

No. 21-276

IN THE
Supreme Court of the United States

SAFEHOUSE,
Petitioner,

v.

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 AMICI CURIAE OF FOURTEEN CITIES
AND COUNTIES IN SUPPORT OF
PETITIONER**

VIRGINIA A. GIBSON

STEPHEN A. LONEY

ALEXANDER B.

BOWERMAN

CAITLYN A. MANCUSO

HOGAN LOVELLS US LLP

1735 Market Street

Philadelphia, PA 19103

(267) 675-4600

CATHERINE E. STETSON

Counsel of Record

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

cate.stetson@hoganlovells.com

*Counsel for Amici Curiae Cities of New York, NY;
Pittsburgh, PA; and Seattle, WA; King County, WA;
and Multnomah County, OR*

Additional counsel on inside cover

JOSEPH TAYLOR SPOERL
HOGAN LOVELLS US LLP
4085 Campbell Avenue
Suite 100
Menlo Park, CA 94025
(650) 463-4000

Counsel for Amici Curiae Cities of New York, NY; Pittsburgh, PA; and Seattle, WA; King County, WA; and Multnomah County, OR

ANNE L. MORGAN
City Attorney

MEGHAN L. RILEY
Litigation Division Chief

P.O. Box 1546
Austin, TX 78701-1546

Counsel for the City of Austin, TX

ESTEBAN A. AGUILAR, JR.
City Attorney
One Civic Plaza N.W.
4th Floor, Room 4072
Albuquerque, NM 87102

Counsel for the City of Albuquerque, NM

CELIA MEZA
Corporation Counsel of the City of Chicago
2 N. LaSalle Street,
Suite 580
Chicago, IL 60602

Counsel for the City of Chicago, IL

HOWARD PHILLIP
SCHNEIDERMAN
Senior Deputy Prosecuting Attorney

KING COUNTY
PROSECUTING
ATTORNEY'S OFFICE
1191 Second Avenue
Suite 1700
Seattle, WA 98101

*Counsel for King
County, WA*

ROBERT E. SINNOTT
*Sr. Assistant County
Attorney*
501 SE Hawthorne
Boulevard
Suite 500
Portland, OR 97214

*Counsel for Multnomah
County, OR*

BARBARA J. PARKER
City Attorney
One Frank Ogawa Plaza
Sixth Floor
Oakland, CA 94612

*Counsel for the City of
Oakland, CA*

RODRIGO A. CASTRO-
SILVA

County Counsel

SCOTT KUHN
*Assistant County
Counsel*

CESAR J. DEL PERAL
*Senior Deputy County
Counsel*

STEVEN DE SALVO
*Senior Deputy County
Counsel*

500 West Temple Street
Sixth Floor
Los Angeles, CA 90066

*Counsel for Los Angeles
County, CA*

GEORGIA M. PESTANA
*Corporation Counsel of
the City of New York*

100 Church Street
New York, NY 10007

*Counsel for the City of
New York, NY*

MARA W. ELLIOTT
City Attorney
KEVIN KING
1200 Third Avenue
Suite 1620
San Diego, CA 92101

*Counsel for the City of
San Diego, CA*

PETER S. HOLMES
Seattle City Attorney
JOHN SCHOCHET
Deputy City Attorney
701 Fifth Avenue
Suite 2050
Seattle, WA 98104

*Counsel for the City of
Seattle*

ELI SAVIT
*Washtenaw County
Prosecuting Attorney*
200 N. Main Street
Suite 300
Ann Arbor, MI 48107

*Counsel for the
Washtenaw County
Prosecuting Attorney*

YVONNE S. HILTON
*Solicitor for the City of
Pittsburgh*
City-County Building
414 Grant Street
Pittsburgh, PA 15219

*Counsel for the City of
Pittsburgh, PA*

DENNIS J. HERRERA
*San Francisco City At-
torney*
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B.
Goodlett Plaza
San Francisco, CA
94102

