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## Unsafe & Unsound: The Future of Supervised Injection Sites After *United States v. Safehouse*

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**UNSAFE & UNSOUND: THE FUTURE OF  
SUPERVISED INJECTION SITES AFTER  
UNITED STATES V. SAFEHOUSE**

*Chloe Rigogne\**

*In the past few years, the United States has experienced a dramatic increase in drug overdose deaths due to factors such as a growing prevalence of synthetic opioids like fentanyl and the strains brought on by the COVID-19 pandemic. In response to the overdose crisis, states and municipalities have started considering once-taboo harm reduction practices, including the implementation of supervised injection sites that facilitate individuals’ use of drugs under the care and supervision of medical professionals. However, supervised injection sites may run afoul of 21 U.S.C. § 856—often referred to as the “crack house” statute—a law introduced in the 1980s as a response to fears about crack cocaine. After years of uncertainty about how courts would interpret the statute if faced with such a supervised injection site case, in 2021, the U.S. Court of Appeals for the Third Circuit became the first circuit court to rule on a challenge to a supervised injection site, ultimately holding that a Philadelphia site—the first in the United States—violates the crack house statute.*

*This Note examines the competing interpretations of 21 U.S.C. § 856(a) in United States v. Safehouse—the first case to decide whether supervised injection sites violate the crack house statute. This Note argues that the text of the statute is ambiguous and suggests that the proper interpretation requires looking beyond the text. Using extratextual aids, this Note concludes by arguing that the best reading of the statute prohibits the expansion of its reach to cover supervised injection sites.*

INTRODUCTION..... 2870

I. SETTING THE SCENE: SUPERVISED INJECTION SITES AND THE  
CRACK HOUSE STATUTE..... 2874

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A. <i>Supervised Injection Sites</i> .....	2874
B. <i>The Federal Crack House Statute</i> .....	2878
1. Text and History of the Statute .....	2878
2. Major Cases Interpreting the Statute.....	2880
II. THE BATTLE OF INTERPRETATIONS .....	2883
A. <i>The Third Circuit Weighs In</i> .....	2884
1. Purpose Requirement Applies to a Third Party .....	2884
a. <i>Textual Support</i> .....	2885
b. <i>Circuit Court Support</i> .....	2888
2. Supervised Injection Sites Violate § 856(a)(2) .....	2889
B. <i>Not So Fast: Opposition to the Third Circuit's</i> <i>Interpretation</i> .....	2890
1. The Purpose Requirement Refers to the Defendant.....	2891
a. <i>Textual Support</i> .....	2891
b. <i>Questioning Other Circuits</i> .....	2893
c. <i>Legislative History and Intent</i> .....	2895
d. <i>Consequences</i> .....	2896
2. Supervised Injection Sites Do Not Violate the Statute.....	2898
III. THE CASE FOR SUPERVISED INJECTION SITES UNDER THE CRACK HOUSE STATUTE .....	2900
A. <i>The Plain Text Is Ambiguous at Best</i> .....	2901
1. What Do the Words Mean?.....	2901
2. Dueling Canons.....	2902
B. <i>Shedding Light: Using Extratextual Tools Reveals the True</i> <i>Meaning of the Statute</i> .....	2903
1. Legislative History .....	2904
2. Rule of Lenity .....	2905
C. <i>Other Principles Support a Narrow Reading</i> .....	2906
CONCLUSION .....	2907

#### INTRODUCTION

Dr. Bonnie Milas remembers chasing her son down the street in her bathrobe trying to stop him from buying drugs.<sup>1</sup> She remembers wrestling with him as he held a full syringe in his hand, ready to inject heroin.<sup>2</sup> She remembers pulling a bathroom door off its hinges to rescue him, and physically restraining him to prevent him from jumping out of a second-story

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1. Bonnie Milas, Opinion, *I Lost Both My Sons to Opioids: But Here's What I Remember About Them on Mother's Day*, USA TODAY (May 8, 2020, 5:00 AM), <https://www.usatoday.com/story/opinion/voices/2020/05/08/mothers-day-remembering-my-two-sons-lost-opioids-doctor-column/5175089002/> [<https://perma.cc/MLE2-S3JB>].

2. *Id.*

window.<sup>3</sup> Despite all of her best efforts, Dr. Milas experienced the nightmare every parent dreads: on January 6, 2018, her son died of a drug overdose.<sup>4</sup> Fourteen months later, Dr. Milas's older son, a "student-athlete of the year" and medical school graduate, also died of a drug overdose.<sup>5</sup> He was her only other child.<sup>6</sup> Though Dr. Milas's story is unimaginably tragic, it is unfortunately an all-too-common reality in the United States.

According to provisional data from the U.S. Centers for Disease Control and Prevention (CDC), during the twelve-month period ending April 2021, over one hundred thousand people died from drug overdoses in the United States.<sup>7</sup> This new record high is a 28.5 percent increase from the previous year, with opioids continuing to account for most overdose deaths.<sup>8</sup> The growing spread of synthetic opioids, such as fentanyl,<sup>9</sup> along with the devastating impact of the COVID-19 pandemic on health-care systems<sup>10</sup> and individual health,<sup>11</sup> has contributed to a continuous and rapid rise in overdose deaths throughout the country.<sup>12</sup>

Nationwide, policy makers have offered and supported various ideas to try to combat the growing toll that drug overdoses have taken on American families. For instance, methadone clinics—sites that provide doses of methadone and other medications that lessen the symptoms of withdrawal for eligible patients dealing with opioid addiction—have opened at an increasing

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3. *Id.*

4. Brief of Proposed Amicus Curiae Friends and Family of Victims of Opioid Addiction, as an Interested Non-Party Supporting Safehouse and Jose Benitez at 32, *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422).

5. *Id.* at 31.

6. *Id.*

7. Press Release, Ctrs. for Disease Control & Prevention, Drug Overdose Deaths in the U.S. Top 100,000 Annually (Nov. 17, 2021), [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2021/20211117.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm) [<https://perma.cc/X67Y-GDD2>].

8. *Id.*

9. See Julie O'Donnell et al., *Trends in and Characteristics of Drug Overdose Deaths Involving Illicitly Manufactured Fentanyls—United States, 2019–2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 1740, 1741 (2021) (showing an increase in overdose deaths involving illicitly manufactured fentanyls from 2019 to 2020).

10. See Amy Sokolow, *Opioid Overdoses Have Skyrocketed amid Coronavirus, but States Are Nevertheless Slashing Addiction Treatment Program Budgets*, STAT (July 16, 2020), <https://www.statnews.com/2020/07/16/opioid-overdoses-have-skyrocketed-amid-the-coronavirus-but-states-are-nevertheless-slashing-addiction-treatment-program-budgets/> [<https://perma.cc/7UKW-NNCS>] (citing Colorado, Florida, Georgia, Minnesota, New Jersey, Oregon, and Utah as examples of states that have cut millions in funding for opioid crisis programs and substance use disorder services).

11. See Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Feb. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/> [<https://perma.cc/NQL7-5K97>].

12. See HOLLY HEDEGAARD ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2019, at 5 (2020), <https://www.cdc.gov/nchs/data/databriefs/db428.pdf> [<https://perma.cc/292V-LMBT>]; Tara Law, *Fentanyl and COVID-19 May Have Made the Opioid Epidemic Even Deadlier*, TIME (Dec. 16, 2021, 1:17 PM), <https://time.com/6128982/fentanyl-pandemic-opioid-epidemic/> [<https://perma.cc/7DTF-YGZM>].

rate in the past several years.<sup>13</sup> The use of needle exchange programs also continues to grow throughout the country.<sup>14</sup> One state even proposed a program that would offer cash, in exchange for a clean drug test, to people who use drugs.<sup>15</sup>

Despite these proposals and treatments, drug overdoses and deaths have continued to rise,<sup>16</sup> leaving many desperate for an alternative. A new suggestion has emerged as a possible tool to reduce overdose deaths: supervised injection sites.

But while the gravity of the opioid epidemic and overdose deaths is evident, the legality of supervised injection sites to treat the problem is less clear, in part due to a federal statute often referred to as the “crack house” statute. The statute, first enacted in the 1980s,<sup>17</sup> makes it illegal for people to “[m]aintain[] drug-involved premises.”<sup>18</sup> Thus, the fact that supervised injection sites provide a place where some visitors can use drugs may violate the statute, depending on one’s interpretation of it.

Musings of how courts might apply the statute to supervised injection sites have circulated for years but have remained relatively theoretical,<sup>19</sup> since

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13. See Christine Vestal, *Long Stigmatized, Methadone Clinics Multiply in Some States*, PEW CHARITABLE TRS.: STATELINE (Oct. 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/31/long-stigmatized-methadone-clinics-multiply-in-some-states> [<https://perma.cc/6JF5-TV6B>]. By federal regulation, patients at methadone clinics must meet certain criteria to be eligible for treatment. See, e.g., Press Release, N.Y.C. Dep’t of Health and Mental Hygiene, Health Department Rolls Out Methadone Delivery Program for New Yorkers Impacted by COVID-19 (May 19, 2020), <https://www1.nyc.gov/site/doh/about/press/pr2020/methadone-delivery-program.page> [<https://perma.cc/ZZS4-DXZC>] (discussing the federal regulations of methadone including requiring those who take methadone to regularly go to an opioid treatment program to pick up the medication, though regulations have loosened somewhat due to the pandemic). Further, while there are some public methadone clinics, some states—such as Georgia, Indiana, Louisiana, Mississippi, West Virginia, and Wyoming—have caps on the number of clinics that can open within the state. See Vestal, *supra*.

14. See, e.g., Liora Engel-Smith, *NC Needle Exchange Programs Expand Their Reach Despite the Odds*, NC HEALTH NEWS (Aug. 29, 2019), <https://www.northcarolinahealthnews.org/2019/08/29/nc-needle-exchange-programs-succeed-despite-odds/> [<https://perma.cc/KG6V-7MUL>]; Emma Gibson, *Arizona Legalizes Clean Needle Exchange Sites*, ARIZ. PUB. MEDIA (May 27, 2021, 12:27 AM), <https://www.azpm.org/s/87081-arizona-legalized-clean-needle-exchange-sites/> [<https://perma.cc/6BCS-3SPA>].

15. S.B. 110, 2021–22 Leg. (Cal. 2021). While the governor vetoed this particular bill, other private organizations, such as the San Francisco AIDS Foundation, run similar contingency management programs that are privately funded. See Adam Beam, *California Looking to Pay Drug Addicts to Stay Sober*, L.A. TIMES (Aug. 26, 2021, 12:58 PM), <https://www.latimes.com/california/story/2021-08-26/california-looking-to-pay-drug-addicts-to-stay-sober> [<https://perma.cc/4MPJ-N5EG>].

16. See Press Release, *supra* note 7.

17. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841(a), 100 Stat. 3207, 3207-52 (codified as amended at 21 U.S.C. § 856).

18. 21 U.S.C. § 856.

19. See, e.g., Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 AM. J. PUB. HEALTH 231, 234 (2008). See generally Ben Longnecker, Note, *Federal Ignorance and the Battle for Supervised Injection Sites*, 74 U. MIA. L. REV. 1145 (2020) (discussing theories of federalism as reasons for why federal challenges to supervised injection sites could be unsuccessful).

supervised injection sites did not yet exist in the United States despite advocates and some legislators pushing for their implementation.<sup>20</sup> The fact that the government historically used the statute to prosecute egregious drug activity, such as facilitating drug sales out of a defendant's home<sup>21</sup> or operating a bar where the defendant-owner encouraged and engaged in buying drugs,<sup>22</sup> made the question even less clear. In 2019, however, Philadelphia announced plans to open the first supervised injection site in the nation,<sup>23</sup> setting up the anticipated showdown between the crack house statute and supervised injection sites.

Through an examination of *United States v. Safehouse*<sup>24</sup> (*Safehouse II*), this Note seeks to analyze the novel application of 21 U.S.C. § 856—the crack house statute—to supervised injection sites. While scholarship has theorized how courts would apply the statute to a supervised injection site, *Safehouse II* is the first case demonstrating how a circuit court addresses the interaction of such sites with the statute; and with other supervised injection sites opening, the question of what other courts will do following this decision will potentially save, or risk, thousands of lives.

Part I lays out the relevant background for understanding the tension between supervised injection sites and the federal crack house statute. Specifically, Part I.A explains the definition, history, and uses of supervised injection sites, particularly in the context of the opioid epidemic. Part I.B proceeds by explaining the background of the federal crack house statute, including its legislative history and its prior applications.

Part II describes the two conflicting interpretations of the crack house statute when applied to supervised injection sites, as articulated by the various judges and parties in the *Safehouse* case. Part II.A begins with the Third Circuit majority opinion and discusses the legal support for the conclusion that supervised injection sites fall within the statute's reach. Part II.B lays out the arguments that contrast with the Third Circuit's approach, largely focusing on the district court opinion in *United States v. Safehouse*<sup>25</sup> (*Safehouse I*) and the dissent in *Safehouse II*.

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20. See H.B. 123, 55th Leg., 1st Sess. (Ariz. 2021); S.B. 57, 2021–22 Leg. (Cal. 2021); Kathryn Sotnik, *Somerville Exploring Controversial Safe Injection Site: 'People Have a Right to Stay Alive,'* NBC Bos. (June 23, 2021, 8:14 PM), <https://www.nbcboston.com/news/local/somerville-exploring-controversial-safe-injection-site-people-have-a-right-to-stay-alive/2413206/> [<https://perma.cc/4356-YNB8>]; Trisha Thadani, *S.F. Working to Open Supervised Drug Use Site by Spring, Possibly in Building Near the Tenderloin*, S.F. CHRON. (Nov. 16, 2021, 7:44 PM), <https://www.sfchronicle.com/sf/article/S-F-working-to-open-supervised-drug-use-site-by-16626514.php> [<https://perma.cc/JR98-573Y>].

