No. 21-276

IN THE

Supreme Court of the United States

SAFEHOUSE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF DELAWARE, ILLINOIS, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does 21 U.S.C. § 856(a) make it a felony to offer medically supervised consumption services for the purpose of preventing opioid overdose deaths?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Delaware, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, Oregon, Rhode Island, Vermont, and Virginia ("*Amici* States"), submit this brief as *amici curiae* in support of petitioner.[1] The *Amici* States are battling a nationwide opioid crisis that claims over 130 lives every day. They are on the front lines of this public health emergency, fighting to save their citizens from overdose deaths. As a result, they share a strong interest in ensuring that multiple, effective interventions are available to address the epidemic, to prevent opioid use disorder, and to treat those suffering from opioid dependence.

1. The opioid epidemic in America is severe and its nature is constantly shifting, making a uniform solution difficult to attain. Since the start of the opioid epidemic in 1999, the Centers for Disease Control and Prevention ("CDC") has observed three waves of opioid overdose death. *Understanding the Epidemic*, Ctrs. for Disease Control & Prevention.[2] These waves have respectively centered around prescription opioids, heroin, and synthetic opioids, each of which require specialized responses by states

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[1] Under Supreme Court Rule 37.2(a), counsel of record received timely notice of the intent of *amici curiae* to file this brief. This brief was not authored in whole or in part by counsel for any party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *Available at* https://bit.ly/3nz0eke (last visited Sept. 24, 2021).

and local governments. *Id.* The newest wave of synthetic opioid use poses unique dangers, including the risk of rapid overdose death without time for adequate medical response. And the death rates associated with this third wave have been exacerbated by the ongoing COVID-19 public health crisis.

In this context, state-sanctioned safe injection sites ("SISs") are emerging as a promising measure to save lives and to fill a time-sensitive gap in medical care. Internationally, SISs have been shown to reduce overdose deaths, increase access to health and social services, lessen drug injections in public, and decrease transmission of viral infections like HIV and Hepatitis. *See* Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. Rev. 413, 416 (2019). Drawing on their lifesaving potential, many states and local governments have proposed legislation that would authorize and regulate SISs within their borders. Given the magnitude of the opioid crisis and the promise of safe injection sites such as Safehouse's, the correct interpretation of 21 U.S.C. § 856(a) is of paramount national importance.

2. The Third Circuit's divided decision curtails states' rights, sows confusion, and warrants review by this Court. Legislation establishing safe injection sites falls within states' broad police power to protect the "lives, limbs, health, comfort, and quiet" of their residents. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). Indeed, the history of the opioid epidemic has also been a story of state and local government innovation, as those on the forefront of the public health crisis develop successful, novel

interventions that become nationwide standards. Good Samaritan laws—which offer bystanders limited legal immunity as they seek help for overdose victims—originated in New Mexico in 2007; only a decade later, nearly every state had enacted a similar law. And syringe exchange programs ("SEPs") were once limited to a single city but are now viewed as a standard harm-reduction approach to prevent the spread of disease nationwide.

Yet the Third Circuit's interpretation of Section 856(a) threatens to cut this innovation short. Notwithstanding the fact that the federal government lacks a general "police power," *Bond v. United States*, 572 U.S. 844, 854 (2014), the Third Circuit read the Controlled Substances Act to criminalize a broad swath of non-commercial activity, making it a felony for any property owner to have "knowledge" that drugs are used on her property. This interpretation raises serious constitutional questions about the scope of congressional power and has sown division both within the Third Circuit and among the circuits. *Amici* States, searching for clarity as they assess the viability of safe injection sites in their own jurisdictions, urge the Court to grant certiorari.

REASONS FOR GRANTING THE PETITION

I. The Interpretation Of Section 856(a) Is Of Exceptional National Importance.

The opioid crisis affects every state in the nation, taking a daily, devastating toll on their residents. And the evolution of the crisis has been neither linear nor predictable; rather, it has been profoundly shaped by the introduction of new opioids like fentanyl and by coinciding crises such as the COVID-19 pandemic.

Faced with steeply rising rates of overdose deaths, states and local governments have increasingly turned to safe injection sites as a promising and innovative avenue to reduce overdose death, increase access to social services, lessen public drug use, and decrease transmission of viral infections. Yet the Third Circuit's interpretation of Section 856(a) threatens to stop them from adopting this lifesaving solution.