*Counsel for the City and
County of San Fran-
cisco, CA*

FRANCIS X. WRIGHT, JR.
City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

*Counsel for the City of
Somerville, MA*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I. THIS CASE PRESENTS AN UNSETTLED QUESTION OF FEDERAL LAW THAT AFFECTS CITIES AND COUNTIES NATIONWIDE.....	7
A. Research Demonstrates that Overdose-Prevention Sites Can Save Lives in Cities and Counties Fighting the Opioid Epidemic	7
B. Overdose-Prevention Sites Advance Federal Public Health Policy	13
C. The Third Circuit’s Decision Will Impact Overdose-Prevention Efforts Nationwide	14
II. THE THIRD CIRCUIT’S DECISION IS INCONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF THE CONTROLLED SUBSTANCES ACT	15
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASE:	
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	16
STATUTES:	
21 U.S.C. § 856	16
21 U.S.C. § 856(a)	15
21 U.S.C. § 856(a)(2).....	4, 5, 6, 14
21 U.S.C. § 1102(2)	16
RULE:	
Sup. Ct. R. 10(c).....	5
OTHER AUTHORITIES:	
<i>5-Point Strategy To Combat the Opioid Crisis</i> , U.S. Dept. of Health & Human Servs., https://www.hhs.gov/opioids/about-the-epidemic/hhs-response/index.html (last reviewed Jan. 21, 2021)	13
Bobby Allyn, <i>Justice Department Promises Crackdown on Supervised Injection Facilities</i> , NPR (Aug. 30, 2018), https://www.npr.org/sections/health-shots/2018/08/30/642735759/justice-department-promises-crackdown-on-supervised-injection-sites	4
Am. Soc’y of Addiction Med., <i>Public Policy Statement on Overdose Prevention Sites</i> (July 22, 2021), available at www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-	

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
policy-statements/2021/07/23/overdose-prevention-sites.....	6
<i>California Opioid Overdose Surveillance Dashboard</i> , California Dep’t of Pub. Health, https://sky-lab.cdph.ca.gov/ODdash/ (last visited Sept. 24, 2021).....	10
Jennifer J. Carroll, PhD, MPH et al., Ctrs. for Disease Control & Prevention, <i>Evidence-Based Strategies for Preventing Opioid Overdose: What’s Working in the United States</i> (2018), available at https://www.cdc.gov/drugoverdose/pdf/pubs/2018-evidence-based-strategies.pdf	<i>passim</i>
Mike Carter, <i>Seattle’s new U.S. Attorney says he won’t allow city to open safe-injection site</i> , <i>Seattle Times</i> (Apr. 3, 2019), https://www.seattletimes.com/seattle-news/seattles-new-u-s-attorney-says-he-wont-allow-city-to-open-safe-injection-site	4
Bill Chappell, <i>A Record Number of People Died From Drug Overdoses in the U.S. During the First Year of COVID-19</i> , <i>KQED</i> (Jul. 15, 2021), https://www.kqed.org/news/11881276/a-record-number-of-people-died-from-drug-overdoses-in-the-u-s-during-the-first-year-of-covid-19	10

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Chicago Dep't of Public Health, <i>2019 Chicago Opioid Overdose Data Brief</i> (Dec. 2020), available at https://www.chicagohan.org/documents/14171/234367/Chicago++2019+Opioid+Brief.pdf/08ce046c-b29e-42e8-409a-a8529d79bc77?t=1609373556834	9
City of Pittsburgh, <i>Executive Order on Fentanyl Test Strips for Overdose Awareness Day</i> (Aug. 31, 2021), available at https://apps.pittsburghpa.gov/red-tail/images/15559_EO_Final_Fentanyl.pdf	2
Cook County Dep't of Public Health, <i>Opioid Epidemic in Suburban Cook County</i> (Feb. 2021), available at https://cookcountypublichealth.org/wp-content/uploads/2021/02/CCDPH-Opioid-Epidemic-Report-2.18.21.pdf	9
DEA 360 Strategy, <i>Reach and Impact Report: Los Angeles</i> (June 2020), available at https://www.dea.gov/sites/default/files/Los%20Angeles%20DEA%20360%20Report.pdf	10
Executive Office of the President, <i>An Update on the President's Commission on Combating Drug Addiction and the Opioid Crisis: One Year Later</i> (2019), available at https://trumpwhitehouse.ar- chives.gov/wp-	