21. See generally *United States v. Banks*, 987 F.2d 463 (7th Cir. 1993).

22. See generally *United States v. Bilis*, 170 F.3d 88 (1st Cir. 1999).

23. See Press Release, City of Phila., *City Announces Progress on Opioid Task Force Recommendations* (Jan. 23, 2018), <https://www.phila.gov/2018-01-23-city-announces-progress-on-opioid-task-force-recommendations/> [<https://perma.cc/T8F2-3DPF>].

24. 985 F.3d 225 (3d Cir.), *cert. denied*, 142 S. Ct. 345 (2021).

25. 408 F. Supp. 3d 583 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

Finally, Part III argues that § 856(a)(2) should be interpreted to exclude supervised injection sites. Part III.A explains that looking merely to the text of the statute or to its prior interpretations provides no clear answer as to whether supervised injection sites fall under the statute. Part III.B then advocates for looking beyond the text to legislative history and to the rule of lenity to provide clarity as to the statute's meaning, and ultimately concludes that these tools of interpretation support a narrow reading of the statute that excludes supervised injection sites. Lastly, Part III.C ends with broader constitutional and policy arguments for why this interpretation is not only sound but also necessary given the current state of affairs regarding drug overdose deaths in the United States.

#### I. SETTING THE SCENE: SUPERVISED INJECTION SITES AND THE CRACK HOUSE STATUTE

Prior to *Safehouse II*, it was unclear how a circuit court might evaluate a supervised injection site under the crack house statute. This part lays out the foundation of the clash between supervised injection sites and the federal crack house statute. Part I.A begins by describing supervised injection sites and their place within the larger scheme of harm reduction approaches to drug use and related harms. Part I.B examines the text and history of the crack house statute and details the major cases that have interpreted the statute prior to *Safehouse I* and *Safehouse II*.

##### A. Supervised Injection Sites

Supervised injection sites—also known as overdose prevention centers (OPC), drug consumption rooms (DCR), or safe injection facilities (SIF)—are places where individuals can go to consume pre-acquired drugs<sup>26</sup> under the supervision of trained staff.<sup>27</sup> Trained workers at the sites can offer visitors general medical advice and referrals to seek treatment or social services, provide sterile needles, answer questions about safe injection practices, monitor individuals for overdose, and administer overdose-reversal agents or first aid if necessary.<sup>28</sup>

The first supervised injection site was established in the Netherlands in the 1970s, and in 1986, the first government-authorized site opened in Berne,

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26. Supervised injection sites do not provide visitors with drugs but do provide services to those visitors who have already acquired drugs and bring them into the facility. See *Supervised Consumption Services*, DRUG POL'Y ALL. (Aug. 6, 2018), <https://drugpolicy.org/resource/supervised-consumption-services> [https://perma.cc/HC9P-JXG4]. Throughout this Note, “pre-acquired” or “pre-obtained” denotes that the drugs visitors use or bring to a supervised injection site were already purchased or acquired before visiting the facility.

27. See *id.* These names are often used interchangeably to refer to the same kinds of sites. This Note uses the term “supervised injection site” to refer to the general category of facilities that provide, among other services, a clean place for visitors to use pre-acquired drugs under the care and supervision of trained medical professionals.

28. Beletsky et al., *supra* note 19, at 231.

Switzerland.<sup>29</sup> Since then, over one hundred facilities have opened around the world, mostly in Europe,<sup>30</sup> Australia,<sup>31</sup> and Canada.<sup>32</sup>

Supervised injection sites are often included as part of a larger harm reduction scheme to prevent drug overdose deaths and treat drug use.<sup>33</sup> Advocates of harm reduction policies argue that regardless of the legality of drug use, it is a fact that people will still use drugs.<sup>34</sup> Because of this inevitability, the goal of harm reduction is just as the name suggests: to *reduce the harms*, such as disease and death, caused by drug use.<sup>35</sup> Such harm reduction schemes thus usually focus on destigmatizing drug use and providing treatment alternatives to people who use drugs, as opposed to focusing on punishing them through incarceration.<sup>36</sup> Common harm reduction approaches include implementing syringe exchange programs (like those currently in place in the United States),<sup>37</sup> providing users with overdose reversal agents like naloxone, checking drugs for impurities such as fentanyl, giving psychosocial support, and offering information and tips on safer drug use practices.<sup>38</sup>

There is considerable evidence that harm reduction measures, including opening supervised injection sites, are effective in reducing overall drug use, preventing drug overdoses and deaths, and increasing the likelihood of treatment.<sup>39</sup> Despite the fact that overdoses still occur at supervised injection

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29. See EUR. MONITORING CTR. FOR DRUGS & DRUG ADDICTION, DRUG CONSUMPTION ROOMS: AN OVERVIEW OF PROVISION AND EVIDENCE 2 (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/TPV9-33R4>].

30. As of 2019, there were approximately ninety supervised injection sites operating throughout Europe. See Cara Tabachnick, *Safe Spaces for Users*, STAN. SOC. INNOVATION REV., Spring 2019, at 8, 8.

31. Currently, there are two supervised injection sites operating in Australia. See AMANDA ROXBURGH ET AL., ADAPTING HARM REDUCTION SERVICES DURING COVID-19: LESSONS FROM THE SUPERVISED INJECTING FACILITIES IN AUSTRALIA 2 (2021).

32. There are approximately thirty-seven government-authorized supervised consumption sites in Canada. See *Interactive Map: Canada's Response to the Opioid Crisis*, GOV'T OF CAN. (July 29, 2021), <https://health.canada.ca/en/health-canada/services/drugs-medication/opioids/responding-canada-opioid-crisis/map.html> [<https://perma.cc/N6LN-LKYZ>].

33. See *What Is Harm Reduction?*, HARM REDUCTION INT'L, <https://www.hri.global/what-is-harm-reduction> [<https://perma.cc/CDF7-PT6V>] (last visited Apr. 2, 2022).

34. See *Principles of Harm Reduction*, NAT'L HARM REDUCTION COAL., <https://harmreduction.org/about-us/principles-of-harm-reduction/> [<https://perma.cc/V8ZK-R6JQ>] (last visited Apr. 2, 2022).

35. See *id.*; see also *What Is Harm Reduction?*, *supra* note 33.

36. See *What Is Harm Reduction?*, *supra* note 33.

37. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015). Division H of the Consolidated Appropriations Act bans the use of federal funding for the purchase of syringes or needles to be used for injecting any illegal drug, but the Act allows local health departments to bypass the ban upon the determination that the area the department serves "is experiencing, or is at risk for, a significant increase in hepatitis infections or an HIV outbreak due to injection drug use." *Id.*

38. See *What Is Harm Reduction?*, *supra* note 33.

39. See Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated?: A Systematic Literature Review*, 145 DRUG & ALCOHOL DEPENDENCE 48, 65 (2014) (reviewing seventy-five studies and concluding that supervised injection sites reduced overdose deaths, promoted safer injection practices, and increased access to and use of health



sites, no overdose deaths have been reported at such facilities.<sup>40</sup> For instance, at a supervised injection site in Germany, at least 3180 overdoses were reversed between the years 2000 and 2013, with no deaths reported.<sup>41</sup> Research also shows that the use of supervised injection facilities is generally associated with quicker entry into drug treatment and recovery services.<sup>42</sup>

Studies also suggest that supervised injection facilities actually reduce crime and other negative externalities, despite critics' concerns to the contrary.<sup>43</sup> For instance, following the opening of a supervised injection site in Vancouver, a study found that in the area surrounding the facility there was a decrease in discarded syringes, public drug use, and the presence of suspected drug dealers.<sup>44</sup> Another study of a supervised injection site in Sydney, Australia, showed that there was a 68 percent decrease in the number of opioid overdose-related ambulance calls in the area surrounding the site as compared to other areas without such a facility.<sup>45</sup>

Despite much of the evidence supporting the effectiveness of supervised injection sites and related harm reduction strategies, public and political support for such measures has been inconsistent. Some evidence suggests that public attitudes have started shifting in favor of rehabilitation efforts for people who use drugs, hinting that concerns about supervised injection sites may eventually fade.<sup>46</sup> There have also been recent political developments

services); SHARON LARSON ET AL., LANKENAU INST. FOR MED. RSCH., SUPERVISED CONSUMPTION FACILITIES—REVIEW OF THE EVIDENCE 11–14 (2017), [https://dbhids.org/wp-content/uploads/2018/01/OTF\\_LarsonS\\_PHLReportOnSCF\\_Dec2017.pdf](https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf) [<https://perma.cc/V5FN-PQ6K>].

40. See ERIC ARMBRECHT ET AL., INST. FOR CLINICAL & ECON. REV., SUPERVISED INJECTION FACILITIES AND OTHER SUPERVISED CONSUMPTION SITES: EFFECTIVENESS AND VALUE; FINAL EVIDENCE REPORT 22 (2021), [https://icer.org/wp-content/uploads/2020/10/ICER\\_SIF\\_Final-Evidence-Report\\_010821.pdf](https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf) [<https://perma.cc/P5NT-CZS5>]; Tanya Albert Henry, *Will the U.S. Get Its First Supervised Drug Consumption Site?*, AM. MED. ASS'N (Dec. 15, 2020), <https://www.ama-assn.org/delivering-care/opioids/will-us-get-its-first-supervised-drug-consumption-site> [<https://perma.cc/NR97-XD7S>].

41. HARM REDUCTION COAL., ALTERNATIVES TO PUBLIC INJECTING 9 (2016), <https://harmreduction.org/wp-content/uploads/2020/08/Resource-SupervisedConsumptionServices-AlternativestoPublicInjections.pdf> [<https://perma.cc/AMW4-JYUX>]. Though only open since December 2021, the first fully operational supervised injection sites in the United States have received more than 10,000 visits and reversed nearly 200 overdoses without a single death. See Samar Khurshid, *'Clear Proof Lives Have Been Saved': Will New York Expand on First Overdose Prevention Centers?*, GOTHAM GAZETTE (Mar. 14, 2022), <https://www.gothamgazette.com/state/11167-new-york-city-expand-overdose-prevention-centers> [<https://perma.cc/J7RU-FGJ7>].

42. See ARMBRECHT ET AL., *supra* note 40, at 20.

43. See Potier et al., *supra* note 39, at 64 (explaining that some opponents to these facilities are concerned about concentrated drug use and increased drug trafficking and crime in the vicinity).

44. See Evan Wood et al., *Summary of Findings from the Evaluation of a Pilot Medically Supervised Safer Injecting Facility*, 175 CANADIAN MED. ASS'N J. 1399, 1400–01 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1635777/pdf/20061121s00020p1399.pdf> [<https://perma.cc/34GM-ZWAR>].

45. See A.M. Salmon et al., *The Impact of a Supervised Injecting Facility on Ambulance Call-Outs in Sydney, Australia*, 105 ADDICTION 676, 678 (2010).

46. See, e.g., *America's New Drug Policy Landscape*, PEW RSCH. CTR. (Apr. 2, 2014), <https://www.pewresearch.org/politics/2014/04/02/section-1-perceptions-of-drug-abuse->

that suggest a possible change in attitudes toward favoring harm reduction measures. For instance, in 2015, Congress “lifted the decades-old ban on federal funding for programs that provide sterile syringes.”<sup>47</sup> More recently, the Biden administration publicly committed to following an “evidence-based harm reduction” approach to the drug overdose and addiction crisis.<sup>48</sup> As part of the American Rescue Plan—the coronavirus relief package signed into law in 2021<sup>49</sup>—Congress also approved a \$30 million Harm Reduction Grant Program that was designed to “support community-based overdose prevention programs, syringe services programs, and other harm reduction services” and that was notably exempt from the long-standing ban on using federal funds to buy clean syringes.<sup>50</sup>

Harm reduction policies, however, have come under a fresh round of political and public backlash, most recently with public outrage in response to claims that funds from the American Rescue Plan were being used to support programs that would distribute “crack pipes” as part of “safe smoking kits.”<sup>51</sup> Even though the Biden administration assured that the funds would not be used in such a way, lawmakers introduced legislation imposing new restrictions that would go so far as to extend the long-standing ban on federal funding of clean needle purchases to the American Rescue Plan.<sup>52</sup>

Support for harm reduction programs in states and municipalities has also fluctuated. For instance, Charleston, West Virginia, closed a harm reduction program in 2018, three years after it opened.<sup>53</sup> Additionally, some states have passed laws making it harder to run syringe services despite the overdose crisis.<sup>54</sup> Although the science tends to support the efficacy of

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views-of-drug-policies/ [https://perma.cc/HMD6-WTKX]. The 2014 survey found that 67 percent of the public believe the government should focus on providing treatment for, not prosecuting, people who use illegal drugs. *Id.* Additionally, 63 percent of those surveyed said that it was a good thing that state governments were moving away from mandatory minimum sentences for nonviolent drug users, a significant increase from 47 percent in 2001. *Id.*

47. ETHAN NADELMANN & LINDSAY LASALLE, *TWO STEPS FORWARD, ONE STEP BACK: CURRENT HARM REDUCTION POLICY AND POLITICS IN THE UNITED STATES 2* (2017).

48. *See* OFF. OF NAT’L DRUG CONTROL POL’Y, EXEC. OFF. OF THE PRESIDENT, *THE BIDEN-HARRIS ADMINISTRATION’S STATEMENT OF DRUG POLICY PRIORITIES FOR YEAR ONE 1, 4* (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/BidenHarris-Statement-of-Drug-Policy-Priorities-April-1.pdf> [https://perma.cc/K9SZ-C6ZC] (detailing commitments to support research efforts regarding the “clinical effectiveness of emerging harm reduction practices,” as well as identifying opportunities to expand access to naloxone in communities with high overdose rates, and “amplify[ing] best practices for [fentanyl test strips]”).

49. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified as amended in scattered sections of the U.S.C.).

