id.* On the night he died, Bias used cocaine for the first time and his death was caused by an allergic reaction. JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 128 (2001). Furthermore, fear of arrest prevented Bias’ friends from seeking medical attention until midway through his third convulsion. *Id.* at 128-29 (“If not for our drug prohibitionist laws, Len Bias . . . would probably still be alive today.”).

72. Luna & Cassell, *supra* note 70, at 25-26.

73. See, e.g., 132 CONG. REC. 27,173 (1986) (statement of Sen. Edward Kennedy) (explaining that Len Bias’ death “highlighted the scope and seriousness of the drug problem and dramatized the need for swift and forceful action.”); 132 CONG. REC. 32,722 (1986) (statement of Rep. Michael Oxley) (attributing “the very widely publicized death of basketball star, Len Bias” with making crack cocaine “the No. 1 domestic concern of the American people.”).

74. Luna & Cassell, *supra* note 70, at 25. See generally HART, *supra* note 14, at 23-24, 202-10 (detailing the moral panic surrounding crack cocaine).

swept up in a moral panic,<sup>75</sup> the 1986 act was pushed through Congress and “enacted without hearings or input from experts.”<sup>76</sup>

Closing crack houses was consistently mentioned as the aim of the provision. Representative William Hughes summarized it as “a provision making it a crime to operate a crack house or a stash house for drugs.”<sup>77</sup> Similarly in the Senate, the entirety of a section-by-section analysis printed in the record explained that the provision “[o]utlaws [the] operation of houses or buildings, so-called ‘crack houses’, where ‘crack’, cocaine and other drugs are manufactured and used.”<sup>78</sup> According to advocates of the bill, a crack house involved criminal activity that went beyond the casual user.<sup>79</sup> Senator Lawton Chiles, a sponsor of the bill, defined crack houses as “the places where users congregate to purchase and use crack.”<sup>80</sup> This was the contemporaneous view of the DOJ, which explained that despite the absence of an official legislative history, § 856 appeared to be “aimed at ‘crack houses’ and ‘shooting galleries.’”<sup>81</sup>

Furthermore, the congressional debate described § 856 as a tool that prosecutors needed in order to arrest and convict otherwise criminal behavior. Before discussing § 856, Senator Chiles explicitly stated that “[c]urrent law makes it very difficult to arrest and convict crack dealers and traffickers,” and discussed how police “have difficulty arresting the operators of crack houses.”<sup>82</sup> 21 U.S.C. § 856 was specifically envisioned as a tool for prosecutors to solve this problem.<sup>83</sup>

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75. *See, e.g.*, 132 CONG. REC. 26,447 (1986) (statement of Sen. Lawton Chiles) (alleging that just a small amount of crack cocaine can “make people into slaves” and “turn promising young people into robbers and thieves”); 132 CONG. REC. 19,241 (1986) (statement of Sen. Lawton Chiles) (describing crack cocaine as a “growing plague” and claiming that people who use crack cocaine “lose all scruples and morals and become thieves and killers”).

76. Luna & Cassell, *supra* note 70, at 25; *see also* Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383, 408 (1995) (describing the process as “extraordinary” because normal legislative procedures were “circumvented” and “the careful, deliberate procedures of Congress were set aside in order to expedite passage of the bill”).

77. 132 CONG. REC. 29,613 (1986) (statement of Rep. William Hughes).

78. 132 CONG. REC. 26,474 (1986). Senator Chiles repeated this language four days later when he explained that the bill would “outlaw[] crack houses.” 132 CONG. REC. 27,180 (1986) (statement of Sen. Lawton Chiles).

79. In fact, the title for the provision was “Establishment of Manufacturing Operations” and the bill was under the subtitle “Manufacturing Operations.” *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841, 100 Stat. 3207 (1986).

80. 132 CONG. REC. 19,241 (1986) (statement by Sen. Lawton Chiles); *see also id.* at 19,245, 19,249 (statements by Sen. Joseph Biden and Sen. George Mitchell) (defining a crack house as a place where crack cocaine is “produced, sold, and used” in the context of the Emergency Crack Control Act of 1986, a predecessor to the Anti-Drug Abuse Act of 1986). *See generally* Emergency Crack Control Act of 1986, S. 2715, 99th Cong. (1986).

81. U.S. DEP’T. OF JUST., CRIM. DIV. HANDBOOK ON THE ANTI-DRUG ABUSE ACT OF 1986 106 (1987).

82. 132 CONG. REC. 26,447 (1986).

83. *See* 132 CONG. REC. 29,613 (1986) (statement of Rep. William Hughes) (“[T]here often is a lot of discussion about sending signals to drug traffickers. This bill doesn’t just send signals; this bill provides major new tools for prosecuting drug traffickers.”).

*C. The PROTECT Act of 2003*

21 U.S.C. § 856 was amended to its current language as part of the PROTECT Act of 2003.<sup>84</sup> This amendment extended liability to people managing or using either permanent or temporary places, allowing § 856 to reach “indoor or outdoor venues and one-off events.”<sup>85</sup> The PROTECT Act aimed to help vulnerable young people through a series of laws aimed at preventing child abuse and added tools for investigating and prosecuting violent crimes against children.<sup>86</sup> To this end, the reach of § 856 was extended to address the growing concern of teenage ecstasy use at raves.<sup>87</sup> Congress was specifically targeting predatory behavior directed towards young people. Then-Senator Joe Biden, a sponsor of the bill, explained that “[t]he bill [was] aimed at the defendant’s predatory behavior, regardless of the type of drug or the particular place in which the drug [was] being used or distributed.”<sup>88</sup>

Additionally, Congress amended § 856 to provide prosecutors the tools to go after raves. Senator Grassley, a co-sponsor of the PROTECT Act, explained that Congress’ goal was to “update the laws that have been effectively used to shut down crack houses so they can go after temporary events used as a cover to sell drugs.”<sup>89</sup> Senator Biden explained his intention was to extend § 856 to outdoor events as well as parties “where the promoter sponsors the event with the purpose of distributing Ecstasy or other illegal drugs.”<sup>90</sup>

Critics of the amendment worried that the proposed expansion would extend criminal liability beyond “property owners who have been directly involved in committing drug offenses.”<sup>91</sup> Senator Biden, a proponent of the change, responded by explaining that the bill would not apply to “legitimate business[es].”<sup>92</sup> Biden

84. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 6, 50 (2003). This amendment was first introduced in 2002 as the RAVE Act. See Reducing Americans’ Vulnerability to Ecstasy Act of 2002, S. 2633, 107th Cong. § 3(a) (2002); see also Kreit, *supra* note 42, at 430, n.95. In 2003, the bill was reintroduced by Senator Joe Biden as the Illicit Drug Anti-Proliferation Act of 2003 and attached as a rider to the PROTECT Act. *Id.*

85. Kreit, *supra* note 42, at 430; see 149 CONG. REC. 1,678 (2003) (statement of Sen. Joseph Biden).

86. See U.S. DEP’T OF JUST., 03-266, FACT SHEET: PROTECT ACT (2003) (describing the problems addressed by the PROTECT Act and the Act’s solution to those problems); Statement on Signing the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 1 PUB. PAPERS 400-01 (Apr. 30, 2003) (explaining that the PROTECT Act “gives law enforcement authorities valuable new tools to deter, detect, investigate, prosecute, and punish crimes against America’s children”).