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
content/uploads/2019/05/Opioid-Commission-Report-One-Year-Later-20190507.pdf	13
<i>Fentanyl</i> , Iowa Harm Reduction Coal., https://www.iowaharmreductioncoalition.org/fentanyl/ (last visited Sept. 24, 2021)	7
Peter Grinspoon, MD, <i>A tale of two epidemics: When Covid-19 and opioid addiction collide</i> , Harv. Health Publ'g: Harv. Health Blog (Apr. 20, 2020), https://www.health.harvard.edu/blog/a-tale-of-two-epidemics-when-covid-19-and-opioid-addiction-collide-2020042019569	2
Heroin & Prescription Opiate Addiction Task Force, King County, WA, <i>Final Report and Recommendations</i> (Sept. 15, 2016), available at https://king-county.gov/depts/health/~media/depts/community-human-services/behavioral-health-recovery/documents/herointf/Final-Heroin-Opiate-Addiction-Task-Force-Report.ashx	4
Inst. for Clinical & Econ. Rev., <i>Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value</i> (Jan. 8, 2021) ["ICER Report"], available at https://icer.org/wp-	

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf.....	3, 11, 12
Amos Irwin et al., <i>A Cost-Benefit Analysis of a Potential Supervised Injection Facility in San Francisco, California, USA</i> , <i>J. Drug Issues</i> (2016), available at https://idhdp.com/media/531280/sifsanfrancisco.pdf	12
Amos Irwin et al., <i>Mitigating the heroin crisis in Baltimore, MD, USA: a cost-benefit analysis of a hypothetical supervised injection facility</i> , <i>14 Harm Reduction J.</i> (2017), available at https://harm-reductionjournal.biomedcentral.com/track/pdf/10.1186/s12954-017-0153-2	12
Beau Kilmer et al., RAND Corp., <i>Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States</i> (2018), available at https://www.ehidc.org/sites/default/files/resources/files/RAND_RR2693.pdf	11
Alex H. Kral, Ph.D. et al., <i>Correspondence: Evaluation of an Unsanctioned Safe Consumption Site in the United States</i> , <i>383 N. Eng. J. Med.</i> 589 (2020), available at https://www.nejm.org/doi/full/10.1056/NEJM2015435	12

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
Sharon Larson, PhD et al., <i>Supervised Consumption Facilities – Review of the Evidence</i> (2017), available at https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf	12
Lauren Lee, <i>Allegheny County reports increase in opioid overdose deaths</i> , Pittsburgh Post-Gazette (July 10, 2020), https://www.post-gazette.com/news/health/2020/07/10/Pittsburgh-Opioid-overdose-Naxolone-Allegheny-County-Health-Department/stories/202007100127	8
Shannon Lin, <i>US Attorney Threatens Legal Action if San Francisco Opens Supervised Injection Sites</i> , KQED (Mar. 4, 2020), https://www.kqed.org/news/11804290/us-attorney-threatens-legal-action-if-san-francisco-opens-supervised-injection-sites	4
Chris Lisinski, <i>Lelling Reaffirms Opposition to Supervised Drug Consumption Sites</i> , GBH (Oct. 3, 2019), https://www.wgbh.org/news/local-news/2019/10/03/elling-fed-enforcement-still-awaits-injection-facilities	3, 4
Rich Lord, <i>Bill Peduto: City’s Opioid Efforts Changing, May Include Safe Injection Sites</i> , Pittsburgh Post-Gazette	

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
(Feb. 1, 2018) https://www.post-gazette.com/local/city/2018/02/01/Bill-Peduto-Pittsburgh-opioid-crisis-epidemic-safe-injection-sites-Philadelphia/stories/201802010122	14
Brandon DL Marshall, PhD et al., <i>Reduction in overdose mortality after the opening of North America’s first medically supervised safer injecting facility; a retrospective population-based study</i> , 377 <i>Lancet</i> 1429 (2011), available at https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2810%2962353-7/fulltext	11
Multnomah County Medical Examiner Database.....	9
Nat’l Harm Reduction Coal., <i>Fact Sheet: Fentanyl Test Strip Pilot</i> , available at https://harmreduction.org/issues/fentanyl/fentanyl-test-strip-pilot/	10
Oakland City Council Resolution 87683: Resolution in Support of AB 362 – Overdose Prevention Programs (Apr. 25, 2019), available at https://cao-94612.s3.amazonaws.com/documents/87683-CMS.pdf	15
Off. of the Chief Med. Exam’r, City & County of San Francisco, <i>Report on Accidental Overdose Deaths</i> , available at https://sf.gov/sites/default/files/2021-	