50. *See* Sheryl Gay Stolberg, *Uproar over ‘Crack Pipes’ Puts Biden Drug Strategy at Risk*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/2022/02/21/us/politics/biden-harm-reduction-crack-pipes.html> [https://perma.cc/YT89-6HWJ].

51. *See id.*

52. *See id.*

53. *See* Joseph P. Williams, *A Fight to Do No Harm*, U.S. NEWS (Jan. 24, 2019, 10:17 AM), <https://www.usnews.com/news/healthiest-communities/articles/2019-01-24/opioid-crisis-harm-reduction-struggles-for-acceptance-in-us> [https://perma.cc/ENU3-WNEL].

54. *See* Stolberg, *supra* note 50.

supervised injection sites, the implementation of such facilities in the United States nevertheless faces a challenge beyond public perception: federal law may bar their existence.

### B. *The Federal Crack House Statute*

While supervised injection sites have been operating in other countries<sup>55</sup>—in some cases for decades<sup>56</sup>—the United States has been slower to implement them. One reason for this lag is the legal ambiguity surrounding supervised injection sites. As it stands, supervised injection sites may be illegal under a federal law colloquially known as the “crack house” statute.<sup>57</sup>

#### 1. Text and History of the Statute

The crack house statute, codified at 21 U.S.C. § 856, was originally enacted as part of the Anti-Drug Abuse Act of 1986.<sup>58</sup> The act was a legislative response to the growing fear and moral condemnation of cocaine use, which had intensified in the wake of basketball player Len Bias’s death by drug overdose.<sup>59</sup> Section 856(a)(1) of the 1986 statute made it illegal for a person to “knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance.”<sup>60</sup> Section 856(a)(2) made it illegal to

manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>61</sup>

The statute aimed to punish those who use their property to run illegal drug businesses, particularly those who operated so-called “crack houses” on their property.<sup>62</sup>

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55. *See supra* notes 29–32 and accompanying text.

56. *See supra* note 29 and accompanying text.

57. *See generally* Alex Kreit, *Safe Injection Sites and the Federal Crack House Statute*, 60 B.C. L. REV. 413 (2019).

58. Pub. L. No. 99-570, § 1841(a), 100 Stat. 3207, 3207-52 (codified as amended at 21 U.S.C. § 856).

59. *See* DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW I* (2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/6SBC-8ELQ>]. In June 1986, Len Bias, a college basketball star, shockingly died of a drug overdose hours after his selection in the NBA draft. *See id.* His death came during the emergence, and subsequent fear, of crack cocaine in the United States, prompting assumptions that his overdose was a result of a crack cocaine overdose. *See id.* The combination of Bias’s shocking death and the panic surrounding crack cocaine led to the swift passage of the Anti-Drug Abuse Act of 1986. *See id.*

60. § 1841(a), 100 Stat. at 3207-52.

61. *Id.*

62. *See* Longnecker, *supra* note 19, at 1168.

In 2003, Congress amended the statute following fears of teenagers using ecstasy at raves.<sup>63</sup> Initially introduced as the Reducing Americans' Vulnerability to Ecstasy Act<sup>64</sup> ("RAVE Act"), then later separately passed in a different form as the Illicit Drug Anti-Proliferation Act of 2003,<sup>65</sup> the amendments broadened the crack house statute to encompass temporary locations, indoor and outdoor venues, and one-off events.<sup>66</sup> This was largely seen as a means of targeting raves where drugs were being sold.<sup>67</sup> The statute, unchanged since the 2003 amendments, makes it unlawful to

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

(2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.<sup>68</sup>

Violations of the statute can carry hefty penalties, with individuals facing a potential prison term of up to twenty years, "a fine of not more than \$500,000, or both."<sup>69</sup> The statute also provides that "a person other than an individual"—namely, a corporation—who violates the statute may be subject to a fine of up to \$2,000,000.<sup>70</sup> Additionally, a person convicted under the statute may be liable for civil penalties.<sup>71</sup>

Even though the statute has been in force since the 1980s, federal prosecution under the statute is relatively infrequent.<sup>72</sup> Prosecutors have almost exclusively used the statute to charge individuals who are closely involved with drug activity occurring on their property.<sup>73</sup> The following section provides a brief overview of the major cases that have interpreted the statute, many of which illustrate the fact that prosecution under the statute is almost exclusively limited to defendants who are intimately tied to the drug activity occurring in the case.

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63. See Kreit, *supra* note 57, at 430 n.94.

64. S. 2633, 107th Cong. (2002).

65. Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of the U.S.C.); see Kreit, *supra* note 57, at 430–31 & n.95 (discussing the legislative history behind the RAVE Act).

66. See Longnecker, *supra* note 19, at 1168–69.

67. See *id.*

68. 21 U.S.C. § 856(a).

69. *Id.* § 856(b).

70. *Id.*

71. *Id.* § 856(d).

72. See Kreit, *supra* note 57, at 430–31 (noting that in 2017, "a total of 19,750 federal drug offenders were sentenced," but "maintaining a drug-involved premise was the primary offense of conviction for only twenty-four defendants who received federal sentences").

73. See *id.* at 431 (citing studies showing that application of the statute is rather limited to cases where defendants are closely involved with the drug activity); *infra* text accompanying notes 76–109.

## 2. Major Cases Interpreting the Statute

After the statute's enactment, courts have been challenged to reconcile the language in § 856(a)(1) and § 856(a)(2), specifically regarding to whom the so-called "purpose requirement"<sup>74</sup> applies. The controversy largely revolves around the language in § 856(a)(2) and whether the text only requires a third party to have "the purpose of unlawfully . . . using a controlled substance" or whether it is the defendant who must specifically provide a place for the purpose of facilitating a third party's drug activity there.<sup>75</sup> This section outlines how courts have interpreted § 856(a)(1) and § 856(a)(2) outside the context of supervised injection sites.

One of the first major cases to analyze the text and construction of 21 U.S.C. § 856(a) was a case in the Fifth Circuit, *United States v. Chen*.<sup>76</sup> In *Chen*, the defendant owned and operated a motel that, over time, became a hub of drug trafficking.<sup>77</sup> The defendant was closely involved in the drug activity occurring at her motel: she observed tenants use and deal drugs in the motel rooms, stored their drugs and drug proceeds, encouraged them to make drug sales to pay rent, loaned them money to buy drugs to resell, and even warned tenants when she knew law enforcement planned to search rooms.<sup>78</sup> Chen was charged under § 856(a)(1) and § 856(a)(2).<sup>79</sup>

The Fifth Circuit analyzed the language of the statute to evaluate whether a jury instruction about deliberate ignorance was proper.<sup>80</sup> Chen argued that in order to convict her under § 856(a)(1), the government must prove she "knowingly maintained a place for the specific purpose of distributing or using a controlled substance."<sup>81</sup> The court first examined whether the phrase "for the purpose of" in § 856(a)(1) refers to the *defendant's* purpose of engaging in illegal drug activity or whether it refers to a *visitor's* purpose to distribute or use drugs at the place.<sup>82</sup>

According to the court, the plain language of § 856(a)(1) unambiguously requires the defendant be the one to act "for the purpose of" illegal drug activity.<sup>83</sup> The court said that "[i]n order to find that the *purpose* requirement did not apply to [a defendant] who knowingly maintains the place, we would have to twist the clear and plain language of the statute. This we cannot

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74. In § 856(a)(1), the current language of the purpose requirement is "for the purpose of manufacturing, distributing, or using any controlled substance." 21 U.S.C. § 856(a)(1). In § 856(a)(2), the purpose requirement states, "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." *Id.* § 856(a)(2).

75. *Id.* § 856(a)(2).

76. 913 F.2d 183 (5th Cir. 1990).

77. *Id.* at 185.

78. *Id.* at 186.

79. *Id.* The *Chen* court applied the 1986 version of the statute. See *supra* text accompanying notes 60–61.

80. *Chen*, 913 F.2d at 187–88.

81. *Id.* at 189.

82. *Id.*

83. *Id.* at 190; 21 U.S.C. § 856(a)(1).

do.”<sup>84</sup> The court further explained that “any other interpretation would render § 856(a)(2) essentially superfluous.”<sup>85</sup>

The Fifth Circuit found that, unlike § 856(a)(1), § 856(a)(2) was written to apply to persons who may have opened and maintained their property for an innocent reason but who nevertheless “knowingly allowed others to engage in [drug] activities by making the place ‘available for use . . . for the purpose of unlawfully’ engaging in such activity.”<sup>86</sup> The Fifth Circuit concluded that § 856(a)(1) requires the *defendant* maintain the place for her own “purpose of manufacturing, distributing, or using any controlled substance,”<sup>87</sup> while § 856(a)(2) does not require a defendant to have such a purpose.<sup>88</sup> Section 856(a)(2), the court held, only requires that drug “activity is engaged in by others” who have the purpose of engaging in such drug-related activity.<sup>89</sup>

Other circuits presented with this same question have followed the Fifth Circuit’s reading of the statute. Shortly after *Chen* was decided, the Ninth Circuit, in *United States v. Tamez*,<sup>90</sup> adopted the Fifth Circuit’s interpretation of the statute.<sup>91</sup> In *Tamez*, the defendant owned a used car dealership that was used to distribute cocaine.<sup>92</sup> *Tamez* was charged and convicted under § 856(a)(2) but appealed the jury verdict, arguing that it was unsound because § 856(a)(2) was intended only to apply to manufacturing operations or “crack houses.”<sup>93</sup> Therefore, *Tamez* contended that the statute could not apply to him because it requires the defendant to intend that the building be used for the purpose of drug activity, whereas his buildings were to be used only to operate a used car dealership.<sup>94</sup> *Tamez* sought to bolster his claim by pointing to the fact that most cases applying § 856(a) involved major drug warehouses, manufacturing operations, or actual crack houses.<sup>95</sup> His car dealership, he claimed, was not in the same category.<sup>96</sup>

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

85. *Id.*

86. *Id.* (quoting 21 U.S.C. § 856(a)(2)).

87. 21 U.S.C. § 856(a)(1).

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

89. *Id.* (holding that “under § 856(a)(2), the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place”).

90. 941 F.2d 770 (9th Cir. 1991).

91. *Id.* at 774.

92. *Id.* at 772.

93. *Id.* at 773. *Tamez* asserted that the statute’s short title—“Establishment of manufacturing operations”—and a summary of the provision in the *Congressional Record* that described the statute as one that “[o]utlaw[s] operation of houses or buildings, so called ‘crack houses’ where ‘crack,’ cocaine and other drugs are manufactured and used,” showed that the statute was intended to be applied more narrowly and therefore did not cover his premises. *Id.* (quoting 132 CONG. REC. S13779 (daily ed. Sept. 26, 1986)).

94. *See id.*

95. *Id.* (citing a series of cases in which the statute was applied to large-scale, coordinated drug activity, including *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988) (meth lab); *United States v. Martinez-Zayas*, 857 F.2d 122 (3d Cir. 1988) (cocaine warehouse and packaging facility); *United States v. Bethancurt*, 692 F. Supp. 1427 (D.D.C. 1988) (crack house); *United States v. Restrepo*, 698 F. Supp. 563 (E.D. Pa. 1988) (cocaine warehouse)).

96. *Id.*

The Ninth Circuit disagreed, citing *Chen* for justification.<sup>97</sup> Because the court deemed the text unambiguous, it rejected Tamez's arguments relying on the statute's short title and on language in the *Congressional Record*.<sup>98</sup> Applying the logic from *Chen*, the court stated that in order for § 856(a)(1) and § 856(a)(2) to have meaning, they must not overlap in such a way as to make one superfluous of the other.<sup>99</sup> To prevent this, the court ruled that § 856(a)(1) requires a defendant have the "intention to manufacture, distribute, or use a controlled substance," whereas § 856(a)(2) was "intended to prohibit an owner from providing a place for illegal conduct" and thus only requires that the illegal activity was present and that the defendant knowingly allowed its continuance, with no focus on the defendant's intent.<sup>100</sup> Thus, the court held that applying § 856(a)(2) to Tamez was proper.<sup>101</sup>

The Eighth Circuit also followed *Chen*'s interpretation of the statute in *United States v. Tebeau*.<sup>102</sup> Tebeau owned 300 acres of property in Missouri called "Camp Zoe" where he hosted a number of music festivals between 2004 and 2010.<sup>103</sup> During a nearly sixteen-month investigation prompted by festival-related drug arrests, undercover officers attended ten festivals and made over "150 controlled purchases of illegal drugs" ranging from "psychedelic mushrooms [and] ecstasy" to "cocaine, LSD, [and] opium."<sup>104</sup> Officers witnessed frequent and blatant drug use during the festivals, and they estimated that around \$500,000 of illegal drugs were sold at each event.<sup>105</sup>

Tebeau's knowledge of the extensive drug activity taking place at Camp Zoe was evident. He attended nearly every festival, admitted that he was aware of drug sales occurring on the property, and operated "Safestock," an on-site medical facility where attendees were treated for overdoses.<sup>106</sup> Camp Zoe employees told officers that Tebeau instructed them on which drugs were allowed at the camp and that Tebeau told security guards to move drug dealers away from the front gates to avoid officers detecting them.<sup>107</sup>

Tebeau was charged with violating § 856(a)(2) of the crack house statute for "managing a drug involved premises."<sup>108</sup> The Eighth Circuit, in upholding Tebeau's conviction, referenced *Chen* and the other circuits that relied on the *Chen* court's reasoning as support for concluding that

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97. *Id.* at 774 ("We reject Tamez' argument on the logic of *Chen*.").

98. *Id.* at 773–74.

99. *See id.* at 773.

100. *Id.* at 774.

101. *Id.*

102. 713 F.3d 955 (8th Cir. 2013).

103. *Id.* at 957–58.