87. Kreit, *supra* note 42, at 430.

88. 149 CONG. REC. 9,383 (2003) (statement of Sen. Joseph Biden) (“I hope that the changes made by the conference report before us today will make promoters think twice before endangering kids in this manner.”); see also 149 CONG. REC. 1,848 (2003) (statement by Sen. Charles Grassley) (describing the amendment as an effort to “update our laws so they can be used effectively against drug dealers who are pushing drugs on our kids”).

89. 149 CONG. REC. 1,849 (2003) (statement of Sen. Charles Grassley).

90. 149 CONG. REC. 1,847 (2003) (statement of Sen. Joseph Biden); see 149 CONG. REC. 9,383 (2003) (statement of Sen. Joseph Biden) (“The bill provides federal prosecutors the tools needed to combat the manufacture, distribution or use of any controlled substance at any venue whose purpose is to engage in illegal narcotics activity.”).

91. 149 CONG. REC. 9,378 (2003) (statement of Sen. Patrick Leahy).

92. 149 CONG. REC. 9,384 (2003) (statement of Sen. Joseph Biden); see also 149 CONG. REC. 1,849 (statement of Sen. Charles Grassley) (explaining that the crack house statute “has not, nor should it be used, to take action against every landlord or every property where drug activity takes place”).

explained that the bill would exclusively target “rogue promoters who not only know that there is drug use at their event but also hold the event for the purpose of illegal drug use or distribution” and that this standard creates “quite a high bar.”<sup>93</sup> This did not include “law abiding people who are going to discourage drug use.”<sup>94</sup> Senator Biden was clear that the bill would not create a “disincentive for promoters to take steps to protect the public health of their patrons.”<sup>95</sup> Therefore, public health measures, which in the context of a rave, included “providing water or air conditioned rooms,” and “having an ambulance on hand,” would “not [be] enough to signify that an event is ‘for the purpose of’ drug use.”<sup>96</sup> Instead, the bill would apply only to promoters “who are taking steps to profit from drug activity.”<sup>97</sup> Accordingly, Senator Biden defined this group as people with a direct connection to drug use,<sup>98</sup> and those who take actions to facilitate its use.<sup>99</sup>

*D. 21 U.S.C. § 856 in Practice: Chen and its Progeny*

21 U.S.C. § 856 is a tool that federal prosecutors rarely use. In 2020, only seventeen federal defendants nationwide were sentenced with § 856 as their primary offense.<sup>100</sup> This number dwarfs in comparison to the 16,287 total federal drug offenders sentenced in 2020.<sup>101</sup> Because § 856 is not subject to the mandatory minimum penalties that are required by most other federal drug offenses, some have argued that the “most common use” of the statute is as a plea negotiation tool.<sup>102</sup> Prosecutors commonly use the crack house statute “to target property owners with close ties to the drug activities occurring on their property.”<sup>103</sup> However, under § 856(a)(2), it is unclear what it means to manage a property “for the purpose of” drug activity.<sup>104</sup> Therefore, as the Fifth Circuit demonstrated in *United States v. Chen*,<sup>105</sup> the statute has the potential to cover a wide range of criminal behavior.

In *Chen*, the Fifth Circuit affirmed in part and reversed in part the conviction of a hotel owner who was found guilty of violating § 856(a)(1) and (a)(2) based on the district court’s use of a deliberate ignorance jury instruction.<sup>106</sup> The district court

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93. 149 CONG. REC. 9,384 (2003) (statement of Sen. Joseph Biden).

94. *Id.*

95. 149 CONG. REC. 1,678 (2003) (statement of Sen. Joseph Biden).

96. *See id.* at 1,847-48.

97. *See id.* at 9,384 (statement of Sen. Joseph Biden).

98. *See id.* (“Some of these folks distribute drugs themselves or have their staff distribute drugs, [and] get kickbacks from drug sales . . .”).

99. *See id.* (“Some of these folks . . . have thinly veiled drug messages on their promotional flyers, tell security to ignore drug use or sales, or send patients who need medical attention to a hospital across town so that people won’t link emergency room visits with their club.”).

100. U.S. SENT’G COMM’N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 70 tbl.20 (2020) (§ 2D1.8). *See generally* U.S. SENT’G GUIDELINES MANUAL § 2D1.8 (U.S. SENT’G COMM’N 2021). In 2020, only fifty-nine defendants in total were sentenced under this statute. U.S. SENT’G COMM’N, *supra*.

101. U.S. SENT’G COMM’N, *supra* note 100, at 109 tbl. D-1.

102. Kreit, *supra* note 42, at 431 n.101.

103. *Id.* at 431.

104. *See* 21 U.S.C. § 856(a)(2).

105. *United States v. Mei-Fen Chen*, 913 F.2d 183 (5th Cir. 1990).