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
05/2021%2005_OCME%20Overdose%20 Report.pdf.....	8, 9
<i>Overdose Death Rates</i> , Nat'l Insts. of Health (Jan. 29, 2021), https://www.drug- abuse.gov/drug-topics/trends-stat- istics/overdose-death-rates	7
<i>Overdose deaths</i> , King County, https://kingcounty.gov/depts/health/ex- aminer/services/reports-data/over- dose.aspx (last updated Dec. 1, 2020)	8
President's Comm'n on Combating Drug Addiction & the Opioid Crisis, <i>Report of the President's Commission on Com- bating Drug Addiction and the Opioid Crisis</i> (2017), available at https://houstonrecoverycenter.org/wp- content/uploads/2019/01/Presidents- Commission-Final-Report.pdf	13
Press Release, Grant Colfax, M.D., Dir. of Health, San Francisco Dept. of Pub. Health, <i>Overdose Deaths on the Rise in San Francisco, Mostly Due to Fentanyl</i> (Feb. 18, 2020), available at <a href="https://www.sfdph.org/dph/files/news-Medi-
adocs/2020PR/PressReleaseSFOverdose
DataJan-Jun2019-02182020.pdf">https://www.sfdph.org/dph/files/news- Medi- adocs/2020PR/PressReleaseSFOverdose DataJan-Jun2019-02182020.pdf	3
Press Release, Wisconsin Department of Health Services, <i>New Report Shows COVID-19 Pandemic Impact on Opioid Overdoses; McKinsey & Company</i>	

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Settlement Funds Aid Response to Opioid Epidemic</i> (Aug. 10, 2021), https://www.dhs.wisconsin.gov/news/releases/081021.htm	2
<i>Project Description</i> , Safer Inside, https://www.saferinside.org/description-team (last visited Sept. 24, 2021)	6
<i>Quick Facts: United States</i> , U.S. Census Bureau, available at https://www.census.gov/quickfacts/fact/table/US/PST045219 (last visited Sept. 24, 2021)	2
<i>Quick Facts: Washtenaw County, Mich.</i> , U.S. Census Bureau (July 1, 2019), https://www.census.gov/quickfacts/fact/table/washtenawcountymichigan,MI/PST045219	9
Washtenaw County Health Dep't, <i>Opioid Report</i> (Apr. 2019), available at https://www.washtenaw.org/Archive-Center/ViewFile/Item/940	10

IN THE
Supreme Court of the United States

No. 21-276

SAFEHOUSE,
Petitioner,

v.

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 *AMICI CURIAE* OF FOURTEEN CITIES
AND COUNTIES IN SUPPORT OF
PETITIONER**

STATEMENT OF INTEREST

The Cities of Albuquerque, NM; Austin, TX; Chicago, IL; New York, NY; Oakland, CA; Pittsburgh, PA; San Diego, CA; San Francisco, CA; Seattle, WA; and Somerville, MA; as well as King County, WA; Los Angeles County, CA; Multnomah County, OR; and the Prosecuting Attorney of Washtenaw County, MI submit this brief as *amici curiae* in support of Petitioner.¹

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner was notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due. Respondent received notice less than 10 days before it was due. All parties have consented to the filing of this brief.

Amici represent the residents of 14 cities and counties across the United States, more than 29 million Americans.² As the level of government closest to the people, many *amici* bear primary responsibility for public health, and for decades have been on the front line of the battle against the opioid crisis.

The COVID-19 pandemic has only compounded the scourge of the opioid epidemic in our communities.³ *Amici* write now because communities across the country desperately need more viable options to fight the opioid epidemic while in the throes of COVID-19. The Respondent's effort here to block one of the most promising options is not only contrary to the law, it also jeopardizes *amici*'s ability to carry out their duties in addressing one of the most staggering public

² See *Quick Facts: United States*, U.S. Census Bureau, available at <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Sept. 24, 2021) (search population statistics for each of the *amici*).