104. *Id.* at 958.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* Since *Tebeau* was decided after the 2003 amendments to the crack house statute, the court applied the current version of § 856(a)(2). *See id.*

§ 856(a)(2)'s purpose requirement did not require proof that Tebeau himself had the intent to manufacture, distribute, or use controlled substances.<sup>109</sup>

These cases illustrate the typical reading of the crack house statute by circuit courts: Section 856(a)(1) requires a defendant to maintain a place for his own purpose of engaging in drug activity, while § 856(a)(2) requires a defendant to make a place available where he knows others might engage in drug activity. Though primarily dealing with egregious drug activity, these cases nevertheless provide a foundation for interpreting the statute in other contexts.

## II. THE BATTLE OF INTERPRETATIONS

In 2018, the city of Philadelphia announced that, in an attempt to curtail the city's record number of drug overdose deaths in 2017, it would support the creation of supervised injection sites that would be run by private nonprofits.<sup>110</sup> In the following months, Safehouse, a nonprofit, was founded to open supervised injection sites that would provide a multitude of services, including "wound care, referrals to primary care," and testing for HIV and Hepatitis C.<sup>111</sup> Safehouse also planned to connect visitors with social services, other medical facilities, and housing opportunities.<sup>112</sup> While Safehouse planned to provide a wide range of services,<sup>113</sup> the most notable—and controversial—was its "consumption room" in which individuals could use pre-acquired drugs under the supervision of trained medical professionals.<sup>114</sup>

In 2019, the U.S. Department of Justice filed a civil suit in the U.S. District Court for the Eastern District of Pennsylvania against Safehouse and its president and treasurer, José Benitez.<sup>115</sup> To block Safehouse from opening, the complaint sought a declaratory judgment and argued that Safehouse's plans to operate a consumption room would violate 21 U.S.C. § 856(a)(2), which makes it illegal for any person to "manage[] or control[] any place" that they "knowingly and intentionally . . . make available for use . . . for the purpose of unlawfully . . . using a controlled substance."<sup>116</sup>

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109. *Id.* at 959–60 (discussing the *Chen* court's analysis of the statute, citing other cases that follow such approach, and ultimately "agree[ing] with the other circuits that the 'bare meaning' of the purpose requirement in § 856(a)(2) indicates that the government was not required to prove that Tebeau had the intent to manufacture, distribute, or use a controlled substance to convict him under the statute").

110. See Press Release, *supra* note 23.

111. *Frequently Asked Questions*, SAFEHOUSE, <https://www.safehousephilly.org/frequently-asked-questions#faqgeneral> [<https://perma.cc/63GF-M34C>] (last visited Apr. 2, 2022).

112. *Id.*

113. *The Safehouse Model*, SAFEHOUSE, <https://www.safehousephilly.org/about/the-safehouse-model> [<https://perma.cc/95V9-QJ4C>] (last visited Apr. 2, 2022).

114. *Id.*

115. *United States v. Safehouse (Safehouse I)*, 408 F. Supp. 3d 583 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021); Amended Complaint for Declaratory Judgment at 5, *Safehouse I*, 408 F. Supp. 3d 583 (No. 19-0519).

116. Amended Complaint for Declaratory Judgment, *supra* note 115, at 5 (quoting 21 U.S.C. § 856(a)(2)).



The case produced conflicting judicial opinions about the proper reading of § 856(a)(2) and whether the statute prohibits the operation of supervised injection sites like Safehouse's proposed consumption room. The district court held that Safehouse's services would not violate § 856(a)(2).<sup>117</sup> On appeal, however, the Third Circuit reversed, finding that Safehouse's proposed consumption room would violate § 856(a)(2).<sup>118</sup>

The following part delineates the major interpretations of the statute and the support provided for each side.<sup>119</sup> Part II.A details the Third Circuit's interpretation that § 856(a)(2) encompasses the activities of supervised injection sites.<sup>120</sup> Part II.B then outlines the competing view that § 856(a)(2) does not reach supervised injection sites, focusing on the district court's interpretation in *Safehouse I* and on the dissent in *Safehouse II*.<sup>121</sup>

### A. The Third Circuit Weighs In

This section explains the Third Circuit's interpretation of the crack house statute and its application to the safe injection site in *Safehouse II*. Part II.A.1 details the Third Circuit's reasoning for finding that § 856(a)(2)'s purpose requirement applies to a third party. Part II.A.2 then explains the Third Circuit's conclusion that, under its reading of the statute, a supervised injection site—specifically Safehouse's proposed consumption room—falls within the statute's scope.

#### 1. Purpose Requirement Applies to a Third Party

The applicability of § 856(a)(2) to supervised injection sites hinges on the phrase “for the purpose of.”<sup>122</sup> The central question is whether this so-called “purpose requirement” means that the defendant (who provides a place) must have the intention or purpose that the place be used by someone else for drug activity, or whether § 856(a)(2) merely means that a third party must have the purpose of using that place for drug activity. In examining § 856(a)(2), the *Safehouse II* majority relied on the provision's plain language and the analysis of other circuits to conclude that the purpose requirement is assigned to the third party, not the defendant.<sup>123</sup>

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117. *Safehouse I*, 408 F. Supp. at 585–86, 618.

118. *Safehouse II*, 985 F.3d at 229–30, *cert. denied*, 142 S. Ct. 345 (2021).

119. The scope of this Note is limited to the case's discussion of statutory interpretation. It is important to note, however, that the Third Circuit evaluated, and ultimately rejected, the argument that regardless of the statute's interpretation, Safehouse's services are legal because the activities are local and fall outside of Congress's Commerce Clause powers. *Id.* at 239–43. For further discussion of this issue, see Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1112–47 (2009); Longnecker, *supra* note 19, at 1163–77.

120. *See infra* Part II.A.

121. *See infra* Part II.B.

122. 21 U.S.C. § 856(a)(2) (making it unlawful to “manage or control any place . . . 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” (emphasis added)).

123. *Safehouse II*, 985 F.3d at 233–35.

*a. Textual Support*

The Third Circuit, in *Safehouse II*, held that the plain text of § 856(a)(2) requires third-party visitors—and importantly, not the defendant—to have the “purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance”<sup>124</sup> for a defendant to be convicted under the statute.<sup>125</sup> This conclusion, according to the court, is supported through a close examination of the text and structure of § 856(a)(1) and § 856(a)(2) when read together as part of a statutory scheme.

Turning first to § 856(a)(1),<sup>126</sup> the court stated that the text requires only one actor: the defendant.<sup>127</sup> This is because the two sets of actions in § 856(a)(1)’s text—(1) to “open, lease, rent, use, or maintain any place” and (2) to have a “purpose of manufacturing, distributing, or using” drugs at that place<sup>128</sup>—do not require a third party for their completion.<sup>129</sup> For instance, any actor is able to “maintain” an apartment or “us[e]” an illicit substance entirely alone, regardless of the presence of any third party.<sup>130</sup> This does not mean that a person must work alone in order to be charged under § 856(a)(1),<sup>131</sup> but the inquiry nevertheless turns on the defendant’s purpose and not on the purpose of a third party.<sup>132</sup> In other words, § 856(a)(1) forbids a defendant “from operating a place for his *own* purpose of illegal drug activity.”<sup>133</sup>

There is little, if any, disagreement that this is the correct interpretation of § 856(a)(1). All circuit courts that have evaluated § 856(a)(1)’s language agree on this interpretation.<sup>134</sup> *Safehouse* and the government also agreed that this is the proper reading of § 856(a)(1),<sup>135</sup> as did the district court.<sup>136</sup> Although there is agreement regarding how § 856(a)(1) should be read, there is considerable disagreement about how the overlaps and dissimilarities between § 856(a)(1) and § 856(a)(2) should be interpreted in relation to each other.

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124. 21 U.S.C. § 856(a)(2).

125. *Safehouse II*, 985 F.3d at 233.

126. The text of § 856(a)(1) makes it illegal to “knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.” 21 U.S.C. § 856(a)(1).

127. *Safehouse II*, 985 F.3d at 234.

128. 21 U.S.C. § 856(a)(1).

129. *Safehouse II*, 985 F.3d at 234.

130. *Id.*

131. *Id.* (listing examples of instances in which a person working with others would still fall under § 856(a)(1), such as a defendant using drugs with friends or manufacturing them with a business partner, or a drug kingpin whose employees operate his drug business without him ever touching said drugs himself).

132. *Id.*

133. *Id.* (emphasis added).

134. *See id.*

135. *Id.*; Brief of Appellees *Safehouse* and José Benitez at 41, *Safehouse II*, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422).

136. *Safehouse I*, 408 F. Supp. 3d 583, 599 (E.D. Pa. 2019), *rev’d*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

In contrast to its reading of § 856(a)(1), the Third Circuit explained that § 856(a)(2) requires at least two actors: the defendant and a third party.<sup>137</sup> While no third party is explicitly mentioned in § 856(a)(2), the court explained that the text’s “verbs require [a third party].”<sup>138</sup> The court elaborated that in order for a landlord to “rent” or “lease” a property, the property has to be leased or rented to someone; for an owner to “profit from” a place, someone else has to be willing to pay the owner; and for a person to make a place “available for use,” someone has to be willing to use the place.<sup>139</sup> The specific inclusion of these verbs, all of which imply the existence of an additional person, necessitates the presence of a third party in addition to the defendant for the statute’s text to make sense.

After establishing that the plain text of § 856(a)(2) requires at least two actors (the defendant and a third party), the court then determined which of these actors each set of actions refers to. The Third Circuit identified three sets of actions in § 856(a)(2): (1) to “manage or control any place”; (2) to “rent, lease, profit from, or make [a place] available for use”; and (3) “manufacturing, storing, distributing, or using a controlled substance” or having the purpose to do so.<sup>140</sup> According to the Third Circuit, the first two sets of actions—(1) managing or controlling a place and (2) renting, leasing, profiting from, or making such place available for use—refer to the defendant.<sup>141</sup> Then, the third party is subsequently the one who must actually manufacture, store, distribute, or use a controlled substance, or have the purpose to do so.<sup>142</sup>

In rebutting Safehouse’s argument that such a reading goes against the presumption of consistent usage,<sup>143</sup> the majority found that the differences in phrasing between the subsections indicate that the word “purpose” has the same meaning in both subsections, but that it refers to the purpose of different people in each.<sup>144</sup> The court explained that the phrase “for the purpose of” in each subsection refers back to the word “use,” its nearest reasonable referent.<sup>145</sup> Thus, the person who “uses the property is the one who must

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137. *Safehouse II*, 985 F.3d at 234.

138. *Id.*

139. *Id.* (quoting 21 U.S.C. § 856(a)(2), which provides in relevant part: “knowingly and intentionally *rent, lease, profit from, or make available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance*” (emphasis added)).

140. *Id.* at 234–35 (quoting 21 U.S.C. § 856(a)(2)).

141. *Id.*

142. *Id.* at 235.

143. Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 22; *see also infra* notes 197–204 and accompanying text.

144. *Safehouse II*, 985 F.3d at 236 (“We presume that ‘purpose’ means the same thing in both [subsections]. But we do not presume that the ‘purpose’ belongs to the same *actor* in each paragraph.”).

145. *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 152–53 (2012)). According to Justice Antonin Scalia and Professor Bryan A. Garner, the nearest-reasonable-referent canon provides that “[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or

have the purpose.”<sup>146</sup> Since the person who is using the place in § 856(a)(2) is the third party, the court explained that it is therefore the third party’s purpose that matters.<sup>147</sup> In contrast, in § 856(a)(1), the person using the property is the defendant, so it is the defendant’s purpose that is relevant under that paragraph.<sup>148</sup>

The Third Circuit also stated that reading § 856(a)(2) to require a third party to have the purpose of engaging in unlawful drug activity is the only way to avoid making § 856(a)(1) and § 856(a)(2) redundant.<sup>149</sup> Although statutes may inevitably overlap, courts seek to avoid reading provisions in such a way that renders one or more to be mere surplusage, especially those placed in the same subsection.<sup>150</sup> If the defendant were the one required to have the “purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance” in § 856(a)(2), the court explained that there would be no meaningful distinction between § 856(a)(1) and § 856(a)(2).<sup>151</sup> This is because there would be no person who would fall uniquely under § 856(a)(2) who does not already fall under § 856(a)(1) if both provisions were interpreted as requiring the defendant to act “for the purpose” of illicit drug activity.<sup>152</sup>

The court further emphasized that its interpretation avoids redundancy between § 856(a)(1)’s intent requirement and § 856(a)(2)’s purpose requirement.<sup>153</sup> The word “intentionally” was only added to the text of § 856(a)(2) and is notably absent from § 856(a)(1).<sup>154</sup> Fundamentally, both intent and purpose require a person to will something.<sup>155</sup> Because of this, to have a purpose of engaging in unlawful drug activity—as is required by § 856(a)(2)—the person with such purpose must intend for that illicit drug

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postpositive modifier normally applies only to the nearest reasonable referent.” SCALIA & GARNER, *supra*, at 152.

146. *Safehouse II*, 985 F.3d at 236.

147. *Id.*

148. *Id.*

149. *Id.* at 233.

150. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 543 (2015).

151. *Safehouse II*, 985 F.3d at 235.

152. *Id.* The majority rejected a series of proposed examples that Safehouse argued demonstrated a distinction between § 856(a)(1) and § 856(a)(2) under its suggested interpretation that § 856(a)(2) requires the defendant to act for the purpose of illegal drug activity. The court rejected Safehouse’s argument that § 856(a)(1) covers a crack house operator, while § 856(a)(2) covers a “distant landlord,” because the distant landlord would fall under either provision as “he has ‘rent[ed]’ and ‘maintain[ed]’ a place for drug activity.” *Id.* (alterations in original). Safehouse also argued that under its interpretation, an owner who allows her boyfriend to run a drug ring from her apartment while the owner is away at work would only fall under § 856(a)(2), but the court rejected this argument on the basis that if the owner did not have the purpose of using her apartment for drug sales, then she would be excluded under both provisions. *Id.* If she did have the purpose of using her apartment for such drug sales, she would then be liable under both provisions. *Id.*

153. *Id.*

154. *See id.* at 235–36. Compare 21 U.S.C. § 856(a)(1) (making it unlawful, in part, to “knowingly open, lease, rent, use, or maintain any place” (emphasis added)), with 21 U.S.C. § 856(a)(2) (making it unlawful, in part, to “knowingly and intentionally rent, lease, profit from, or make [a place] available for use” (emphasis added)).