A. Opioid abuse is a pervasive crisis that affects every state in the nation.

States have reported staggering numbers of overdose deaths stemming from opioid use disorder. In Maryland, for example, yearly opioid-related deaths increased from 529 in 2011 to 2,518 in 2020. *Maryland Opioid Dashboard*, Opioid Operational Command Ctr. (June 24, 2021).[3] In 2020 alone, Michigan reported 2,684 overdose deaths involving opioids. *Michigan Overdose Data to Action Dashboard*, Michigan.gov.[4] On a nationwide scale, the opioid crisis claims 136 lives each day, and nearly 500,000 people died from opioid-related overdoses between 1999 and 2019. *See Understanding the Epidemic*, *supra*.

The nature of the crisis has evolved over time, making it increasingly difficult to engineer an enduring solution. The CDC divides the opioid crisis into three waves. *Id.* The first wave involved primarily prescription opioids; the second included

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[3] *Available at* https://bit.ly/3EfD3kF.

[4] *Available at* https://bit.ly/3loTbYz (last visited Sept. 24, 2021).

increased heroin use; and the third encompassed an uptick in the use of synthetic opioids, such as fentanyl. *Id.* Since the start of the first wave in 1999, at least 247,000 people have died from an overdose related to prescription opioids. *Prescription Opioids: Overview*, Ctrs. for Disease Control & Prevention.[5] These fatalities correlated with "dramatic increases in [the] prescribing of opioids for chronic pain." Ctrs. for Disease Control & Prevention, *2018 Annual Surveillance Report of Drug-Related Risks and Outcomes* 6 (2018).[6]

During the second wave, starting in 2010, heroin-related overdose deaths began to increase. *Understanding the Epidemic*, *supra.* From 1999 to 2019, nearly 130,000 people died from overdoses related to heroin use. *Opioid Basics: Heroin*, Ctrs. for Disease Control & Prevention.[7] Heroin carries unique risks: it is commonly injected, and the use and disposal of syringes increases the risk of blood-borne illnesses such as HIV and Hepatitis B and C. *Id.* While the CDC reported a slight decrease in overdose deaths involving heroin from 2018 to 2019, the number of deaths remains disturbingly high—seven times higher than in 1999. *Heroin Overdose Data*, Ctrs. for Disease Control & Prevention.[8] And although heroin is used everywhere, it has a

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[5] *Available at* https://bit.ly/393FQzf (last visited Sept. 24, 2021).

[6] *Available at* https://bit.ly/2YQCFsB.

[7] *Available at* https://bit.ly/3Afii6c (last visited Sept. 24, 2021).

[8] *Available at* https://bit.ly/3AiB3pG (last visited Sept. 24, 2021).

concentrated impact on cities. *Id.* (describing the high rates of opioid overdose death rates in large metropolitan areas).

During the third wave, which began around 2013, the use of synthetic opioids added further fuel to the fire. *See Understanding the Epidemic*, *supra.* In 2019, more than 36,000 overdose deaths could be traced back to synthetic opioid use, and these accounted for nearly 73 percent of opioid-related deaths. *Synthetic Opioid Overdose Data*, Ctrs. for Disease Control & Prevention.[9] Even in comparison with heroin, synthetic opioids pose a serious concern. Fentanyl is 50 to 100 times more potent than morphine. *Opioid Basics: Fentanyl*, Ctrs. for Disease Control & Prevention.[10] And illegally sold fentanyl is often mixed with heroin and other drugs, thereby increasing the risk of overdose for an already potent drug. *Id.* Large metropolitan areas have borne the brunt of this third wave of the crisis. *Synthetic Opioid Overdose Data, supra.*

The opioid epidemic has also been exacerbated by the ongoing COVID-19 public health crisis. The American Medical Association details that "[*e*]*very* state has reported a spike or increase in overdose deaths or other problems during the COVID pandemic." Am. Med. Ass'n, *Issue Brief: Nation's Drug-Related Overdose and Death Epidemic*

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[9] *Available at* https://bit.ly/2VKlVSS (last visited Sept. 24, 2021).

[10] *Available at* https://bit.ly/3k8aKwD (last visited Sept. 24, 2021).