106. *Id.* at 185-87.

instructed the jury that the knowledge element of § 856 could be satisfied if Chen “deliberately closed her eyes to what would otherwise have been obvious to her.”<sup>107</sup> At trial, Chen maintained that she lacked the culpable knowledge despite testimony of her direct involvement from two undercover police officers, four former tenants, and two Houston police officers.<sup>108</sup> Chen argued that the deliberate ignorance instruction was inappropriate because she could not be both deliberately ignorant of the drug activity at the motel and guilty of operating the motel “for the purpose of” drug activity.<sup>109</sup> Therefore, the issue before the court was “whether the phrase ‘for the purpose of’ in” § 856(a)(1) and (a)(2) conflicted with the instruction.<sup>110</sup>

For (a)(1), the court held that the deliberate ignorance instruction was inappropriate because the phrase “for the purpose of” applied to Chen, and one cannot be deliberately ignorant, yet “still have the purpose of engaging in illegal drug activities.”<sup>111</sup> The court reasoned that the purpose requirement in (a)(1) applied “to the person who opens or maintains the place for the illegal activity” based on “plain language of the statute.”<sup>112</sup> It explained that this interpretation was “unambiguous” and that any other interpretation would “twist the clear and plain language of the statute.”<sup>113</sup>

For (a)(2), however, the court concluded that the deliberate ignorance instruction was appropriate because the purpose requirement in (a)(2) applied to Chen’s motel guests and not to Chen herself.<sup>114</sup> Despite finding the phrase “for the purpose of” unambiguous under (a)(1), the court interpreted (a)(2) differently, allowing the conviction to stand.<sup>115</sup> The court reasoned that the purpose requirement referred to different people in (a)(1) and (a)(2) because “any other interpretation would render § 856(a)(2) essentially superfluous.”<sup>116</sup> According to the Fifth Circuit, (a)(2) was “designed to apply to the person who knowingly allowed others to engage in those activities by making the place ‘available for use . . . for the purpose of unlawfully’ engaging” in drug activity.<sup>117</sup>

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107. *Id.* at 187 (defining “[d]eliberate [i]gnorance” as “a conscious purpose to avoid enlightenment . . . [or] willful blindness to the existence of the fact”).

108. *Id.* at 185-88.

109. *Id.* at 187.

110. *Id.* at 188.

111. *Id.* at 188-90.

112. *Id.* at 190.

113. *Id.*

114. *Id.* at 191 (explaining that “§ 856(a)(2) does not require the person who makes the place available to others for drug activity to possess the purpose of engaging in illegal activity; the purpose in issue is that of the person renting or otherwise using the place”).

115. *See id.* at 189-90.

116. *Id.* at 190 (explaining that “a statute should be construed so that each of its provisions is given its full effect” and that “interpretations which render parts of a statute inoperative or superfluous are to be avoided”) (quoting *Duke v. Univ. of Texas*, 663 F.2d 522, 526 (5th Cir. 1981)). *See generally Surplusage Canon*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[I]f possible, every word and every provision in a legal instrument is to be given effect.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174-79 (2012).

117. *Chen*, 913 F.2d at 190.

Other courts have adopted the construction of § 856(a)(2) in *Chen*, but none have independently interpreted the meaning of “for the purpose of.”<sup>118</sup> For example in *United States v. Tamez* the Ninth Circuit based its reasoning “exclusively ‘on the logic of *Chen*.’”<sup>119</sup> Similarly, the Second, Seventh, and Eighth Circuits have reasoned that a defendant can violate (a)(2) based on the purpose of a third party.<sup>120</sup> The First Circuit has neither adopted the construction of *Chen* nor had an opportunity to interpret the meaning of “for the purpose of” in (a)(2).

Because Safehouse was the first supervised consumption site to attempt to open in the United States, no court had ever applied § 856(a)(2) to this type of facility. However, the *Chen* construction led federal officials and some academics to suspect that a supervised consumption site would violate federal law.<sup>121</sup>

### III. UNITED STATES V. SAFEHOUSE

#### A. Procedural History

In February 2019, the DOJ sued Safehouse and sought a declaratory judgment that its plan to open a supervised consumption site would violate 21 U.S.C. § 856(a)(2).<sup>122</sup> The government argued that Safehouse’s site would violate federal law because Safehouse would “knowingly and intentionally provide a place for drug users to use controlled substances unlawfully.”<sup>123</sup> Grounding its argument on the purpose requirements of § 856(a)(2) articulated in *Chen*, the government asserted that if the third parties who used the consumption room had the purpose of using drugs at the consumption room, Safehouse’s proposal would violate the statute.<sup>124</sup> In response, Safehouse sought a declaratory judgment that its proposed operation would not violate § 856(a)(2).<sup>125</sup>

The key issue in this case was the construction of § 856(a)(2). Specifically, the district court and the Third Circuit had to determine what it means under § 856(a)(2) to “manage or control [a] place . . . and knowingly and intentionally . . . make [it] available for use . . . for the purpose of unlawfully . . . using a controlled substance.”<sup>126</sup>

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118. See *United States v. Safehouse*, 408 F. Supp. 3d 583, 603 (E.D. Pa. 2019) (“The other Circuits that have endorsed *Chen*’s interpretation have largely done so without question, simply citing the rule against surplusage and choosing not to engage in independent analysis of the statute.”).

119. *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991).

120. *United States v. Wilson*, 503 F.3d 195, 197-98 (2d Cir. 2007); *United States v. Banks*, 987, F.2d 463, 466 (7th Cir. 1993); *United States v. Tebeau*, 713 F.3d 955, 961 (8th Cir. 2013).

121. See *Kreit*, *supra* note 42, at 441-42 (“[S]afe injection facilities seem to be on very shaky ground under federal law.”); sources cited *supra* note 58, 60.

122. Complaint at 8, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519-GAM).

123. *Id.* at 6.

124. *United States’ Motion for Summary Judgment and Opposition to Safehouse’s Motion for Declaratory Judgment* at 4-9, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519-GAM).

125. *Defendant Safehouse’s Answer, Affirmative Defenses, Counterclaims to Plaintiff’s Complaint, and Third-Party Complaint* at 44, *United States v. Safehouse*, 408 F. Supp. 3d 583 (E.D. Pa. 2019) (No. 2:19-cv-00519-GAM).

126. 21 U.S.C. § 856(a)(2).