155. *See Safehouse II*, 985 F.3d at 235–36.

activity to occur.<sup>156</sup> According to the Third Circuit, if § 856(a)(2) requires the defendant have the intent for drug activity to occur at the place (i.e., the purpose requirement applies to the defendant), then the defendant would have to both “intentionally” make a place available for use and intend that the place be used for the “purpose” of unlawfully using drugs.<sup>157</sup> If this were the case, then § 856(a)(2)’s two volitional requirements—intent and purpose—would be redundant because “[o]ne cannot have a purpose of unlawful drug activity without intending that activity.”<sup>158</sup> But if the purpose requirement in § 856(a)(2) applies to a third-party visitor—as the Third Circuit holds—then the defendant has the intent requirement, while the third party has the purpose requirement, saving the two words from redundancy and giving meaning to every word in the provision.<sup>159</sup> This interpretation, the Third Circuit explained, is also supported by other circuits that have analyzed the statute.

*b. Circuit Court Support*

The Third Circuit identified six other circuits that read the two subsections in § 856(a) in the same manner, explaining that not only have these circuits interpreted the statute the same way, but no circuit has held otherwise.<sup>160</sup> The *Safehouse II* majority acknowledged that no circuit has been confronted with applying the statute to a safe injection site and that all the other circuit cases instead involved rather egregious drug activity, often with the close involvement of the defendant.<sup>161</sup> Though the factual circumstances in those cases are different than one involving a supervised injection site, the Third Circuit found this difference irrelevant for purposes of statutory interpretation because the other circuits that previously analyzed the statute “recognize[d] the textual difference between the defendant’s own purpose under paragraph (a)(1) and the third party’s purpose under (a)(2).”<sup>162</sup>

The court refused to look at legislative history, determining that the text itself unambiguously assigns the purpose requirement to the third party, and therefore found it unnecessary to try to parse through Congress’s intent.<sup>163</sup> The court also found it unnecessary to use the rule of lenity,<sup>164</sup> as the statute is “clear enough, not ‘grievously ambiguous,’” after employing the traditional tools of statutory construction.<sup>165</sup>

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156. *Id.* at 236.

157. *Id.* (emphasis added).

158. *Id.* at 235–36 (explaining that “the intent requirement would make no sense layered on top of requiring the defendant to have the purpose,” but that it is logical “to require the defendant’s intent on top of the *third party’s* purpose”).

159. *See id.* at 236.

160. *Id.* (listing cases from the Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuit Courts of Appeals).

161. *Id.*; *see also supra* Part I.B.

162. *Safehouse II*, 985 F.3d at 236.

163. *Id.* at 238–39.

164. For a discussion of the rule of lenity, see *infra* note 253 and accompanying text.

165. *Safehouse II*, 985 F.3d at 236 (quoting *United States v. Castleman*, 572 U.S. 157, 173 (2014)).

After concluding that § 856(a)(2)'s purpose requirement refers to a third party, the Third Circuit went on to address whether, under this interpretation of the statute, Safehouse's operation of a supervised injection site would violate § 856(a)(2).

## 2. Supervised Injection Sites Violate § 856(a)(2)

This section details the *Safehouse II* majority's reasoning for concluding that, since under § 856(a)(2) it is a third party who must have the purpose that drug activity occurs, Safehouse's planned consumption room would violate the crack house statute.

After conducting its statutory interpretation, the court turned to whether visitors to Safehouse's consumption room would satisfy the purpose requirement and ultimately concluded that they would.<sup>166</sup> The Third Circuit, agreeing with the district court<sup>167</sup> and the other circuit courts,<sup>168</sup> determined that the third party must have a "significant purpose" of drug activity in order to violate the statute.<sup>169</sup> In support of this determination, the court first explained that since § 856(a)(2) states that a third party must act "for the purpose"—and not a purpose—of drug activity occurring, in deciding whether a defendant has violated the statute, the third party's purpose of drug activity taking place must be more than "merely incidental."<sup>170</sup> However, the court made clear that the third party's purpose need not be the sole purpose,<sup>171</sup> first, because a person is capable of having multiple purposes at once, and second, because Congress chose not to write "for the sole purpose" in the text of § 856(a)(2) despite having done so in other statutes.<sup>172</sup> Thus, for Safehouse to be liable under § 856(a)(2), it is not necessary that Safehouse's visitors go to Safehouse with the sole motivation of using drugs.<sup>173</sup> Because the Third Circuit found that a third party's purpose must lie somewhere between "sole" and "incidental," the court agreed with the district court and other circuits in concluding that a third party must act with a significant purpose of engaging in drug activity to violate the statute.<sup>174</sup>

Though the court acknowledged that some visitors might go to Safehouse for services other than using the consumption room, the court stated that the "main attraction" of a supervised injection site is the opportunity to use drugs

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166. *Id.* at 237–38.

167. *Safehouse I*, 408 F. Supp. 3d 583, 607–08 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

168. *See, e.g.*, *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010); *United States v. Soto-Silva*, 129 F.3d 340, 342, 347 (5th Cir. 1997).

169. *Safehouse II*, 985 F.3d at 237.

170. *Id.* (quoting *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992)).

171. *Id.*

172. *Id.* (referencing 18 U.S.C. § 48(d)(2)(B), 15 U.S.C. § 62, and 17 U.S.C. § 120(d)(1) as examples of Congress writing the phrase "for the sole purpose" in a statutory provision).

173. *See id.*

174. *See id.* The court also stated that a person can have multiple significant purposes and still be held liable under the statute if one of those significant purposes is to use drugs at the facility. *Id.* at 237–38.

at the facility.<sup>175</sup> The majority reasoned that many of Safehouse's other services and offerings revolve around visitors' drug use, including access to clean syringes, overdose-reversal agents, and counseling.<sup>176</sup> From this, the Third Circuit concluded that when a person visits a safe injection site to prevent a drug overdose, "that reason is bound up with the significant purpose of doing drugs," satisfying the statutory requirement.<sup>177</sup>

The majority rejected counterarguments that its reading was too broad and would target activity outside the intended purpose of the statute. Specifically, the majority rejected the contention that its interpretation would "punish parents for housing their drug-addicted children, or homeless shelters for housing known drug users," explaining that in such examples, the third party "use[s] these places to eat, sleep, and bathe."<sup>178</sup> This would make the third party's "drug use in homes or shelters . . . incidental to living there," in contrast with the visitors to Safehouse, whose drug use would "be a significant purpose of their visit."<sup>179</sup>

Even if § 856(a)(2)'s purpose requirement applied to the defendant and not to a third party, the court explained that supervised injection sites would nevertheless violate the statute because they have a significant purpose of visitors using drugs.<sup>180</sup> While Safehouse argued that it had several purposes, including stopping overdoses, providing medical care, and preventing disease,<sup>181</sup> the Third Circuit reiterated that a defendant can have multiple purposes at once, and a significant purpose of a safe injection site is to have its visitors use drugs.<sup>182</sup> Supervised injection sites, including Safehouse, expect visitors to bring pre-obtained drugs with them to use in the facility, and the sites offer visitors advice on how to ingest these drugs safely, supply visitors with clean syringes, and provide fentanyl strips to test the drugs.<sup>183</sup> Additionally, the court stressed that "motive is distinct from mens rea" and though Safehouse's intentions may be admirable, this does not insulate them from liability under § 856(a)(2).<sup>184</sup>

### *B. Not So Fast: Opposition to the Third Circuit's Interpretation*

Though the *Safehouse II* majority reads the crack house statute as outlawing supervised injection sites, the dissenting opinion and the district court's opinion interpret the statute differently.<sup>185</sup> This section examines the view that supervised injection sites do not fall under the statute's purview.

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175. *Id.*

176. *See id.* at 237–38.

177. *Id.* at 238.

178. *Id.*

179. *Id.*

180. *See id.*

181. *See* Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 1.

182. *See Safehouse II*, 985 F.3d at 238.

183. *Id.*

184. *Id.* (providing other examples of well-intentioned individuals who would still be guilty of crimes, such as a child stealing bread to feed his family being guilty of theft or a son assisting his terminally ill parent in ending her life being guilty of murder).

185. *See id.* at 243 (Roth, J., dissenting in part and dissenting in judgment).

### 1. The Purpose Requirement Refers to the Defendant

In contrast with the Third Circuit's interpretation that § 856(a)(2)'s purpose requirement refers to a third party's purpose of drug activity,<sup>186</sup> others contend that it refers to the defendant's purpose<sup>187</sup> or to the purpose of the place where the drug activity is occurring.<sup>188</sup> This section outlines the view that § 856(a)(2)'s purpose requirement refers to the *defendant's purpose* of facilitating drug use.

#### *a. Textual Support*

Proponents of this view argue that, on its face, § 856(a)(2) reads most naturally as requiring the defendant to have the purpose that others use the property for unlawful drug activities. As the Third Circuit admits, there is no third party named in § 856(a)(2)'s text.<sup>189</sup> Therefore, proponents argue that to predicate a defendant's criminal liability "on the 'purpose' of a third party who is neither named nor described in the statute" is exceptionally unusual.<sup>190</sup> This broad reading of the statute is even more odd, proponents explain, because it "criminalizes otherwise innocent conduct—here, lawfully making your property 'available for use'" based on this unnamed third party's "subjective thoughts."<sup>191</sup>

Additionally, proponents claim that § 856(a)(2)'s grammatical construction suggests that the defendant is the one who must possess the "purpose" of having illegal drug activity occur.<sup>192</sup> The "grammar canon" provides that words should be read in accordance with the meaning that proper grammar and usage would assign them.<sup>193</sup> In § 856(a)(2), the phrase "for the purpose of" modifies the preceding set of verbs: "rent, lease, profit from, or make available for use."<sup>194</sup> As noted in *Safehouse I*, the subject of

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186. See *supra* Part II.A.1.

187. See *Safehouse I*, 408 F. Supp. 3d 583, 592 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

188. See Brief of Appellees *Safehouse* and José Benitez, *supra* note 135, at 23. *Safehouse* argued that the relevant purpose in § 856(a)(2) is the purpose for which the "place" in question is used, which can be determined by looking at both the purpose of the owner and the "operation of and physical functions within the facility." *Id.*; see also *Safehouse I*, 408 F. Supp. 3d at 595. This does not necessarily mean the same thing as the purpose of the defendant, but as the district court explained, the difference is negligible. See discussion *infra* note 195. Thus, this Note largely treats these arguments as one.

189. See *Safehouse II*, 985 F.3d at 234.

190. See *id.* at 243 (Roth, J., dissenting in part and dissenting in judgment). In her dissent, Judge Roth notes that it is rare, if not unheard of, for a statute to have a defendant's liability turn on the mental state of a third party: "I know of no statute, other than section 856(a)(2), in which the 'purpose' of an unnamed third party would be the factor that determines the mens rea necessary for a defendant to violate the statute." *Id.* at 245.

191. *Id.* at 245 (quoting 21 U.S.C. § 856(a)(2)).

192. See, e.g., *Safehouse I*, 408 Supp. 3d at 597.

193. SCALIA & GARNER, *supra* note 145, at 140.

194. *Safehouse I*, 408 F. Supp. 3d at 597.



these verbs is the defendant who is charged with violating the statute.<sup>195</sup> Since it is the defendant who performs these verbs, and the purpose requirement is modifying those verbs that the defendant must perform, it is the defendant who must act “for the purpose of” illicit drug activity, not a third party.<sup>196</sup>

Supporters of this interpretation also compare the language of § 856(a)(1) and § 856(a)(2) to reinforce their reading. Looking at the text and structure of both subsections together, proponents note that there are numerous similarities between the two. Both § 856(a)(1) and § 856(a)(2) have the same subject: “any person.”<sup>197</sup> Both have a knowledge requirement—“knowingly” or “knowingly and intentionally”—followed by a group of verbs and a direct object—“place.”<sup>198</sup> Notably, both subsections conclude with the same “for the purpose of” clause barring illicit drug activity.<sup>199</sup> Proponents argue that the similarities between § 856(a)(1) and § 856(a)(2) should not be read to mean different things in each provision, as this would violate established rules of statutory construction, specifically the presumption of consistent usage.<sup>200</sup> The presumption of consistent usage directs those interpreting a text’s language to presume that words or phrases used in different parts of the same statute have the same meaning in each part.<sup>201</sup> It is especially relevant when two statutory provisions containing the same language are closely related to each other,<sup>202</sup> as in § 856(a)(1) and § 856(a)(2). Because courts universally agree that the “for the purpose of” language in § 856(a)(1) refers to the defendant’s purpose,<sup>203</sup> proponents argue that it therefore makes little sense for this identical language to be read differently in § 856(a)(2).<sup>204</sup>

Supporters of this view also argue that reading § 856(a)(2)’s purpose requirement to apply to the defendant does not make it impermissibly redundant of § 856(a)(1), contrary to the Third Circuit’s interpretation.<sup>205</sup> The district court, for instance, explained that § 856(a)(1) refers to a

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195. *Id.* While Safehouse asked the district court to read “for the purpose of” as modifying “the place” instead of the defendant’s actions, the court explained that “a place does not carry an inherent purpose separate from a person’s intentions for its use,” and therefore, though “purpose” should modify the defendant’s acts, the distinction in essence makes no difference because the purpose of the place and the defendant would be identical. *Id.* at 597 n.18.

196. *Id.* at 597.