Continues to Worsen (2021) (emphasis added).[11] In 2020, Colorado—among other states—saw the largest year-over-year increase in opioid-related deaths since at least 2000. *See* Faith Miller, *Largest Jump in Colorado Overdose Deaths in More than 20 Years, Data Show*, Colo. Newsline (July 15, 2021).[12] And a study of San Francisco overdose deaths found a 50 percent increase in weekly median deaths after the onset of the COVID-19 pandemic. Ayesha Appa et al., *Drug Overdose Deaths Before and After Shelter-in-Place Orders During the COVID-19 Pandemic in San Francisco*, JAMA Network (May 12, 2021).[13]

These initial reports suggest that "societal disruption related to COVID-19 is likely contributing" to increased rates of overdose death, especially because such disruption "disproportionately affects people experiencing poverty and marginal housing." *Id.* The strain on the healthcare system associated with the COVID-19 pandemic also presents "grave risk[s] to the millions of Americans with opioid use disorder, who . . . are heavily dependent on face-to-face health care delivery." G. Caleb Alexander et al., *An Epidemic in the Midst of a Pandemic: Opioid Use Disorder and COVID-19*, 173 Annals of Internal Med. 57, 57 (2020). And individuals with substance use disorders are also at increased risk of COVID-19 exposure and of severe disease and death due to COVID-19. Joshua A. Barocas, *Business Not as Usual—Covid-19 Vaccination in Persons with Substance Use Disorders*, 384 New Eng. J. Med. e6(1)

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[11] *Available at* https://bit.ly/3jY8ism.

[12] *Available at* https://bit.ly/3ty5cyz.

[13] *Available at* https://bit.ly/3lrUWnI.

(2021);[14] *see Drug Overdose: COVID-19 and People at Increased Risk*, Ctrs. for Disease Control & Prevention (listing individuals with substance use disorder at increased risk of COVID-19 exposure and illness).[15]

B. Safe injection sites are a promising way for states to address this national crisis.

1. Safe injection sites can reduce overdose death and promote public health.

Amid this urgent, nationwide public health crisis, safe injection sites provide a promising way to address opioid use disorder and reduce overdose deaths. SISs like Safehouse offer drug users immediate access to sterile injection equipment, opioid reversal agents like naloxone, and pathways into drug treatment programs. Pet. for Writ of Cert. at 7-8. These services are especially crucial given the rise of synthetic opioid use. Overdose death from fentanyl can occur within minutes, making quick action essential to prevent death. *See Preventing Opioid Overdose: Know the Signs. Save a Life*, Ctrs. for Disease Control & Prevention 2 ("It's important to recognize the signs [of overdoses] and *act fast*." (emphasis added)).[16]

Naloxone, which acts to block and reverse the effects of an opioid, is among the best lifesaving interventions. It can "quickly restore normal

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[14] *Available at* https://bit.ly/2ZlYUHj.

[15] *Available at* https://bit.ly/2ZlAWfh (last visited Sept. 24, 2021).

[16] *Available at* https://bit.ly/3nv87qD (last visited Sept. 24, 2021).

breathing and save the life of a person who is overdosing on opioids." *Naloxone For Opioid Overdose: Life-Saving Science*, Nat'l Inst. on Drug Abuse.[17] Safe injection sites, which can readily provide naloxone to their patients, thus align with the CDC recommendation that individuals "avoid using drugs alone," "[u]se small amounts of a drug at a time," and "provide naloxone to a friend or family member who will check on you . . . in case you experience an overdose." *Drug Overdose: COVID-19 and People at Increased Risk*, *supra.* And because many hospitals are already overburdened by COVID-19 patients, *see* Alexander et al., *supra*, at 57, establishing alternative sites to receive emergency medical care is especially crucial to states battling both crises.

Studies of established safe injection sites confirm their lifesaving potential. After an SIS opened in Vancouver, Canada, professionals intervened in over 300 overdoses during the site's first five years of operation. *See* Amber A. Leary, Note, *A Safe Harbor in the Opioid Crisis: How the Federal Government Should Allow States to Legislate for Safe Injection Facilities in Light of the Opioid Public Health Emergency*, 84 Brook. L. Rev. 635, 660 (2019). And an academic assessment of an unsanctioned safe injection site in the United States led scientists to conclude that broader implementation of this intervention could reduce mortality from opioid-related overdose. *See* Alex H. Kral et al., *Evaluation of an Unsanctioned Safe Consumption Site in the*

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[17] *Available at* https://bit.ly/3nytcR2 (last visited Sept. 24, 2021).