Safehouse's case was initially successful. In October 2019, the district court held that the supervised consumption rooms would not violate § 856(a)(2) "because Safehouse [did] not plan to operate them 'for the purpose of' unlawful drug use within the meaning of the statute."<sup>127</sup> First, based on the natural reading and the legislative history of § 856(a), the court determined that Safehouse — not the users of the consumption room — had to act "for the purpose of unlawfully . . . using a controlled substance."<sup>128</sup> Second, the district court determined that to violate § 856(a)(2), Safehouse had to act with "a significant purpose to facilitate drug use."<sup>129</sup> The court reasoned that because Safehouse planned to make their consumption room available "for the purposes of reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services" they did not act with the requisite purpose.<sup>130</sup> Thus, the court concluded that Safehouse's supervised consumption room would not violate the statute.<sup>131</sup>

### B. The Third Circuit

On appeal in January 2021, the Third Circuit held that Safehouse's supervised consumption room would violate § 856(a)(2) "[b]ecause Safehouse knows and intends that its visitors will come with a significant purpose of doing drugs."<sup>132</sup>

The Third Circuit first had to determine *who* had to act "for the purpose" of drug activity. According to the majority, the statute does not require the government to prove that Safehouse opened the consumption room "for the purpose of" unlawful drug activity but only that Safehouse's "*tenant or visitor* had a purpose to manufacture, distribute or use drugs."<sup>133</sup> The majority based its construction on both the plain text of the statute and the rule against surplusage, mirroring the reasoning of *Chen*.<sup>134</sup> Each reasoning will be discussed in turn.

First, the court reasoned that its construction was supported by the plain text. To reach this conclusion, Judge Bibas, who wrote the majority opinion, compared the words and structure of (a)(1) and (a)(2).<sup>135</sup> For (a)(1) the majority concluded that the paragraph requires one actor, the defendant, to "open, lease, rent, use, or maintain" a place "for the purpose of manufacturing, distributing, or using a controlled substance."<sup>136</sup> Thus, to prove a violation of (a)(1) the government must prove that the defendant had the requisite purpose.<sup>137</sup>

However, the majority also concluded that the plain text supported a different construction of (a)(2). The majority reasoned that the verbs of (a)(2) contemplate an

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127. *United States v. Safehouse*, 408 F. Supp. 3d 583, 587 (E.D. Pa. 2019).

128. *Id.* at 595-605.

129. *Id.* 618.

130. *Id.* at 614.

131. *Id.* at 618.

132. *United States v. Safehouse*, 985 F.3d 225, 229 (3d Cir. 2021).

133. *Id.* at 233.

134. Compare *United States v. Safehouse*, 985 F.3d 225, 233-37 (3d Cir. 2021), with *United States v. Chen*, 913 F.2d 183, 189-91 (5th Cir. 1990).

135. *Safehouse*, 985 F.3d at 233-35.

136. 21 U.S.C. § 856(a)(1); *Safehouse*, 985 F.3d at 233-35.

137. *Safehouse*, 985 F.3d at 233.

unmentioned third party in addition to the defendant.<sup>138</sup> The defendant is the actor who must “manage or control” the place and then “rent, lease, profit from, or make [the place] available for use.”<sup>139</sup> The court reasoned that the second group of verbs creates the requirement of a third party.<sup>140</sup> The third party is the tenant that the landlord rents or leases the place to, the customer that the business owner profits from, or the person that the defendant makes a place available for.<sup>141</sup> Therefore, in (a)(2), it is the third party that is the actor who does the drug activity.<sup>142</sup> Accordingly, the majority concluded that because this third party is contemplated by the statute, and because they are the actor who does the unlawful drug activity, the purpose requirement in (a)(2) refers to the third-party.<sup>143</sup>

Second, the court reasoned that an interpretation of § 856(a)(2) that requires the government to prove that Safehouse acted “for the purpose of” drug activity would make (a)(2) redundant with (a)(1).<sup>144</sup> Although (a)(1) “requires just one actor” the majority explained that it does not “forbid third parties.”<sup>145</sup> Therefore, a defendant can be guilty of violating (a)(1) if they manufacture, distribute, or use drugs with a third person.<sup>146</sup> Thus, if the government was required to prove that the defendant acted “for the purpose of” drug activity under (a)(2), then (a)(2) would not cover any activity that was not already covered by (a)(1).<sup>147</sup>

After the majority determined *who* had to act “for the purpose of” unlawfully using a controlled substance, the next question was whether *that actor* had the requisite purpose. Accordingly, the majority’s reasoning focused on whether the participants of the consumption room acted “for the purpose of” using drugs. The court concluded that Safehouse would violate § 856(a)(2) as long as its participants have a “significant purpose” of using drugs.<sup>148</sup> This means that using drugs at Safehouse must be more than the participant’s “merely incidental” purpose,<sup>149</sup> but it does not need to be their “sole purpose.”<sup>150</sup> The court held that using drugs would be a significant purpose for any participants at Safehouse despite the other medical, counseling, and social work services offered.<sup>151</sup> According to the majority, because Safehouse’s “main attraction” would be the consumption room and its other services make it safer to use drugs, any reason a participant has for going to Safehouse “is bound up with the significant purpose of doing drugs.”<sup>152</sup>

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138. *Id.* at 234.

139. 21 U.S.C. § 856(a)(2); *Safehouse*, 985 F.3d at 234.

140. *Safehouse*, 985 F.3d at 234.

141. *See id.*

142. *Id.* at 235 (“The third party does the last set of actions: she ‘manufacture[s], stor[es], distribut[es], or us[es] a controlled substance’ (or at least has the purpose to do so).”).

143. *Id.* at 234-35.

144. *See id.* at 235-36. The majority reasoned that this construction would also create a redundancy between (a)(2)’s intent requirement and its purpose requirement. *Id.*

145. *Id.* at 234.

146. *Id.*

147. *Id.* at 235.

148. *Id.* at 237-38.

149. *Id.* at 235 (citing *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992)).

150. *Safehouse*, 985 F.3d at 235 (citing *United States v. Shetler*, 665 F.3d 1150, 1161 (9th Cir. 2011)).

151. *Id.* at 237-38. *See generally* SAFEHOUSE, *supra* note 57.

152. *Safehouse*, 985 F.3d at 238.