197. The district court noted that the subject of both paragraphs in § 856(a) is identified in the text of § 856(b), which establishes the criminal penalties for “[a]ny person who violates subsection (a).” *Id.* at 595 (quoting 21 U.S.C. § 856(b)).

198. *Id.*

199. *Id.*

200. *See id.*; *see also Safehouse II*, 985 F.3d 225, 245 (3d Cir.) (Roth, J., dissenting in part and dissenting in judgment), *cert. denied*, 142 S. Ct. 345 (2021).

201. *See* SCALIA & GARNER, *supra* note 145, at 170 (“A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”).

202. *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 121, 147–48 (2021).

203. *See supra* text accompanying notes 126–36.

204. *See Safehouse I*, 408 F. Supp. 3d at 595–96.

205. *See Safehouse II*, 985 F.3d at 235.

defendant using his property for his *own* drug activity, while § 856(a)(2) refers to a defendant who makes his property available for the purpose of others engaging in such illegal drug activity.<sup>206</sup> The difference, according to the court, is that under § 856(a)(2), the defendant need not be personally involved in the drug activity but must still have an illicit intention for others to partake in that activity on the defendant's property.<sup>207</sup>

The *Safehouse II* dissent found the provisions to be distinct from each other because each has different actus reus requirements,<sup>208</sup> with § 856(a)(1) having only one actus reus element—"open, lease, rent, use, or maintain any place"<sup>209</sup>—while § 856(a)(2) has two<sup>210</sup>—"manage or control any place" and "rent, lease, profit from, or make available for use."<sup>211</sup> According to the dissent, under this interpretation, "a rave operator who encourages drug dealers to attend events in order to increase attendance" could be liable under § 856(a)(2), but not under § 856(a)(1).<sup>212</sup>

Thus, under these readings, § 856(a)(1) is aimed at individuals who are "the non-owner operator of the property," while § 856(a)(2) targets those who are "typically the owner landlord or manager" of the property.<sup>213</sup> Following this approach, § 856(a)(1) should be read to apply to defendants who "rent, lease, or use" a place for the defendant's own purpose of engaging in drug activity, while § 856(a)(2) should be read to apply to the defendant who provides a place for use with the purpose that others engage in drug activity at that place, such as a crack house operator.

#### *b. Questioning Other Circuits*

Those who disagree with the majority's interpretation in *Safehouse II* assert that the court relied on improper precedent to support its reading of the statute. For instance, proponents argue that the cases the Third Circuit invoked involve egregious and rampant drug activity taking place on the defendants' properties and focus on defendants who encourage drug distribution or drug activity.<sup>214</sup> On the contrary, supervised injection sites

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206. *Safehouse I*, 408 F. Supp. 3d at 600.

207. *Id.*

208. *Safehouse II*, 985 F.3d at 247 (Roth, J., dissenting in part and dissenting in judgment). Though there is no single definition, the actus reus of a crime is the voluntary act or omission composing "the physical or external" part of a crime that accompanies the mental element, the mens rea. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 83 (8th ed. 2018).

209. 21 U.S.C. § 856(a)(1).

210. *Safehouse II*, 985 F.3d at 247 (Roth, J., dissenting in part and dissenting in judgment).

211. 21 U.S.C. § 856(a)(2).

212. *Safehouse II*, 985 F.3d at 247.

213. Appellees Safehouse & José Benitez's Petition for Rehearing En Banc at 7–8, *Safehouse II*, 985 F.3d 225 (3d Cir. 2021) (No. 20-1422).

214. Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 24–25, 36 (explaining that the particular scenarios in the cases cited by the government on appeal, specifically the "drug motel" in *Chen*, the "cocaine-and-car dealership" in *Tamez*, and the "drug-fueled music festival" in *Tebeau*, all involve "properties rife with drug dealing activity from which the defendant reaped substantial financial benefits" and thus are distinguishable from Safehouse's activities).

are “medical and public health facilit[ies]” that bear no resemblance to the defendants in those cases.<sup>215</sup> They therefore claim that the cases relied on by the Third Circuit are not sufficiently analogous to be relevant in analyzing the conduct of supervised injection sites under § 856(a)(2).

Additionally, the court in *Safehouse I* and the dissent in *Safehouse II* state that the other circuits, in interpreting the statute, improperly rely on *United States v. Chen* as the basis for reading § 856(a)(2)’s purpose requirement as referring to a third party’s purpose.<sup>216</sup> First, they note that the *Chen* court did not explain its jump from the conclusion that the only actor who partakes in drug activity under § 856(a)(2) is a third party to the subsequent conclusion that the *defendant* therefore need not have an illicit *purpose* of such drug activity occurring.<sup>217</sup> The *Chen* court explained that the combination of the words “knowingly” and “for the purpose of” indicate that, under § 856(a)(1), it is the defendant’s purpose that is relevant.<sup>218</sup> The court cited sixteen other federal statutes in which the combination of “knowingly” and “for the purpose of” clearly refers to the purpose of the defendant as support for its reading of § 856(a)(1).<sup>219</sup> However, the district court stated that the Fifth Circuit gives no justification for why this same reasoning does not extend to conclude that the purpose requirement in § 856(a)(2) also refers to the defendant,<sup>220</sup> since the same combination of “knowingly” and “for the purpose of” is also present in § 856(a)(2).<sup>221</sup> Though the additional word “intentionally” immediately follows “knowingly” in § 856(a)(2)—unlike in § 856(a)(1)—the court explains that the inclusion of this additional mental state in § 856(a)(2) is no reason to read the combination differently than in § 856(a)(1) and is especially no justification for reading § 856(a)(2) in such a way that lowers the mental state required for conviction.<sup>222</sup>

Further, the *Chen* court applied the 1986 version of the statute, when the only overlap between § 856(a)(1) and § 856(a)(2) was the phrase “for the purpose of,”<sup>223</sup> which, according to the *Safehouse II* dissent, the *Chen* court

215. *See id.* at 24–25.

216. *See Safehouse I*, 408 F. Supp. 3d 583, 598–601 (E.D. Pa. 2019), *rev’d*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021); *see also Safehouse II*, 985 F.3d at 246 (Roth, J., dissenting in part and dissenting in judgment) (citing cases from the Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals).

217. *See Safehouse I*, 408 F. Supp. 3d at 598–99; *see also Safehouse II*, 985 F.3d at 246 (Roth, J., dissenting in part and dissenting in judgment).

218. *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990).

219. *Id.* at 190 n.9.

220. *See Safehouse I*, 408 F. Supp. 3d at 598–99.

221. 21 U.S.C. § 856(a)(2) (reading in part: “*knowingly* and intentionally rent, lease, profit from, or make available for use . . . the place *for the purpose of*” illicit drug activity (emphasis added)).

222. *See Safehouse I*, 408 F. Supp. 3d at 598.

223. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1841(a), 100 Stat. 3207, 3207-52 (codified as amended at 21 U.S.C. § 856(a)). The 1986 version made it unlawful to

- (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;
- (2) manage or control any building, room, or enclosure, either as an owner, lessee, agent employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure

improperly read to have a different meaning in each subsection.<sup>224</sup> Moreover, because the decision in *Chen* was rendered more than ten years before the statute's current version was enacted, the Fifth Circuit could not look at the elucidating statements, made by Congress during the amendment process in 2003, as to what the text of § 856(a) actually means.<sup>225</sup> While the Fifth Circuit could only apply the then current text, the district court found a bigger issue with the willingness of other courts to follow *Chen* despite clear statements from Congress that show its analysis is counter to the statute's purpose.<sup>226</sup>

*c. Legislative History and Intent*

Proponents of interpreting the statute to exclude supervised injection sites also claim that the statute's legislative history and intent bolster their interpretation and disprove the Third Circuit's reading. First, they contend that Congress did not contemplate supervised injection sites when enacting or amending the statute. The district court in the Eastern District of Pennsylvania conducted a search of Congress's records to determine whether Congress wrote the statute with supervised injection sites in mind, finding just one reference to supervised injection sites that was specifically in the context of stopping the spread of HIV.<sup>227</sup> The court also searched medical literature for "safe injection sites" prior to the statute's most recent amendment to determine whether the facilities were within public consciousness at the time of legislating.<sup>228</sup> Though there were references to such facilities prior to 2003, none were related to reducing opioid addiction, which indicates, according to the court, that the activities of a supervised injection site like Safehouse cannot fall within the statute's reach.<sup>229</sup>

Additionally, proponents of this view cite the statute's legislative history as support for the interpretation that § 856(a)(2)'s purpose requirement refers to the defendant's purpose of facilitating drug activity and not a third party's purpose of engaging in drug activity. For instance, proponents cite statements that then Senator Joe Biden<sup>230</sup> made while introducing the amendments to § 856(a) in 2003, saying, "Let me be clear. Neither current law nor my bill seeks to punish a promoter for the behavior of their

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for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

*Id.*

224. See *Safehouse II*, 985 F.3d 225, 247 (3d Cir.) (Roth, J., dissenting in part and dissenting in judgment), *cert. denied*, 142 S. Ct. 345 (2021).

225. *Safehouse I*, 408 F. Supp. 3d at 601–04.

226. See *id.* at 601–03.

227. See *id.* at 615.

228. The district court searched PubMed, a medical literature database maintained by the National Library of Medicine and the National Institutes of Health in collaboration with the National Center for Biotechnology Information. *Id.*

229. *Id.* at 615–16.

230. Then Senator Biden was a sponsor of the Illicit Drug Anti-Proliferation Act of 2003 which originally contained the 2003 amendment. See Kreit, *supra* note 57, at 430–31.

patrons.”<sup>231</sup> According to Judge Jane Richards Roth’s dissent in *Safehouse II*, this statement, along with then Senator Biden’s remark that the “bill would help in the prosecution of 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,”<sup>232</sup> shows that the statute is focused on the mental state of the defendant, not a third party.<sup>233</sup> Further, Judge Gerald A. McHugh in *Safehouse I* pointed to another statement that then Senator Biden made before the vote on the conference report, in which Biden said that the “bill is aimed at the defendant’s *predatory behavior*, regardless of the type of drug or the particular place in which it is being used or distributed,”<sup>234</sup> indicating to Judge McHugh that Congress, in expanding the statute in 2003, was concerned with the defendant’s intention, not a third party’s intention.<sup>235</sup>

Safehouse and its supporters also argue that the legislative history provides evidence that the statute targets actors who facilitate or encourage drug use, not supervised injection sites that seek to reduce drug use and overdoses. While introducing the proposed amendment, Senator Chuck Grassley, a cosponsor, commented that the changes to the statute were an effort to “update our laws so they can continue to be used effectively against drug dealers who are pushing drugs on our kids.”<sup>236</sup> He also emphasized that the legislation targets events used as a “cover” for drug use and transactions, even citing drug reduction efforts as an example of conduct that would be inconsistent with criminal intent under the statute.<sup>237</sup> Proponents who argue that supervised injection sites do not fall under the crack house statute’s reach thus cite this legislative history as evidence that the Third Circuit misread the statute and expanded criminal liability beyond promoters of drug activity to reach medical and health intervention services, such as supervised injection sites, contrary to what they say the legislative history suggests.<sup>238</sup>

#### d. Consequences

Those who read § 856(a)(2)’s purpose requirement as applying to the defendant’s purpose support this interpretation by citing several “absurd” consequences they say would result from a contrary interpretation. Judge Roth, in her *Safehouse II* dissent, illustrated this interpretation by providing a series of hypothetical situations.<sup>239</sup> For instance, she explained that under

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231. 149 CONG. REC. 1847 (2003).

232. *Id.*

233. See *Safehouse II*, 985 F.3d 225, 245 (3d Cir.) (Roth, J., dissenting in part and dissenting in judgment), *cert. denied*, 142 S. Ct. 345 (2021).

234. 149 CONG. REC. 9383 (2003) (emphasis added).

235. See *Safehouse I*, 408 F. Supp. 3d 583, 612 (E.D. Pa. 2019), *rev’d*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

236. 149 CONG. REC. 1848 (2003).

237. *Id.* at 1848–49.

238. Petition for a Writ of Certiorari at 21–22, *Safehouse v. U.S. Dep’t of Just.*, 142 S. Ct. 345 (2021) (No. 21-276).

239. *Safehouse II*, 985 F.3d 225, 244, 247–49 (3d Cir.) (Roth, J., dissenting in part and dissenting in judgment), *cert. denied*, 142 S. Ct. 345 (2021).

the majority's interpretation, a parent who lets their "drug-addicted adult son" live with them in order to monitor his drug use and prevent him from overdosing could be held liable under § 856(a)(2).<sup>240</sup> This is because the son (the third party) would be using the place in question (the home) for a significant purpose of engaging in unlawful drug activity.<sup>241</sup> The majority claimed that the hypothetical parent would not fall under § 856(a)(2)'s purview because the son's drug use is merely incidental to his other purpose of using the place for shelter.<sup>242</sup> Judge Roth countered that the majority's "incidental purpose" differentiation does not protect its reading of the statute from inherently absurd results.<sup>243</sup> In claiming that the son's drug use would be incidental to his purpose of shelter, the majority, according to Judge Roth, assumes the child's motivation, when the son's primary purpose could be to consume drugs in a place where there is a lower risk of overdosing.<sup>244</sup> The parents in question could therefore still be convicted under § 856(a)(2), a "result [that] is far afield from the crack houses and raves targeted by the statute."<sup>245</sup>

Judge Roth also stated that the Third Circuit's interpretation of the statute effectively outlaws a safe injection site's services indoors, but would oddly allow the same services to be provided outside with no consequences.<sup>246</sup> She explained that because the government asserts that the word "place" in the statute refers to real property,<sup>247</sup> offering individuals medical advice, clean syringes, and overdose-reversal agents would be legal in nearly every other context under the statute, such as outdoors or even in a "mobile van."<sup>248</sup> This is because, under the majority's interpretation, the defendant would not be providing a relevant "place,"<sup>249</sup> meaning the statute would be inapplicable.<sup>250</sup> Judge Roth added that police and emergency medical services (EMS) already provide the care that Safehouse seeks to offer, the only difference being that "[i]nstead of patrolling the streets for users who have overdosed, Safehouse wants to save lives *indoors*."<sup>251</sup> According to

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240. *Id.* at 247.