United States, 383 New Eng. J. Med. 589, 590 (2020).[18]

In addition to preventing overdose deaths, SISs allow governments to promote public health by increasing access to health and social services, lessening drug injections in public, and decreasing transmission of viral infections like HIV and Hepatitis. *See* Kreit, *supra*, at 416. As the federal government has acknowledged, "[h]arm-reduction organizations provide a key engagement opportunity between people who use drugs . . . and health care systems," allowing these organizations to "build[] trust" and "encourage individuals to further pursue a range of treatment options." *See* Exec. Off. of the President, Off. of Nat'l Drug Control Pol'y, *The Biden-Harris Administration's Statement of Drug Policy Priorities for Year One* 4.[19] During the COVID-19 public health crisis, these trusted relationships with harm-reduction organizations can facilitate crucial public health campaigns such as those promoting COVID-19 vaccination. *See* Barocas, *supra*, at e6(1) (noting that "[a]dministration of other vaccines at syringe programs has been highly successful"). Research suggests that "providing vaccination at places where trusting relationships exist . . . will make it easier for people to receive both doses," *id.*, especially because individuals with substance use disorder have shown high rates of COVID-19 vaccine hesitancy, *see* Alexandra M. Mellis et al., *Trust in a COVID-19 Vaccine Among People with Substance Use*

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[18] *Available at* https://bit.ly/2VWPHDT.

[19] *Available at* https://bit.ly/39pKKql (last visited Sept. 24, 2021).

Disorders, 220 Drug & Alcohol Dependence 108,519 (2021) (highlighting the resulting need for targeted vaccine distribution programs).

There are currently at least 120 SISs operating in ten countries around the world, including Australia, Canada, Denmark, France, Germany, Luxembourg, the Netherlands, Norway, Spain, and Switzerland. *See Supervised Consumption Services*, Drug Pol'y Alliance.[20] A systematic literature review assessing these sites confirmed that SISs are effective at enhancing access to primary healthcare and reducing levels of public drug injections and dropped syringes. Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 Drug & Alcohol Dependence 48, 64 (2014). Furthermore, SISs were not found to increase drug use, drug trafficking, or drug-related crime in the surrounding areas. *Id.* at 64-65.

2. States and local governments are considering safe injection sites.

Drawing on the potential for SISs to save lives and promote public health, several states and local governments have proposed safe injection sites within their own borders. In July, Rhode Island became the first state to pass legislation authorizing SISs. *See Governor Signs Law Creating Drug Injection Site Program*, AP News (July 8, 2021);[21] *see also* 23 R.I. Gen Laws §§ 23-12.10-1 to -5 (2021). And last year, the city of San Francisco approved legislation that

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[20] *Available at* https://bit.ly/3nCbign (last visited Sept. 24, 2021).

[21] *Available at* https://bit.ly/3twGT3T.

would allow safe injection sites to open within the city, pending approval by the state. *See* S.F., Cal., Health Code art. 46 (2020).

Bills authorizing safe injection sites have also been pending in legislatures across the country. In California, for example, Senate Bill 57 would authorize time-limited overdose prevention programs in several of the state's urban centers, including San Francisco, Los Angeles, and Oakland, if they meet a set of specific criteria. *See* S.B. 57, 2021-2022 Reg. Sess. (Cal. 2021). Proposals pending before the Massachusetts legislature would create a ten-year pilot program establishing several supervised consumption sites under the regulation of the state health department. *See* H. 2088, 192d Gen. Court, 1st Ann. Sess. (Mass. 2021); S. 1272, 192d Gen. Court, 1st Ann. Sess. (Mass. 2021). And a recent New Mexico bill would have required the state health department to establish and manage a safe injection site itself. *See* S.B. 255, 55th Leg., 1st Sess. (N.M. 2021).[22]

City governments have likewise considered SISs as evidence-based tools to address the opioid epidemic. In a 2018 report assessing the feasibility and efficacy of SISs, the New York City Department of Health and Mental Hygiene recommended piloting four SISs, finding that doing so could prevent up to

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[22] Several other states have considered similar legislation over the past four years. *See, e.g.*, S.B. 18-040, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018); H.B. 110, 102d Gen. Assemb., Reg. Sess. (Ill. 2021); Legis. Doc. 949, 129th Leg., 1st Reg. Sess. (Me. 2019); H.B. 139, 2019 Reg. Sess. (Md. 2019); Assembly Bill No. 677, 219th Leg., 2020-2021 Reg. Sess. (N.J. 2020); S. 107, 2017-2018 Legis. Sess. (Vt. 2017); S.B. 5380, 66th Leg., 2019 Reg. Sess. (Wash. 2019).