³ City of Pittsburgh, *Executive Order on Fentanyl Test Strips for Overdose Awareness Day* (Aug. 31, 2021), available at https://apps.pittsburghpa.gov/redtail/images/15559_EO_Final_Fentanyl.pdf (“the COVID-19 pandemic has forced people into isolation, causing individuals to use drugs alone, in larger amounts, and with increased frequency; * * * the pandemic has exacerbated mental health conditions and economic stressors which are common risk factors for unsafe opioid use”); Press Release, Wisconsin Department of Health Services, *New Report Shows COVID-19 Pandemic Impact on Opioid Overdoses; McKinsey & Company Settlement Funds Aid Response to Opioid Epidemic* (Aug. 10, 2021), <https://www.dhs.wisconsin.gov/news/releases/081021.htm>; Peter Grinspoon, MD, *A tale of two epidemics: When Covid-19 and opioid addiction collide*, Harv. Health Publ'g: Harv. Health Blog (Apr. 20, 2020), <https://www.health.harvard.edu/blog/a-tale-of-two-epidemics-when-covid-19-and-opioid-addiction-collide-2020042019569>.

health crises of our (or any) time.

Several of the undersigned *amici* filed briefs in support of Safehouse on the merits in the Eastern District of Pennsylvania and the Third Circuit, as well as in support of Safehouse’s petition for rehearing en banc in the Third Circuit.⁴ That is because *amici* believe in the promise of overdose-prevention sites like Safehouse as effective, evidence-based medical interventions. Sites like Safehouse represent one of the best hopes for rescuing people from overdose by administering life-saving naloxone and referring people in crisis to opioid use disorder (OUD) treatment and social support services.⁵ Many localities, including several *amici*, have analyzed the available evidence and concluded that overdose-prevention sites would help them meet the challenges posed by the opioid epidemic in their communities.⁶

⁴ See Dist. Ct. Dkt. Nos. 80-1, 88; C.A. Dkt. Nos. 79, 164-2, 169.

⁵ See Inst. for Clinical & Econ. Rev., *Supervised Injection Facilities and Other Supervised Consumption Sites: Effectiveness and Value* 69 (Jan. 8, 2021) [“ICER Report”], available at https://icer.org/wp-content/uploads/2020/10/ICER_SIF_Final-Evidence-Report_010821.pdf.

⁶ See, e.g., Press Release, Grant Colfax, M.D., Dir. of Health, San Francisco Dept. of Pub. Health, *Overdose Deaths on the Rise in San Francisco, Mostly Due to Fentanyl* (Feb. 18, 2020), available at <https://www.sfdph.org/dph/files/newsMediaDocs/2020PR/PressReleaseSFOverdoseDataJan-Jun2019-02182020.pdf> (“The city also plans to create overdose prevention sites to mitigate one of the significant risk factors in overdose death: using alone.”); Chris Lisinski, *Lelling Reaffirms Opposition to Supervised Drug Consumption Sites*, GBH (Oct. 3, 2019), <https://www.wgbh.org/news/local-news/2019/10/03/elling-fed-enforcement-still-awaits-injection-facilities> (“Somerville Mayor Joe Curtatone is working to open [an overdose prevention] site

Rather than support these efforts, the Department of Justice (DOJ) decided to bring a first-of-its-kind action *against* Safehouse, and threatened other actions wherever such sites are opened.⁷ The district court ruled in Safehouse’s favor, holding that the Controlled Substances Act (CSA) does not prohibit overdose-prevention sites like Safehouse. A divided three-judge panel of the Third Circuit reversed. The full court declined to rehear the case. But three judges dissented from the denial of rehearing, explaining that “Four judges have now examined the language of 21 U.S.C. § 856(a)(2). Two interpret it one way and two

in his city next year”); Heroin & Prescription Opiate Addiction Task Force, King County, WA, *Final Report and Recommendations* 26 (Sept. 15, 2016), *available at* https://king-county.gov/depts/health/~media/depts/community-human-services/behavioral-health-recovery/documents/herointf/Final-Heroin-Opiate-Addiction-Task_Force-Report.ashx (recommending the establishment of overdose prevention sites in Seattle and King County because they “offer a supervised place for hygienic consumption of drugs in a non-judgmental environment free from stigma, while providing low-barrier access to on-site health services and screenings, referrals, and linkages to behavioral health and other supportive services (for example, housing).”).