*C. Dissent and District Court's Construction*

In a fiery dissent, Judge Roth argued that Safehouse's supervised consumption room did not violate § 856(a)(2) because Safehouse was "not motivated at least in part by a desire for unlawful drug activity to occur."<sup>153</sup> According to the dissent, the majority's construction "criminalizes otherwise innocent conduct, based solely on the 'purpose' of a third party who is neither named nor described in the statute."<sup>154</sup> To reach this conclusion, the dissent argued that the majority twisted the meaning of the statute to a point where "identical words have different meanings, different words are superfluous and two plus two equals five."<sup>155</sup> Judge Roth agreed with the district court's analysis that § 856(a)(2) requires the defendant, in this case Safehouse, to act "for the purpose of" drug activity and that the proposed supervised consumption site would not be operated with that purpose.<sup>156</sup>

Counter to the majority's interpretation and the interpretation in *Chen*, the dissent and the district court concluded that (a)(1) and (a)(2) do not overlap and that the plain text does not support the majority's construction. The dissent explained that the difference between § 856(a)(1) and (a)(2) is their *actus reus* requirement.<sup>157</sup> 21 U.S.C. § 856(a)(1) has one element: a person must "open, lease, rent, use, or maintain [a] place."<sup>158</sup> Section (a)(2) has two elements: (i) a person must "manage or control [a] place," and (ii) that person must also "rent, lease, profit from, or make [the place] available for use."<sup>159</sup> None of these elements overlap, therefore, there is no surplusage. The dissent expressed that the majority was wrong to rely on *Chen* and its progeny.<sup>160</sup> Since *Chen*, the only change to the *actus reus* elements were the addition of "rent" and "lease" to (a)(1).<sup>161</sup> Thus, Judge Roth criticized the majority for "twist[ing] the text of the statute based on the potential overlap of two words."<sup>162</sup>

Because there is no overlap in (a)(1) and (a)(2), the different sections apply in different situations. As the district court explained, (a)(1) "refers to one's use of their property for their own drug activity."<sup>163</sup> On the other hand, (a)(2) "refers to one

153. *Id.* at 251 (Roth, J., dissenting).

154. *Id.*

155. *Id.* (comparing the majority's construction to a George Orwell Novel).

156. *See id.* at 246-47 (Roth, J., dissenting); *United States v. Safehouse*, 408 F. Supp. 3d 583, 599 (E.D. Pa. 2019).

157. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting). *See generally Actus Reus*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability.").

158. 21 U.S.C. § 856(a)(1); *see Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

159. 21 U.S.C. § 856(a)(2); *see Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

160. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

161. *Id.* Compare 21 U.S.C. § 856(a) (1990) (amended 2003), with 21 U.S.C. § 856(a) (2021).

162. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting). This is a *potential* overlap because "rent" and "lease" can mean different things depending on the circumstances. *Safehouse* argued that there was no overlap between the terms, citing the canon of *noscitur a sociis*, because in (a)(1) "rent" and "lease" refer to a tenant's actions while the same terms are used in (a)(2) to refer to a landlord's actions. *Petition for Writ of Certiorari* at 20 n.9, *Safehouse*, 985 F.3d 225 (No. 21-276). *See generally Noscitur a Sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]he meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it.").

163. *United States v. Safehouse*, 408 F. Supp. 3d 583, 600 (E.D. Pa. 2019).

making property available for the purpose of others engaging in drug activity.”<sup>164</sup> As Judge Roth explained, “a property owner [who] sells drugs from his home but does not let others use it” would only violate (a)(1).<sup>165</sup> The drug dealer violates (a)(1) because they “use” or “maintain” the house “for the purpose of” their personal drug sales.<sup>166</sup> They do not violate (a)(2) because they do not act “for the purpose of” others engaging in drug activity on their property.<sup>167</sup> Alternatively, if “a rave operator encourages drug dealers to attend events to increase attendance,” they would violate (a)(2) but not (a)(1).<sup>168</sup> The rave operator is culpable under (a)(2) because, by encouraging drug dealers to attend the event, they intend to “profit from” the third party’s drug activity.<sup>169</sup> They do not violate (a)(1) because they do not “use” or “maintain” the venue “for the purpose of” their own drug activity.<sup>170</sup>

The dissent and the district court also concluded that their interpretation is supported by the “presumption of consistent usage” and therefore conforms to the plain text of the statute.<sup>171</sup> According to this rule of statutory construction, “if a phrase has a clear meaning in one portion of a statute, but the meaning is less clear in a related section, courts should presume that the phrase carries the same meaning in both.”<sup>172</sup> The dissent and district court explained that their construction is supported by the presumption of consistent usage because the phrase “for the purpose of” refers to the defendant’s purpose in both § 856(a)(1) and (a)(2).<sup>173</sup> As the district court explained:

Through canons must be applied with caution, the presumption of consistent usage carries inherent logical force where, as here, the two provisions in question are part of the same subsection, were enacted together, and use the phrase in the same way. In that regard, the presumption of consistent usage canon is one that directs the court to focus on how *Congress* used terms within the structure of a statute, reducing the risk of judges importing a meaning of their own. “For the purpose of” in (a)(1) clearly and undisputedly refers to the purpose of the actor accused of violating the provision. Although the implication in (a)(2) that third parties will use the place in question may make the purpose clause there less clear to some readers than in (a)(1), courts should presume – absent context indicating otherwise – that the clause carries the same meaning. That is, courts should presume that (a)(2) requires that the [defendant] act “for the purpose of” drug activity.<sup>174</sup>

According to the dissent, the majority’s construction violates the presumption of consistent usage because it results in two different meanings of the phrase “for the

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164. *Id.*

165. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

166. 21 U.S.C. § 856(a)(1); *see Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

167. § 856(a)(2); *see Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

168. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

169. § 856(a)(2); *see Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

170. § 856(a)(1); *see Safehouse*, 985 F.3d at 247 (Roth, J., dissenting).

171. *Safehouse*, 985 F.3d at 245 (Roth, J., dissenting); *United States v. Safehouse*, 408 F. Supp. 3d 583, 597 (E.D. Pa. 2019). *See generally* SCALIA & GARNER, *supra* note 116, at 170-73 (explaining that under the presumption of consistent usage “[a] word or phrase is presumed to bear the same meaning throughout a text; [and] a material variation in terms suggests a variation in meaning.”).

172. *Safehouse*, 408 F. Supp. 3d at 597 (citing SCALIA & GARNER, *supra* note 116, at 170).

173. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting); *Safehouse*, 408 F. Supp. 3d at 597.