130 deaths and save up to $7 million per year. N.Y.C. Health, *Overdose Prevention in New York City: Supervised Injection as a Strategy to Reduce Opioid Overdose and Public Injection* 5 (2018).[23] Most recently, Somerville, Massachusetts has considered opening a safe injection site. *See* Kathryn Sotnik, *Somerville Exploring Controversial Safe Injection Site: "People Have a Right to Stay Alive,"* NBC Bos. (June 23, 2021).[24] These proposals dovetail with research revealing that a "large majority of people [living in cities] who use heroin and fentanyl would be willing to use safe consumption spaces where they could obtain sterile syringes and have medical support in case of an overdose." *Safe Consumption Spaces Would Be Welcomed by High-Risk Opioid Users*, Johns Hopkins Bloomberg Sch. of Pub. Health (June 5, 2019).[25]

These SIS proposals would allow states and local governments to prevent overdose death, targeting the cities and neighborhoods where safe injection services are most needed. Like Philadelphia, many states and cities considering SISs contain densely populated urban areas, where public injections are more frequent due to high rates of homelessness. *See, e.g.*, *Overdose Prevention in New York City*, *supra*, at 34 (noting that in New York City, people who are homeless die from overdoses at more than six times the rate of the general population). And to the extent that safe injection sites are currently operating in the shadows, *see* Kral et al., *supra*, at 589, these

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[23] *Available at* https://on.nyc.gov/3hD7PKI.

[24] *Available at* https://bit.ly/3k18Iy9.

[25] *Available at* https://bit.ly/2P4XuvP.

legislative proposals would allow state and city health departments to carefully regulate and oversee the operation of SISs. *See, e.g.*, H.B. 110, 102d Gen. Assemb., Reg. Sess. (Ill. 2021) (requiring the state health department to establish standards for the safe injection site and setting various reporting requirements).

Yet the Third Circuit's decision curtails the lifesaving potential of these proposed SISs. States hoping to experiment with this intervention must now fear that nonprofits and doctors in their jurisdictions will be subject to criminal prosecution. *See, e.g.*, Shannon Lin, *US Attorney Threatens Legal Action if San Francisco Opens Supervised Injection Sites*, KQED (Mar. 4, 2020).[26] Given the magnitude of the opioid crisis and the promise of safe injection sites such as Safehouse's, the correct interpretation of Section 856(a) is of paramount national importance.

II. The Court Should Grant Review Because The Third Circuit's Decision Curtails States' Power To Act As Laboratories of Health Policy And Sows Confusion.

States have wide latitude to protect the "lives, limbs, health, comfort, and quiet" of their residents. *Medtronic Inc.*, 518 U.S. at 475 (quoting *Metro. Life Ins. Co.*, 471 U.S. at 756). Indeed, a "State's power to regulate . . . for the purpose of protecting the health of its citizens . . . is at the *core* of its police power." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982) (emphasis added); *see Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) ("[U]nder

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[26] *Available at* https://bit.ly/3nBi0mT.

our constitutional scheme the States retain 'broad power' to legislate protection for their citizens in matters of local concern such as public health." (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949))). Federal intrusion on this power creates serious constitutional concerns.

Drawing on their power to protect the public health, states have become critical laboratories of health policy, adopting innovative and successful interventions to address the shifting opioid epidemic. Yet the Third Circuit's interpretation of Section 856(a) jeopardizes states' newest public health innovation: safe injection sites. Moreover, the divided opinion sits in tension with precedent from several other courts of appeals and inserts serious uncertainty into the legal landscape. Given the gravity of the nationwide opioid crisis, this Court should grant certiorari and hold that Section 856(a) does not prohibit SISs.

A. Drawing on their power to regulate public health, states have been at the forefront of creatively addressing the opioid crisis.