⁷ See Bobby Allyn, *Justice Department Promises Crackdown on Supervised Injection Facilities*, NPR (Aug. 30, 2018), <https://www.npr.org/sections/health-shots/2018/08/30/642735759/justice-department-promises-crackdown-on-supervised-injection-sites>; Mike Carter, *Seattle’s new U.S. Attorney says he won’t allow city to open safe-injection site*, Seattle Times (Apr. 3, 2019), <https://www.seattletimes.com/seattle-news/seattles-new-u-s-attorney-says-he-wont-allow-city-to-open-safe-injection-site>; Shannon Lin, *US Attorney Threatens Legal Action if San Francisco Opens Supervised Injection Sites*, KQED (Mar. 4, 2020), <https://www.kqed.org/news/11804290/us-attorney-threatens-legal-action-if-san-francisco-opens-supervised-injection-sites>; Lisinski, *supra* note 6.

interpret it another.”⁸ The need for a clarifying ruling from this Court could not be more apparent.

If it stands, the Third Circuit’s divided ruling will hinder the development of public health interventions such as overdose-prevention sites in *amici’s* localities across the United States, causing needless uncertainty throughout other Circuits. The cities or counties that press onward with plans to implement these public health intervention efforts would face significant risk and uncertainty surrounding their legality nationwide, effectively consigning communities around the country to the unacceptable status quo for the foreseeable future. That stark reality has led the undersigned *amici* to join the call for this Court to grant certiorari in this case and rule on this unsettled question of federal law.

SUMMARY OF ARGUMENT

Local public health officials fighting the opioid crisis need to know whether 21 U.S.C. § 856(a)(2) of the Controlled Substances Act prohibits overdose-prevention sites like Safehouse. That is an exceptionally “important question of federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c). Among the Third Circuit panel majority, the dissent, the dissent of three judges from the denial of rehearing en banc, and the District Court’s decision, it is clear that well-informed legal opinions diverge regarding the proper interpretation of Section 856(a)(2) in the context of legitimate medical interventions.

As with other public-health threats, *amici* have taken an evidence-based approach to confronting the

⁸ Pet. App. 56a (McKee, Restrepo, and Roth, JJ., dissenting from denial of rehearing).

opioid crisis. A number of jurisdictions, including several *amici*, have explored ways that overdose-prevention sites can bolster their response to the crisis; San Francisco even developed a full-scale operational demonstration model in its Tenderloin neighborhood.⁹ There is ever-stronger evidence that overdose-prevention sites can reduce the mortality caused by this epidemic and produce significant community benefits in public health and safety.¹⁰ Sites like the one Safehouse proposes also further federal public health policy, as they advance the objectives and methods recommended by multiple federal agencies.¹¹

The Third Circuit panel majority's conclusion that Section 856(a)(2) *prohibits* overdose-prevention sites will undermine these objectives well beyond Philadelphia, as the decision is sure to influence courts (and prosecutors) nationwide. That 2-1 ruling should not be the last word on overdose-prevention sites.

The petition for certiorari should be granted.

⁹ See *Project Description*, Safer Inside, <https://www.saferinside.org/description-team> (last visited Sept. 24, 2021).

¹⁰ Am. Soc'y of Addiction Med., *Public Policy Statement on Overdose Prevention Sites* (July 22, 2021), available at www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2021/07/23/overdose-prevention-sites.

¹¹ See Jennifer J. Carroll, PhD, MPH et al., Ctrs. for Disease Control & Prevention, *Evidence-Based Strategies for Preventing Opioid Overdose: What's Working in the United States* 9-13 (2018), available at <https://www.cdc.gov/drugoverdose/pdf/pubs/2018-evidence-based-strategies.pdf>.