174. *Safehouse*, 408 F. Supp. 3d at 597-98.

purpose of” in § 856(a)(1) and (a)(2).<sup>175</sup> In (a)(1) “for the purpose of” refers to the purpose of the defendant but in (a)(2) “for the purpose of” refers to the purpose of the third party.<sup>176</sup> This interpretation violates the presumption that a word or phrase “bear[s] the same meaning throughout a text.”<sup>177</sup> As the dissent and district court explained, this was just as egregious, if not more, in *Chen*.<sup>178</sup> Before the 2003 amendment, the phrase “for the purpose of” was the only overlap between (a)(1) and (a)(2).<sup>179</sup> Instead, as the dissent explained, “*Chen* and its progeny decided that, to avoid superfluity, the *only* words that were the *same* between the two sections must have *different* meanings.”<sup>180</sup>

Next, in order to determine whether Safehouse violated § 856(a)(2), the dissent and the district court applied their construction of (a)(2) to determine whether Safehouse acted “for the purpose of” drug activity. The dissent determined that in order to act “for the purpose of” drug activity, the defendant must be “motivated at least in part by a desire for unlawful drug activity to occur.”<sup>181</sup> Similarly, the district court determined that the statute requires the defendant to have “a significant purpose[] to facilitate, rather than reduce, unlawful drug use.”<sup>182</sup>

Both the dissent and the district court determined that Safehouse did not meet this standard because the purpose of the supervised consumption room is to *reduce* drug use. The dissent concluded that Safehouse’s Consumption Room would be made available “for the purpose of providing medical care to people who would otherwise do drugs on the street and risk overdose.”<sup>183</sup> Therefore, even though participants would be allowed to use drugs at the facility, the dissent explained that Safehouse would not be motivated by a desire for unlawful drug activity to occur because “Safehouse does not prefer that participants choose the Consumption Room” over drug treatment or the other services offered.<sup>184</sup> Furthermore, the dissent concluded that even though Safehouse may desire that participants “use drugs in the Consumption Room, *as opposed to the street*, [this] does not imply that Safehouse desires that they use drugs at all.”<sup>185</sup> This is because participants would be required

175. The majority’s contention is that, under its construction, “for the purpose of” means the same thing in (a)(1) and (a)(2) but is applied to different actors. *Safehouse*, 985 F.3d at 235-36.

176. *Id.*

177. See SCALIA & GARNER, *supra* note 116, at 170-73; see also *Safehouse*, 985 F.3d at 245 (Roth, J., dissenting); *Safehouse*, 408 F. Supp. 3d at 597, 600 (district court opinion).

178. See *Safehouse*, 985 F.3d at 247 (Roth, J. dissenting); *Safehouse*, 408 F. Supp. 3d at 597, 599-603 (district court opinion).

179. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting). Compare 21 U.S.C. § 856(a) (1990) (amended 2003) (statute applied in *Chen*), with 21 U.S.C. § 856(a) (2021) (statute applied in *Safehouse*).

180. *Safehouse*, 985 F.3d at 247 (Roth, J., dissenting) (“There is no rule of construction that supports or even permits such a reading.”).

181. *Id.* at 251 (explaining that when a statute uses the phrase “for the purpose of” the focus is on the defendant’s motivations).

182. *Safehouse*, 408 F. Supp. 3d at 607-08, 614 (district court opinion) (“[O]ne who makes a place available to another for a purpose other than drug use does not necessarily violate § 856(a)(2) even if they know some consumption of drugs therein occurs in addition to that other lawful purpose.”).

183. *Safehouse*, 985 F.3d at 251-52 (Roth, J., dissenting); see also *Safehouse*, 408 F. Supp. 3d at 614 (district court opinion) (describing Safehouse’s purpose as “reducing the harm of drug use, administering medical care, encouraging drug treatment, and connecting participants with social services”).

184. *Safehouse*, 985 F.3d at 252 (Roth, J., dissenting). See generally SAFEHOUSE, *supra* note 57.

185. *Safehouse*, 985 F.3d at 252 (Roth, J., dissenting).

to supply their own drugs and thus, “Safehouse likely believes that participants would use drugs regardless of whether the Consumption Room is available.”<sup>186</sup> Thus, as the district court explained, any desire that drug use occur in the Consumption Room is secondary “to the purpose of ensuring proximity to medical care while users are vulnerable to fatal overdose.”<sup>187</sup>

#### D. Conclusions

Subsequently, Safehouse’s petition for rehearing en banc<sup>188</sup> and its petition for certiorari were denied.<sup>189</sup> Thus, *United States v. Safehouse* is currently the lone authority applying 21 U.S.C. § 856(a)(2) to supervised consumption sites. However, this issue is far from settled. As deaths from drug overdoses continue to rise, many localities will continue to propose supervised consumption sites in spite of the Third Circuit opinion.<sup>190</sup> There are several reasons that future courts should adopt the dissent and district court’s construction over that of the Third Circuit.

Although the majority claimed that its construction was based solely on the plain text of § 856(a)(2),<sup>191</sup> the plain text is ambiguous.<sup>192</sup> In *Safehouse*, four judges interpreted the phrase “for the purpose of” in the statute: two judges in the majority interpreted the phrase one way,<sup>193</sup> while the dissent and the district court interpreted the language another way.<sup>194</sup> The majority concluded that the language of the statute was clear.<sup>195</sup> However, it is grammatically ambiguous whether the phrase “for the purpose of” in § 856(a)(2) applies to the defendant or a third party. The majority ignores the equally plausible interpretation that “for the purpose of” refers to the defendant in both (a)(1) and (a)(2) and the presumption that identical words used in different parts of the same statute are intended to have the same meaning.<sup>196</sup> Furthermore, the majority does not acknowledge the consequences of tying criminal liability to the mental state of a third party.

The dissent and the district court recognized that the statute is ambiguous and “nearly incomprehensible.”<sup>197</sup> To resolve the ambiguity the dissent and the district court looked to the legislative history and the absurd consequences of the majority’s

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186. *Id.*

187. *Safehouse*, 408 F. Supp. 3d at 614 (district court opinion).

188. *Safehouse*, 985 F.3d 225, *reh’g denied*, 991 F.3d 503 (3d Cir. 2021).

189. *Safehouse*, 985 F.3d 225, *cert. denied*, 142 S. Ct. 345 (2021) (mem.).

190. *See, e.g.*, Mays & Newman, *supra* note 53.

191. *Safehouse*, 985 F.3d at 233-36.

192. *See generally Ambiguity*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Uncertainty of meaning based . . . on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations.”).

193. *See Safehouse*, 985 F.3d at 233-37.

194. *See Safehouse*, 985 F.3d at 244-51 (Roth, J., dissenting); *United States v. Safehouse*, 408 F. Supp. 3d 583, 595-613 (E.D. Pa. 2019).

195. *Safehouse*, 985 F.3d at 233-36.

196. *See Safehouse*, 985 F.3d at 244-51 (Roth, J., dissenting); *Safehouse*, 408 F. Supp. 3d 583, 595-605.