States' power to protect the public health offers them the flexibility to experiment with innovative solutions as they address crises such as the opioid epidemic. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] . . . state may . . . serve as a laboratory."). As this Court has explained, "[t]he *essence* of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441

U.S. 418, 431 (1979) (emphasis added). And the evolution of the opioid epidemic has highlighted the paramount importance of states' "free[dom] to develop a variety of solutions" as they address overdose death and opioid abuse. *Id.*

Notably, implementing effective interventions to the opioid epidemic requires "a clear understanding of the causes and characteristics of local public health problems." Jennifer J. Carroll et al., Ctrs. For Disease Control & Prevention, *Evidence-Based Strategies for Preventing Opioid Overdose: What's Working in the United States* 3 (2018).[27] In rural areas of the country, the opioid crisis is exacerbated by a lack of substance abuse treatment infrastructure, a limited number of physicians providing medication-assisted treatment, and insufficient regional coordination of treatment resources. Christine Hancock et al., Nat'l Rural Health Ass'n, *Treating the Rural Opioid Epidemic* 1 (Feb. 2017).[28]

By contrast, urban areas face challenges related to high population density and racial disparities in health care. *See* Marisa Peñaloza, *Black Opioid Deaths Increase Faster than Whites, Spurring Calls for Treatment Equity*, NPR (Sept. 10, 2021).[29] In San Francisco, for example, approximately 69 percent of people who inject drugs have "reported living on the street, using homeless shelters, or living in [hotels]." S.F. Safe Injection Servs. Task Force, *2017 Final*

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[27] *Available at* https://bit.ly/3nCZSck.

[28] *Available at* https://bit.ly/3lsdKTR.

[29] *Available at* https://n.pr/3CkXmeX.

Report 5 (2017).[30] This results in widespread public injection and unsafe disposal of drug paraphernalia—creating risks in public spaces for residents, visitors, and drug users. *Id.* at App. A. Given the varied landscape of the epidemic, President Biden has acknowledged that states and local governments should be afforded the flexibility to "target resources to individuals and communities most in need of support." *The Biden Plan to End the Opioid Crisis*, JoeBiden.com.[31]

Indeed, some of the most successful opioid interventions arose because states were able to "try novel social . . . experiments without risk to the rest of the country." *New State Ice Co.*, 285 U.S. at 311. New Mexico was the first state to pass "Good Samaritan legislation," which offers bystanders limited immunity from drug-related charges when they seek help for fellow drug users suffering from overdose. Carroll et al., *supra*, at 19. But the innovation caught on quickly: only eleven years after New Mexico passed its novel law, forty-five states had enacted Good Samaritan legislation. *Id.*

Syringe exchange programs were also once limited to a single city—Tacoma, Washington. *See* Melissa Vallejo, Note, *Safer Bathrooms in Syringe Exchange Programs: Injecting Progress into the Harm Reduction Movement*, 118 Colum. L. Rev. 1185, 1195 (2018). Syringe exchange programs provide drug users with clean needles at no cost and thereby help prevent the spread of HIV, Hepatitis, and other blood-borne

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[30] *Available at* https://bit.ly/2Xoc2L7.

[31] *Available at* https://bit.ly/3kgmJIG (last visited Sept. 24, 2021).

diseases. Carroll et al., *supra*, at 26. And the CDC reports that "[w]hen people who inject drugs use an [SEP], they are more likely to enter treatment for substance use disorder and stop injecting than those who don't." *Syringe Services Programs (SSPs) FAQs*, Ctrs. for Disease Control & Prevention.[32] Inspired by the potential for SEPs to save lives, many states have passed laws specifically legalizing such exchange programs. *Id.* In 2016, Congress even authorized federal funds to help states and localities operate SEPs. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 520, 129 Stat. 2242, 2652 (2015). Once a harm-reduction strategy limited to a single city, SEPs now help to prevent the spread of disease nationwide.

Drawing on their police power to protect the public health, states have also sought to stem the tide of overdose deaths through widespread access to naloxone. *See* Amy Lieberman & Corey Davis, Network for Pub. Health L., *Legal Interventions to Reduce Overdose Mortality: Naloxone Access Laws* 1 (2021).[33] And in an effort to increase access to counseling and other treatment options, many states have expanded their Medicaid programs to include treatment for substance use disorders. *Substance Use Disorders*, Medicaid.gov.[34]

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[32] *Available at* https://bit.ly/3lu4AX2 (last visited Sept. 24, 2021).

[33] *Available at* https://bit.ly/3nA1ZgZ.

[34] *Available at* https://bit.ly/3ElWx7p (last visited Sept. 24, 2021).

B. The Third Circuit's divided decision erroneously curtails states' police power, creates confusion, and prevents states from developing further innovative public health solutions.