241. *See id.* at 248.

242. *Id.* at 238 (majority opinion).

243. *Id.* at 247 (Roth, J., dissenting in part and dissenting in judgment).

244. *Id.* at 248 ("If the son could not do drugs there, would he still move in? Alternatively, the son might already have a home (or be indifferent to being homeless) but begrudgingly accepted his parents' invitation to move in with them because he shared their concern about overdosing.").

245. *Id.*

246. *See id.* at 249; *see also* Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 40.

247. *See Safehouse II*, 985 F.3d at 249 (Roth, J., dissenting in part and dissenting in judgment) (citing Transcript of Oral Argument at 36–39, *Safehouse II*, 985 F.3d 225 (2021) (No. 20–1422)).

248. *See* Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 40.

249. *See* 21 U.S.C. § 856(a)(2) (making it unlawful for a person to "manage or control any place . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of unlawfully . . . using a controlled substance") (emphasis added).

250. *See* Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 40 (noting that the government does not dispute the legality of these actions outdoors).

251. *Safehouse II*, 985 F.3d at 244 (Roth, J., dissenting in part and dissenting in judgment).

proponents of this view, this distinction provides support for interpreting the provision's purpose requirement to refer to the defendant's purpose and not a third party's.<sup>252</sup>

These examples are also used to support the position that the rule of lenity<sup>253</sup> is appropriate to consider in interpreting the statute. Because reading the statute's purpose requirement to apply to a third party's purpose and not the defendant's could subject parents of children addicted to drugs or operators of homeless shelters to criminal liability<sup>254</sup>—punishable by up to twenty years in prison, for instance<sup>255</sup>—Safehouse cites the rule of lenity as additional support for interpreting the statute to apply to the defendant<sup>256</sup> and for ultimately concluding that, under this interpretation, supervised injection sites do not violate the statute.

## 2. Supervised Injection Sites Do Not Violate the Statute

After establishing that the statute's purpose requirement refers to the defendant, those who read the statute narrowly next determine that supervised injection sites do not possess the purpose required by the statute. In doing so, they first define what making a place available “for the purpose of unlawfully . . . using a controlled substance” means in order to determine whether supervised injection sites violate § 856(a)(2).<sup>257</sup>

Those who read the statute narrowly generally agree with the *Safehouse II* majority that a person may have more than one purpose and still violate the statute.<sup>258</sup> In *Safehouse I*, Judge McHugh noted that requiring a defendant's purpose of unlawful drug use to be his *sole* purpose would mean the statute “would fail to reach rave promoters who encourage dancing *and* drugs and

252. See Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 40 (“It cannot be that Safehouse itself, as well as its leadership and personnel, would commit a 20-year felony unless it insists that a person leave the safety of its shelter . . . at the very moment when access to lifesaving medical supervision and care is most critical . . .”).

253. The rule of lenity is a tool of statutory interpretation that “requires a court to resolve statutory ambiguity in favor of a criminal defendant, or to strictly construe the statute against the state.” David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018); see also SCALIA & GARNER, *supra* note 145, at 296 (“Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.”).

254. See *Safehouse II*, 985 F.3d at 248–49 (Roth, J., dissenting in part and dissenting in judgment) (adding that under the majority's interpretation of the statute, operators of homeless shelters who know that clients would use drugs on their property can be held criminally liable under the statute).

255. 21 U.S.C. § 856(b).

256. See Brief of Appellees Safehouse and José Benitez, *supra* note 135, at 47. The district court did “not rely on the rule of lenity as the basis for [its] decision” that the statute should be read narrowly but did state that principles such as the separation of powers—which underlies the rule of lenity—do “carry substantial weight.” *Safehouse I*, 408 F. Supp. 3d 583, 617–18 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

257. 21 U.S.C. § 856(a)(2).

258. See *Safehouse I*, 408 F. Supp. 3d at 607; *Safehouse II*, 985 F.3d at 251 (Roth, J., dissenting in part and dissenting in judgment); see also *Safehouse II*, 985 F.3d at 237 (majority opinion).

crack house operators who live in the house *and* use it as a crack house.”<sup>259</sup> He clarified that while the defendant’s purpose of unlawful drug use need not be his only purpose, it must nevertheless be a “significant” or “primary” purpose, citing as evidence the fact that the government acknowledged that an incidental purpose would be insufficient and the fact that the view is consistent with other courts’ interpretations.<sup>260</sup>

Turning to whether the statute’s purpose requirement prohibits the actions of supervised injection sites, proponents of a narrow reading state that the defendant must have a significant purpose of facilitating drug activity to violate § 856(a)(2).<sup>261</sup> In support of this interpretation, Judge McHugh first explained that definitionally, “a purpose is something one seeks to advance, ‘something set up as an object or end to be attained.’”<sup>262</sup> He then wrote that the legislative history “indicates that the statute targets exploitive behavior like that of crack house operators, rave promoters, and others creating spaces to facilitate drug use and access to drugs,” who all have a common goal of “enabling drug use and supporting the market for unlawful drugs.”<sup>263</sup>

Those who agree with this reading contend that supervised injection sites do not violate the statute, as their purpose is to *combat* drug abuse, prevent overdoses, and provide medical services to visitors, not to promote unlawful drug use.<sup>264</sup> Both Judge McHugh in *Safehouse I* and Judge Roth in her *Safehouse II* dissent detailed Safehouse’s proposed efforts to not only stop drug overdoses—such as by administering overdose-reversal agents and offering fentanyl test strips to visitors—but also to encourage visitors to enter rehabilitation programs by offering referrals to social services and treatment facilities.<sup>265</sup> Further, Judge Roth pointed out that visitors at supervised injection sites like Safehouse do not need to use drugs to enter and use other services.<sup>266</sup> By offering medical intervention services to all visitors and encouraging those who do use drugs to seek treatment, proponents conclude that, contrary to the Third Circuit’s holding in *Safehouse II*, supervised

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259. *Safehouse I*, 408 F. Supp. 3d at 607.

260. *Id.* at 607–08.

261. *Id.* at 614 (stating that to possess the required purpose under the statute, a defendant must have a “significant purpose[] to facilitate, rather than reduce, unlawful drug use”); *Safehouse II*, 985 F.3d at 251 (Roth, J., dissenting in part and dissenting in judgment) (explaining that a defendant must be “motivated at least in part by a desire for unlawful drug activity to occur” in order to have “acted with the requisite purpose under” the statute).

262. *Safehouse I*, 408 F. Supp. 3d at 609 (citing dictionary definitions of the word “purpose”).

263. *Id.* at 613–14. For a discussion of the legislative history cited in support of this view, see *supra* Part II.B.1.c.

264. See *Safehouse I*, 408 F. Supp. 3d at 613–14; *Safehouse II*, 985 F.3d at 252 (Roth, J., dissenting in part and dissenting in judgment). In her dissent, Judge Roth also explains that even if Safehouse’s purpose is to encourage drug use, it still does not violate the statute because, under federal law, “using a controlled substance” is not unlawful, possession is. *Safehouse II*, 985 F.3d at 253.

265. *Safehouse I*, 408 F. Supp. 3d at 614; *Safehouse II*, 985 F.3d at 251–52 (Roth, J., dissenting in part and dissenting in judgment).

266. *Safehouse II*, 985 F.3d at 244 (Roth, J., dissenting in part and dissenting in judgment).



injection sites do not have the significant purpose of facilitating drug use that is required to violate the statute.

### III. THE CASE FOR SUPERVISED INJECTION SITES UNDER THE CRACK HOUSE STATUTE

While the *Safehouse II* opinion is limited to the Third Circuit, the decision and its reasoning could have far-reaching implications for the future of supervised injection sites in the United States. In July 2021, mere months after the Third Circuit rendered its decision, Rhode Island became the first state to authorize the creation of supervised injection facilities—called harm prevention centers—contingent on the support of local communities.<sup>267</sup> In November 2021, New York City opened two supervised injection sites in Manhattan, becoming the first city in the United States to have sites in operation.<sup>268</sup> Other localities are still considering and pushing for similar bills, though they have yet to begin running any supervised injection sites.<sup>269</sup>

Though the Third Circuit's interpretation of the statute confirmed what some scholars speculated could occur should a court hear a challenge to a supervised injection site,<sup>270</sup> contrary interpretations from Judge McHugh in *Safehouse I* and Judge Roth in the *Safehouse II* dissent draw attention to the statute's problems and cast doubt on whether the Third Circuit's interpretation of the statute is sound. Ultimately, the power to resolve whether the crack house statute applies to supervised injection sites lies in the legislative hands of Congress.<sup>271</sup> In the meantime, however, courts cannot shirk their responsibility to interpret the statute as cases come before them. Opening supervised injection sites and other harm reduction policies are becoming increasingly popular proposals to reduce the devastating consequences of the current overdose crisis in the United States,<sup>272</sup> making future cases against supervised injection sites a likely reality.<sup>273</sup> Moreover,

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267. 23 R.I. GEN. LAWS § 23-12.10-1 (2022).

268. See Jeffery 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/YWW9-SX7P>].

269. See sources cited *supra* note 20.

270. See Beletsky et al., *supra* note 19, at 234.

271. U.S. CONST. art. 1, §§ 1, 8.

272. See Brian Mann, *Overdose Deaths Are So High That the Biden Team Is Embracing Ideas Once Seen as Taboo*, NPR (Oct. 27, 2021, 5:56 PM), <https://www.npr.org/2021/10/27/1049245787/biden-hhs-tackle-drug-overdose-deaths> [<https://perma.cc/8ZNE-KSC6>].

273. See, e.g., Press Release, U.S. Att'y's Off., Statement from U.S. Attorney Lelling Regarding Drug Injection Sites (Oct. 3, 2019), <https://www.justice.gov/usao-ma/pr/statement-us-attorney-elling-regarding-drug-injection-sites> [<https://perma.cc/77RZ-8AE8>] (stating that “efforts to open injection facilities, including here in Massachusetts, will be met with federal enforcement”). Although the Biden administration seems unlikely to use the crack house statute to target other supervised injection sites, there is no guarantee that future administrations will not follow the approach of the Trump administration's Department of Justice, which chose to prosecute *Safehouse*. See Mann, *supra* note 272.

the lives of thousands, if not millions, of Americans may depend on the very real consequences of the interpretation.<sup>274</sup>

When evaluating the legality of a supervised injection site under 21 U.S.C. § 856(a)(2), courts should interpret the text's purpose requirement as referring to the purpose of the defendant. This part argues that the statute does not prohibit supervised injection sites. Part III.A explains that § 856(a)(2) is ambiguous as to what the phrase “for the purpose of unlawfully . . . using a controlled substance”<sup>275</sup> means, requiring an examination beyond the text to determine the proper interpretation. Part III.B then looks to other tools of statutory interpretation, specifically the legislative history and the rule of lenity, to reach the conclusion that the crack house statute does not prohibit supervised injection sites. Part III.C concludes by arguing that separation of powers principles and the current state of the nation's drug overdose crisis supports a narrow interpretation of the crack house statute.

#### A. The Plain Text Is Ambiguous at Best

Third Circuit Judge Theodore A. McKee may have said it best: “Four judges have now examined the language of 21 U.S.C. § 856(a)(2). Two interpret it one way and two interpret it another.”<sup>276</sup> While disagreement regarding a statute's interpretation does not necessarily render its text ambiguous, the fact that a district court in the Eastern District of Pennsylvania and the Third Circuit stated that the text is clear but reached opposite conclusions as to whom § 856(a)(2)'s purpose requirement applies strongly suggests that the purpose requirement is far from clear. This section delves into the conflicting canons and tools of statutory interpretation used throughout *Safehouse I* and *II*,<sup>277</sup> arguing that the text alone cannot produce a clear reading of the statute's meaning and does not, in and of itself, support the Third Circuit's interpretation of the statute.

##### 1. What Do the Words Mean?

First, the language of 21 U.S.C. § 856(a)(2) does not elucidate whether the defendant or a third party must have the stated purpose, as both conclusions are plausible from looking at the text on its face. For instance, as *Safehouse* contended in *Safehouse I*, “for the purpose of” immediately follows the word “place,” signaling that the phrase must be modifying the word “place.”<sup>278</sup> Since a place cannot have a purpose that is separate from that of its owner,

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274. See Kristin M. Holland et al., *Trends in US Emergency Department Visits for Mental Health, Overdose, and Violence Outcomes Before and During the COVID-19 Pandemic*, 78 JAMA PSYCHIATRY 372, 376–77 (2021) (finding that emergency room visits for drug overdoses increased during the COVID-19 pandemic).

275. 21 U.S.C. § 856(a)(2).

276. *United States v. Safehouse*, 991 F.3d 503, 506 (3d Cir. 2021) (McKee, J., dissenting from denial of rehearing en banc).

277. This includes the arguments made at the district court level.

278. See *Safehouse I*, 408 F. Supp. 3d 583, 597 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

the phrase “for the purpose of” refers to that owner.<sup>279</sup> It could also be said that because a place cannot have a purpose, the phrase “for the purpose of” instead modifies the preceding list of verbs,<sup>280</sup> which are all performed by the defendant.<sup>281</sup> These two readings of the statute’s plain text reasonably support the conclusion that the purpose requirement belongs to the defendant, not to an unnamed third party.<sup>282</sup>

On the other hand, § 856(a)(2)’s language could also suggest that it is the third party who must have the requisite purpose. The text could indicate that “for the purpose of” refers to the word “use,” the nearest reasonable referent as the Third Circuit suggests.<sup>283</sup> Since it is a third party who “uses” the place for drug activity, the statute’s grammatical construction could lead to the interpretation that only the third party must have the stated purpose to unlawfully use drugs at the place and that the defendant need not facilitate or encourage the drug use to be liable under the statute.<sup>284</sup> These conflicting interpretations illustrate how the statute, especially its purpose requirement, is unclear on its face.