197. *Safehouse*, 985 F.3d at 244 (Roth, J., dissenting). Even the government acknowledged that the language of the statute is poorly written. Transcript of Oral Argument at 21-22, *Safehouse*, 985 F.3d 225 (No. 20-1422); *see also Safehouse*, 991 F.3d at 507 (McKee, J., dissenting) (denial of rehearing opinion).

formalistic interpretation.<sup>198</sup> The Third Circuit avoided this history by claiming that their construction was based solely on the plain text of the statute.<sup>199</sup> For the reasons discussed, plain meaning does not resolve the ambiguity. What is clear, however, is that Congress did not intend to criminalize people who act to reduce drug use.

The legislative history does not support criminalizing otherwise innocent conduct based solely on the mental state of a third party. Then-Senator Biden's comments reveal that Congress intended the defendant to act "for the purpose of" unlawful drug activity.<sup>200</sup> Notably, in response to concerns that the 2003 amendment would reach businesses who knew that drug use would occur on their property but did not condone or encourage it, Biden explained that his bill targeted "rogue promoters."<sup>201</sup> According to Biden, the defendant must "not only know that there is drug use at their event but also hold the event for the purpose of illegal drug use or distribution."<sup>202</sup> The majority's construction is in direct conflict with this statement. Under the majority's formalistic construction, the promoter would violate 21 U.S.C. § 856(a)(2) if the third-party attendees of the event intended to use illegal drugs regardless of the promoter's plans for the event.

Furthermore, the legislative history confirms that acting "for the purpose of" drug activity requires the defendant to be motivated by a desire for unlawful drug activity to occur "for the purpose of" facilitating drug use. In 1986, Congress contemplated the harm of crack cocaine and crack houses.<sup>203</sup> It follows that those lawmakers originally envisioned § 856 as a statute that would target places designed to facilitate drug use and the people who operated such places. When Congress amended § 856 in 2003, it contemplated the harm of ecstasy and raves.<sup>204</sup> At no point in the legislative history did Congress consider whether harm reduction strategies intended to reduce death and drug use would be included in the statute. Despite the government's claim that Congress contemplated this kind of facility,<sup>205</sup> this assertion is unsupported.<sup>206</sup> Although Congress expanded the potential reach of the statute in 2003, the expansion was limited to events that encourage drug use and a "defendant's predatory behavior."<sup>207</sup> Although the statute clearly applies beyond the specific locations of crack houses and raves, the majority's mechanistic construction expands criminal liability to anyone who knowingly and intentionally allows a person to use drugs on their property regardless of whether they approve of the use or not. As the dissent explains, this includes people who allow others to use

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198. See *Safehouse*, 985 F.3d at 247-51 (Roth, J., dissenting); *Safehouse*, 408 F. Supp. 3d 583, 601-03, 605, 611-13 (district court opinion). See generally *Formalistic*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Involving adherence to matters of form, . . . at the expense of concerns about substance.").

199. *Safehouse*, 985 F.3d at 238-39.

200. See discussion *supra* Section II.C.

201. 149 CONG. REC. 9,384 (2003) (statement of Sen. Joseph Biden).

202. *Id.*

203. See discussion *supra* Section II.B.

204. See discussion *supra* Section II.C.

205. See Transcript of Oral Argument at 23, *Safehouse*, 995 F.3d 225 (No. 20-1422).

206. *United States v. Safehouse*, 991 F.3d 503, 511 (3d Cir. 2021) (denial of rehearing opinion) (explaining that the government did not present evidence to support this claim).

207. See 149 CONG. REC. 9,383 (2003) (statement of Sen. Joseph Biden).

their property “*despite* their knowledge that drug use will occur, [but] not *for the purpose* that drug use occur.”<sup>208</sup>

The dissent correctly argues that the majority’s construction violates the absurdity doctrine, a canon of statutory construction that allows judges to interpret a statute in a way that avoids absurd results.<sup>209</sup> For example, consider a parent who, fearing that they will lose their adult child to an opioid overdose, encourages their child to move back home.<sup>210</sup> The parent knows that the child will continue to use drugs but believes that their child will be safer because they will be there to administer naloxone and seek further medical attention. If these parents were Mainers, this practice would be consistent with the guidance of the Maine Office of Behavioral Health.<sup>211</sup> Yet, regardless of their motivations, under the majority’s construction, these parents would be in violation of § 856(a)(2).

This arrangement is analogous to supervised consumption sites. Like Safehouse, the parents “manage or control” the home and “knowingly and intentionally” make it available to a person who uses drugs.<sup>212</sup> Like the consumption room participants, the child uses the home “for the purpose of” drug use.<sup>213</sup> The majority avoids this result by assuming that the child’s drug use would be “incidental” to their use of the home.<sup>214</sup> According to the majority, the child uses the home “for the purpose of” eating, sleeping, and bathing.<sup>215</sup> However, the majority overlooks the possibility that the child could be motivated to move in with their parents solely “for the purpose of” using drugs.<sup>216</sup>

Under the dissent and district court’s construction, the parents do not violate the statute. This is because unlawful drug activity is not what motivates the parents to open their home.<sup>217</sup> The parent’s clear motivation is a desire to keep their child alive. However, under the majority’s construction, these same parents could face up to twenty years in federal prison.<sup>218</sup>

#### IV. POLICY

The dissent and district court’s construction would also save lives. People who use drugs at supervised consumption sites do not die.<sup>219</sup> Allowing people to use drugs in safe and hygienic conditions supports the overall goals of a harm reduction

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208. *Safehouse*, 985 F.3d at 250 (Roth, J., dissenting).

209. *Id.* at 247 (Roth, J., dissenting). *See generally* SCALIA & GARNER, *supra* note 116, at 234-37 (explaining the absurdity doctrine).

210. *Safehouse*, 985 F.3d at 247-48 (Roth, J., dissenting).

211. *OPTIONS*, *supra* note 31.

212. 21 U.S.C. § 856(a)(2); *see Safehouse*, 985 F.3d at 248 (Roth, J., dissenting).

213. *See Safehouse*, 985 F.3d at 248 (Roth, J., dissenting).

214. *Id.* at 238.

215. *Id.*

216. *Id.* at 248 (Roth, J., dissenting).

217. *See id.*

218. *See* 21 U.S.C. § 856(b).