Safe injection sites, which build on the benefits of previous innovations, are the newest iteration of this creative response. Like Good Samaritan laws and naloxone access programs, SISs such as Safehouse ensure that individuals experiencing opioid overdose have access to support and lifesaving medication. Pet. for Writ of Cert. 8. Like syringe exchange programs, safe injection sites seek to prevent the spread of blood-borne disease. *Id.* And much like the Medicaid expansion programs described above, SISs facilitate access to addiction treatment and counseling. *Id.* at 7-8. But unlike each of these individual interventions, safe injection sites—which offer these interventions in concert at one location—operate under the threat of prosecution.

A divided panel of the Court of Appeals for the Third Circuit concluded that Safehouse's proposed safe injection site violated the Controlled Substances Act, 21 U.S.C. § 856(a)(2), which makes it unlawful to "manage or control any place . . . and knowingly and intentionally . . . make available for use, with or without compensation, the place for the purpose of unlawfully . . . using a controlled substance." *Id.* The statute itself was inspired by an "explosion of public concern about crack cocaine use in the mid 1980s" and was subsequently amended to prevent "the use of 'ecstasy' by young people at 'rave' parties." 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, 1117-19 (2009). The legislative record indicates that the purpose of the statute was to aid law enforcement in arresting drug dealers and users—not public health workers or doctors. *See* 132 Cong. Rec. 26447 (1986) ("When police raid these crack houses, the dealers and users can easily dispose of these drugs, thus avoiding arrest. [Section 856] makes it a felony to operate such a house . . . ." (statement of Sen. Chiles)).

Yet notwithstanding this historical context, the Third Circuit concluded that Safehouse could be liable under Section 856(a)(2) as long as *drug users* on the property had the "purpose of" using substances on the site's premises and Safehouse knew of that drug use. *United States v. Safehouse*, 985 F.3d 225, 232-33, 235 (3d Cir. 2021) ("Th[e] third party, we hold, is the one who must act 'for the purpose of' illegal drug activity." *Id.* at 235.). But the Third Circuit was not united on this question. In her partial dissent, Judge Roth highlighted the anomaly of a statute where 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 (Roth, J., dissenting in part and dissenting in judgment). Because Safehouse did not operate for the "purpose of" drug use, Judge Roth would not have applied the statute to cover the safe injection site. *Id.*

Dissenting from the denial of rehearing en banc, Judge McKee echoed Judge Roth's skepticism about applying Section 856(a)(2) to Safehouse. Under the majority's reading, Judge McKee reasoned, the statute would "subject parents to substantial criminal sanctions—including lengthy imprisonment—if they

allow their addicted child to live at home and consume drugs there in order to minimize the chances of a fatal overdose." *United States v. Safehouse*, 991 F.3d 503, 507 (3d Cir. 2021) (McKee, J., dissenting from denial of rehearing en banc). This result sits in tension with the decisions of other circuits, many of whom have concluded that the "purpose" provision of Section 856(a)(1) "cannot reasonably be construed . . . to criminalize simple consumption of drugs in one's home." *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992); *see United States v. Shetler*, 665 F.3d 1150, 1162 (9th Cir. 2011). This division between the judges of the Third Circuit and among the circuits further highlights the need for this Court's intervention. States, seeking to protect public health and to act as "laboratories," *New State Ice Co.*, 285 U.S. at 311, require this Court's clear guidance as they consider the viability of safe injection sites like Safehouse's in their own jurisdictions.

The Third Circuit's broad reading of Section 856(a)(2)'s "purpose" provision also raises significant constitutional questions about the division of power between states and the federal government. As petitioners highlight, the Third Circuit's interpretation of Section 856 criminalizes a huge swath of non-commercial activity, making it a felony for any local property owner to have "knowledge" that drugs are used on her property. This broad interpretation contravenes the principle that the federal government "can exercise only the powers granted to it." *Bond*, 572 U.S. at 854. Unlike the states, the federal government does not have this kind of "police power." *Id.*

Despite the constitutional concerns raised by its interpretation of Section 856, the Third Circuit panel majority did not heed this Court's mandate to "construe the statute to avoid [constitutional] problems" where "an alternative interpretation of the statute is 'fairly possible.'" *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Eschewing the prudent interpretation, the Third Circuit construed the statute broadly, raising concerns about the scope of Congress's power. Because this divided ruling threatens to limit states' power to adopt lifesaving public health interventions and creates serious legal uncertainty, the *Amici* States urge this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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