## 2. Dueling Canons

Delving further into canons of statutory interpretation does not help clarify the statute’s meaning. Both sides employ different canons as support for opposite conclusions regarding to whom the purpose requirement in § 856(a)(2) applies. This is because, for nearly every canon, there is a counter-canon that points to a different interpretation.<sup>285</sup> For example, the *Safehouse II* majority relied on the surplusage canon to support the conclusion that § 856(a)(2)’s text unambiguously requires a third party to have a “purpose of unlawfully . . . using a controlled substance.”<sup>286</sup> The majority stated that any other interpretation would result in broad overlap between § 856(a)(1) and § 856(a)(2) and would thus render § 856(a)(2) useless since anyone who would fall under § 856(a)(2) would also fall under

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279. *See id.*

280. For reference, the provision states that “it shall be unlawful to . . . knowingly and intentionally rent, lease, profit from, or make available for use . . . the place for the purpose of unlawfully . . . using a controlled substance.” 21 U.S.C. § 856(a)(2).

281. *See Safehouse I*, 408 F. Supp. 3d at 597.

282. *Id.* at 597–98. The purpose of “the place” and the person who controls the place is the same according to the court, and therefore “for the purpose of” modifies the verbs. *Id.* at 597 n.18.

283. *See Safehouse II*, 985 F.3d 225, 236 (3d Cir.) (discussing the nearest-reasonable-referent canon detailed by Justice Scalia and Professor Garner), *cert. denied*, 142 S. Ct. 345 (2021); *see also* SCALIA & GARNER, *supra* note 145, at 152 (explaining the nearest-reasonable-referent canon).

284. *Safehouse II*, 985 F.3d at 236.

285. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules of Canons About How Statutes Are to Be Constructed*, 3 VAND. L. REV. 395, 401 (1950) (explaining that “there are two opposing canons on almost every point”).

286. *See Safehouse II*, 985 F.3d at 233, 235 (stating that reading § 856(a)(2)’s purpose requirement to apply to the defendant as opposed to a third party would mean “(a)(2) would do no independent work” from § 856(a)(1) and create a “fatal” redundancy).

its sister provision.<sup>287</sup> However, others contend that reading § 856(a)(2)'s purpose requirement to apply to the defendant produces some, but not fatal, overlap between the provisions.<sup>288</sup>

Meanwhile, the *Safehouse II* dissent and the *Safehouse I* opinion used the presumption of consistent usage to support the conclusion that § 856(a)(2) requires the defendant to have the purpose that others engage in unlawful drug activity at the place the defendant provides.<sup>289</sup> When reading the two subsections, the *Safehouse II* dissent and the *Safehouse I* opinion claim that one should presume that the identical language used in § 856(a)(1) should carry the same meaning in § 856(a)(2).<sup>290</sup> The *Safehouse II* majority, however, contends that the purpose requirement merely applies to a different person, not that it has a different meaning under its interpretation.<sup>291</sup>

While canons do not necessarily hold equal weight in every case,<sup>292</sup> their use on each side of this debate cannot be said to definitively support the conclusion that the purpose requirement in § 856(a)(2) must apply to a third party. It is difficult to dismiss either interpretation, as the provisions have similarities suggesting that they should be read consistently with one another. Doing so, however, arguably narrows the scope of who could plausibly be charged and convicted solely under § 856(a)(2). While there may be good-faith disagreement as to which interpretation is correct, it cannot be said that the text unambiguously supports one conclusion over the other. For this reason, a court interpreting the applicability of § 856(a)(2) to a supervised injection site should look beyond the statute's text, where it then becomes clear that the proper interpretation of the statute excludes applying the statute to supervised injection sites.

### *B. Shedding Light: Using Extratextual Tools Reveals the True Meaning of the Statute*

This section sets forth the extratextual tools that courts should look to in interpreting § 856(a)(2) when confronted with the question of whether the statute prohibits supervised injection sites. Part III.B.1 explains how the statute's legislative history provides support for the interpretation articulated by the *Safehouse I* opinion and the *Safehouse II* dissent. Part III.B.2 discusses the rule of lenity as an additional tool that lends support for such an interpretation.

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287. See *supra* text accompanying notes 149–59.

288. See *supra* text accompanying notes 205–13.

289. See *Safehouse II*, 985 F.3d at 245 (Roth, J., dissenting in part and dissenting in judgment) (“The Majority offers no reason to disregard this presumption.”); see also *Safehouse I*, 408 F. Supp. 3d 583, 597–98 (E.D. Pa. 2019), *rev'd*, 985 F.3d 225 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 345 (2021).

290. See *supra* text accompanying notes 197–204.

291. *Safehouse II*, 985 F.3d at 236 (“We presume that ‘purpose’ means the same thing in both. But we do not presume that the ‘purpose’ belongs to the same actor in each paragraph.”).

292. See SCALIA & GARNER, *supra* note 145, at 59 (“No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”).

### 1. Legislative History

Since the text of 21 U.S.C. § 856(a)(2) can reasonably be interpreted in multiple ways, courts evaluating the legality of a supervised injection site under § 856(a)(2) should look to the legislative context to determine its meaning. It is when one looks to this legislative context that it becomes clear that the Third Circuit's interpretation is contrary to the meaning of the statute, which does not prohibit the kinds of services that supervised injection sites offer.

First, the crack house statute's legislative history clarifies that the proper reading of § 856(a)(2) requires the defendant to have the proscribed purpose of facilitating drug use, not a third party. Then Senator Biden's repeated statements in 2003 during the bill's introduction and debates on the conference report emphasize that the statute is "aimed at the *defendant's* predatory behavior"<sup>293</sup> and that the statute requires a defendant to have both the knowledge and the intention that the event or place facilitate drug use or distribution, not mere awareness that his place is being used for drug use.<sup>294</sup> When Senator Patrick Leahy expressed concerns over the amendments going too far and criminalizing legitimate businesses,<sup>295</sup> then Senator Biden later assured that the changes give "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.*"<sup>296</sup> Nearly every statement in the *Congressional Record* supports the interpretation that the relevant purpose in § 856(a)(2) is the defendant's, not a third party's.<sup>297</sup> Yet the Third Circuit, in finding the statute unambiguous, refused to look at this evidence that directly contradicts its interpretation.

Second, the legislative context shows that the crack house statute never contemplated, and therefore does not extend to, medical intervention facilities like supervised injection sites. The 1986 enactment of the statute was specifically concerned with crack houses,<sup>298</sup> with the section-by-section description of the statute stating it "[o]utlaws operation of houses or buildings, so-called 'crack houses,' where 'crack' cocaine and other drugs are manufactured and used."<sup>299</sup> The 2003 amendments were concerned with rogue rave promoters and with curbing the use of club drugs like ecstasy.<sup>300</sup> While there is at least one statement made by Senator Grassley referencing "illegal drug use in any location" that could lend support to a contrary

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293. 149 CONG. REC. 1846, 9383 (2003) (emphasis added).

294. *Id.* at 1847 (explaining that the amended statute "help[s] in the prosecution of 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").

295. *Id.* at 9378 (expressing concern that the expansion of the statute would hold business owners "personally accountable for the illegal acts of others").

296. *Id.* at 9383 (emphasis added).

297. *See supra* text accompanying notes 230–38.

298. *See* Jacob A. Epstein, Note, *Molly and the Crack House Statute: Vulnerabilities of a Recuperating Music Industry*, 23 U. MIA. BUS. L. REV. 95, 103 (2014).

299. 132 CONG. REC. 26,474 (1986).

300. *See* Kreit, *supra* note 57, at 430.

interpretation of the statute,<sup>301</sup> the remainder of Senator Grassley's comments support a much narrower interpretation than the Third Circuit's reading provides for.<sup>302</sup>

The statute also makes no mention of supervised injection sites or drug overdose prevention efforts, and as Judge McHugh discussed in *Safehouse I*, supervised injection sites were not in the public discourse in the United States at the time of the statute's enactment or amendments.<sup>303</sup> Though statutes may often reach activities and situations different from their original contemplations, criminalizing activity that is fundamentally aligned with the goal of the statute steps beyond the intent of the text. By refusing to look at Congress's intent, the Third Circuit expands the reach of a statute intended to stop individuals who facilitate drug use and distribution, like rogue rave promoters and crack house operators, to encompass medical intervention sites proven to reduce crime, lower drug use, and save lives.<sup>304</sup>

## 2. Rule of Lenity

Courts interpreting § 856(a)(2) should also use the rule of lenity in assisting their interpretive analysis. As previously discussed, the Third Circuit dismissed applying the rule of lenity when interpreting the application of § 856(a)(2)'s purpose requirement to supervised injection sites because it found no ambiguity that would necessitate using the rule.<sup>305</sup> But, as discussed above, looking solely at the text of the statute does not provide clarity.<sup>306</sup> To the contrary, the statute's text is unclear, evidenced by its grammatical structure and conflicting canons of statutory interpretation, which provide support for multiple interpretations. Further, when looking at legislative intent and history, there is ample support for the interpretation that the purpose requirement refers to the defendant's purpose of facilitating or encouraging drug activity to occur at the defendant's property.<sup>307</sup> To the extent that a person reading the statute could still find its meaning ambiguous after considering its legislative history, the rule of lenity provides additional support for rejecting the Third Circuit's interpretation.

There are various standards as to what level of ambiguity must exist to properly consider lenity in interpreting a statute.<sup>308</sup> However, there hardly seems to be a more appropriate time to consider lenity than when a vague criminal statute carrying hefty penalties<sup>309</sup> is applied to facilities that were

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301. 149 CONG. REC. 1848 (2003) ("Illegal drug use in any location should not be tolerated, regardless of what cover activity is created to hide the transaction.").

302. See *supra* text accompanying notes 236–37.

303. See *supra* text accompanying notes 227–29.

304. See *supra* Part I.A.

305. See *Safehouse II*, 985 F.3d 225, 236 (3d Cir.), *cert. denied*, 142 S. Ct. 345 (2021).

306. See *supra* Part III.A.

307. See *supra* Part III.B.1.

308. See Romantz, *supra* note 253, at 566–67 (explaining that the Supreme Court has "offered no less than nine different tests to determine whether statutory ambiguity is bad enough to trigger lenity").

309. See *supra* text accompanying notes 69–71.

not contemplated at the time of the statute's enactment<sup>310</sup> and that seek to directly prevent the types of activities the statute explicitly criminalizes. The possibility that, under a broad reading of the statute, a sister could be held criminally liable and face up to twenty years in prison for supervising her brother's drug use in her own home for the purpose of preventing him from overdosing exemplifies why lenity is appropriate when interpreting the statute. If it is unclear whether the statute applies to supervised injection sites, it is within the nation's best interest to err on the side of leniency and wait for Congress to explicitly make clear what the statute means.

### C. Other Principles Support a Narrow Reading

Overall, the extratextual tools, as well as the text of the statute, indicate that the statute does not apply to supervised injection sites. An interpretation of the statute that considers extratextual evidence allows for the consideration of critical context that provides an understanding of the statute that the statute's pure text does not.

Ignoring extratextual evidence when interpreting the statute also threatens the fundamental separation of powers by handing over lawmaking powers to the courts. Separation of powers principles hold that Congress has the power to make laws while courts have the power to interpret those laws.<sup>311</sup> Congress never contemplated outlawing harm reduction measures designed to prevent drug overdoses when criminalizing crack house operators and rave promoters in the statute. Operating supervised injection sites is an act that only Congress can make a crime, and by reading the statute to apply broadly to medical intervention facilities, courts usurp powers that belong exclusively to Congress.<sup>312</sup> While it may not be necessary to turn to extratextual tools in every case, where there exists such ambiguity as to what the statute means and to whom it applies, importing context from reasonable sources outside of the text is necessary to garner the true meaning of the statute and for the courts to properly do their jobs in saying what the law is.<sup>313</sup>

Finally, it is important to note that the law does not exist in a vacuum. The current reality is that the United States is suffering from a drug overdose crisis that shows no signs of slowing.<sup>314</sup> While only Congress can definitively provide answers as to what the statute means and how far it reaches, courts should not use this as an opportunity to criminalize life-saving actions that are otherwise legal. To interpret the statute otherwise not only would be inconsistent with the text's meaning and with constitutional

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310. See *supra* Part III.B.1.

311. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 176, 178–79 (1803).

312. See *United States v. Bass*, 404 U.S. 336, 348 (1971) (stating that “because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity”).

313. See, e.g., William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 547 (2017) (“What makes little sense is a blanket prohibition against considering pertinent nontextual information if statutory language is ‘clear.’ This is especially so if the courts’ main concern is interpretive *accuracy*—that is, getting it right.”).

314. See Press Release, *supra* note 7.

principles but also would jeopardize the lives of millions suffering from addiction and punish those who try to help them.

#### CONCLUSION

Ultimately, Congress has the final say on whether the crack house statute's meaning is properly articulated by the Third Circuit in *Safehouse II*. In the meantime, a court evaluating the legality of a supervised injection site under 21 U.S.C. § 856(a)(2) should read the statute narrowly and consider it inapplicable to medical intervention facilities like supervised injection sites. The statute's text is ambiguous at best, and courts should, therefore, turn to extratextual tools to resolve the ambiguity. Both the legislative context and the rule of lenity favor a narrow reading of the crack house statute, and constitutional principles support such an interpretation. Congress enacted the crack house statute to reach illicit drug activity and those who help promote it. Congress did not enact the statute to stop life-saving medical intervention efforts from being implemented. To read the statute otherwise would twist its meaning and would be both legally and morally untenable.