219. *See* Potier et al., *supra* note 50, at 62 (“In the [seven studies evaluated], no death by overdose was ever reported within the [supervised consumption sites] in which this parameter was evaluated.”); *see also Insite User Statistics*, *supra* note 46 (explaining that there have been zero deaths at Insite’s supervised consumption site despite 3.6 million visits and 6,440 overdose interventions).

strategy. Studies show that supervised consumption sites attract the most marginalized people who use drugs, create safer injection conditions, and increase access to health care.<sup>220</sup> Communities as a whole benefit from less drug use in public places.<sup>221</sup> These same studies show that supervised consumption sites accomplish these goals without increasing crime, drug trafficking, or the number of people who use drugs.<sup>222</sup>

Furthermore, supervised consumption sites would be consistent with the harm reduction strategy already in place in Maine.<sup>223</sup> The state is relying on naloxone distribution to stop the rise in overdose deaths, distributing over 100,000 doses since 2019.<sup>224</sup> The Maine Office of Behavioral Health warns people who use drugs that naloxone is the only way to reverse an overdose.<sup>225</sup> To ensure that someone is present to administer life-saving measures, the state advises people to use drugs in the company of others;<sup>226</sup> and, to encourage people to seek medical attention after an overdose, the state extends limited criminal immunity to people at the scene of an overdose.<sup>227</sup> Finally, the state has taken steps to ensure that the person responding to a 911 call, whether a member of law enforcement or an EMT, will be armed with naloxone.<sup>228</sup>

Supervised consumption sites simply move these existing practices indoors. For the vast majority of participants, a visit to a consumption room will be uneventful. They will use their drug of choice, access the integrated services offered, and go on with their day. If a participant experiences an overdose, naloxone and oxygen will be administered immediately. Because of this intervention, that participant will live. They will not die waiting for a first responder to arrive. They will not die because their companions feared arrest and failed to get them help. They will not have to rely on friends and family to administer naloxone. They will not die alone.

## V. THE FUTURE OF SUPERVISED CONSUMPTION SITES IN MAINE

### *A. Prosecutorial Discretion*

Much like § 856(a)(2)'s text, the future of supervised consumption sites in Maine is unclear. However, before a federal judge in Maine interprets § 856(a)(2), the U.S. Attorney's Office for the District of Maine will have to decide whether they will use limited federal law enforcement resources to interfere with local efforts to save lives. It remains to be seen whether the Biden DOJ will prosecute supervised consumption sites with the same zeal as the Trump DOJ. Early signs suggest that it

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220. See Potier et al., *supra* note 50, at 48.

221. See *id.* at 63.

222. See *id.*

223. See discussion *supra* Section I.B.

224. MARGARET CHASE SMITH POL'Y CTR., *supra* note 34, at 2 tbl.1.

225. OPTIONS, *supra* note 31.

226. *Id.*

227. See 17-A M.R.S. § 1111-B (2021); P.L. 2022, ch. 724 (expanding Maine's Good Samaritan Law).

228. See MARGARET CHASE SMITH POL'Y CTR., *supra* note 34, at 1, 2 tbl. 1 (reporting 9,172 doses of naloxone distributed to law enforcement agencies from July 2019 through June 2021); P.L. 2021, ch. 161 (establishing that an emergency medical services person may distribute naloxone).

may not;<sup>229</sup> notably, the Biden DOJ waived its right to file a response to Safehouse’s petition for certiorari.<sup>230</sup> As discussed above, the position that supervised consumption sites violate federal law is counter to President Biden’s own comments from his days as a Senator.<sup>231</sup>

Furthermore, non-enforcement of supervised consumption would be similar to the federal government’s approach to legalized marijuana. In 2013, the DOJ adopted a non-enforcement policy<sup>232</sup> which has allowed a thriving marijuana industry to develop in eighteen states and the District of Columbia despite violations of federal law including § 856(a)(2). For example, consider a landlord who leases a commercial property to a recreational marijuana retailer. The landlord violates § 856(a)(2) because they “manage or control [the property] . . . as an owner . . . and knowingly and intentionally rent, lease, profit from, or make [the property] available for use . . . for the purpose of unlawfully manufacturing, storing, distributing, or using [marijuana.]”<sup>233</sup> Nonetheless, the marijuana industry has continued to operate without significant interference from the federal government.<sup>234</sup> The DOJ could similarly defer to state governments that choose to implement supervised consumption sites as part of their harm reduction strategy. It is compelling to note that compared to legalized marijuana, supervised consumption sites are less likely to impact neighboring states and their impact on the national market for controlled substances would be minimal.<sup>235</sup>

#### B. District of Maine and the First Circuit

Despite the Third Circuit’s decision in *Safehouse*, prospective supervised consumption sites in Maine should not be discouraged. The competing constructions of § 856(a)(2) show that the plain text alone cannot determine whether supervised consumption sites violate federal law.

Notably, the First Circuit has yet to adopt the questionable reasoning of *Chen* and *Safehouse*. Therefore, if the U.S. Attorney’s Office for the District of Maine prosecutes a supervised consumption site, the First Circuit would have the opportunity to independently interpret the meaning of § 856(a)(2). At this point, the court would have to choose whether to adopt the formalistic interpretation of the Third Circuit — ignoring the clear legislative intent and the absurd results that follow from it — or adopt the construction of the dissent and district court. Under the

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229. Jennifer Peltz & Michael Balsamo, *Justice Dept. Signals it May Allow Safe Injection Sites*, ASSOCIATED PRESS, (Feb. 8, 2022), <https://apnews.com/article/business-health-new-york-c4e6d999583d7b7abce2189fba095011> [<https://perma.cc/CX5F-XG93>] (“[T]he Justice Department said it is ‘evaluating’ such facilities and talking to regulators about ‘appropriate guardrails.’”)

230. Waiver, *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021) (mem.).

231. See discussion *supra* Section II.C.

232. Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys (Aug. 29, 2013); see also Kreit, *supra* note 42, at 437.

233. See 21 U.S.C. § 856(a)(2). The retailer violates § 856(a)(1) because they “knowingly open, lease, rent, use, or maintain any place . . . for the purpose of manufacturing, distributing, or using [marijuana].” See § 856(a)(1).

234. Kreit, *supra* note 42, at 437-38.

235. Kreit, *supra* note 42, at 438.

dissent and district court's construction, a person violates § 856(a)(2) when they act "for the purpose" of facilitating drug use. This construction punishes the people who act to promote drug use and ignores those who act to reduce it. It also aligns with the intent of the legislators who designed and ultimately passed the statute. Further, it supports the obvious conclusion that supervised consumption sites are not crack houses or raves. Most importantly, it saves lives.