ARGUMENT**I. THIS CASE PRESENTS AN UNSETTLED QUESTION OF FEDERAL LAW THAT AFFECTS CITIES AND COUNTIES NATIONWIDE.****A. Research Demonstrates that Overdose-Prevention Sites Can Save Lives in Cities and Counties Fighting the Opioid Epidemic.**

With often limited municipal resources, *amici* have implemented numerous medical interventions recommended by the Centers for Disease Control and Prevention (CDC), including syringe-services programs, medication-assisted treatment programs, and naloxone distribution.¹² Yet opioid overdose deaths continue to haunt their communities.

The rise of synthetic opioids, and illicitly manufactured fentanyl in particular, has strained existing outreach efforts beyond their limits.¹³ Fentanyl is 50 times more potent than heroin.¹⁴ A person can die from a fentanyl overdose in just five minutes—from an amount as small as a grain of sand.¹⁵ Even a life-saving intervention like naloxone is no help if it is not there in time.

¹² *Id.* at 8-11, 26-28.

¹³ See *Overdose Death Rates*, Nat'l Insts. of Health (Jan. 29, 2021), <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates>.

¹⁴ *Fentanyl*, Iowa Harm Reduction Coal., <https://www.iowaharm-reductioncoalition.org/fentanyl/> (last visited Sept. 24, 2021).

¹⁵ *Id.*

Between fentanyl and the COVID-19 pandemic, the opioid crisis is worse than ever. In Seattle's home of King County, Washington, drug overdose deaths have risen every year between 2011 and 2020 and are on pace to reach the highest rate ever in 2021.¹⁶ Preliminary data show that overdose deaths in King County have already surpassed 500 this year as of September 2021.¹⁷ Fentanyl is one driver of this increase, present in only 3 overdoses during 2015 but implicated in 172 overdoses during 2020.¹⁸ Fentanyl was also the most common drug implicated in the 564 overdose deaths that occurred in 2019 in Pittsburgh's home of Allegheny County, Pennsylvania.¹⁹ This represented an increase of 72 deaths from the prior year, despite the fact that Allegheny County's Health Department has distributed more than 20,000 naloxone kits and held 165 training programs to teach residents how to administer it.²⁰ And in San Francisco, preliminary data for 2020 reported 712 accidental overdose deaths, with fentanyl contributing to more than 500 of them.²¹

¹⁶ *Overdose deaths*, King County, <https://king-county.gov/depts/health/examiner/services/reports-data/overdose.aspx> (last updated Dec. 1, 2020).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Lauren Lee, *Allegheny County reports increase in opioid overdose deaths*, Pittsburgh Post-Gazette (July 10, 2020), <https://www.post-gazette.com/news/health/2020/07/10/Pittsburgh-Opioid-overdose-Naxolone-Allegheny-County-Health-Department/stories/202007100127>.

²⁰ *Id.*

²¹ Off. of the Chief Med. Exam'r, City & County of San Francisco, *Report on Accidental Overdose Deaths*, available at https://sf.gov/sites/default/files/2021-05/2021%2005_OCME%20Overdose%20Report.pdf.

In just the first five months of 2021, San Francisco lost 299 lives to overdose.²²

The list goes on. Chicago, for example, reported 855 opioid-related overdose deaths in 2019.²³ Eighty percent of them involved fentanyl.²⁴ And in suburban Cook County outside of Chicago, acute opioid-exposure overdoses accounted for more than \$500 million in hospital charges from 2016 to 2019, with a disproportionate share of those costs falling on government insurance programs, uninsured individuals, and hospitals themselves.²⁵ Multnomah County, Oregon saw an increase of opioid overdose fatalities from 128 in 2019 to 181 in 2020, and fentanyl-related fatalities nearly tripled in 2020.²⁶ Washtenaw County, Michigan, a county of about 367,000,²⁷ has lost more than 450 residents to opioid overdoses since 2011, with the proportion of deaths associated with synthetic opioids like fentanyl increasing from 38% to 84% from 2016 to

²² *Id.*

²³ Chicago Dep't of Public Health, *2019 Chicago Opioid Overdose Data Brief* (Dec. 2020), available at <https://www.chicagohan.org/documents/14171/234367/Chicago++2019+Opioid+Brief.pdf/08ce046c-b29e-42e8-409a-a8529d79bc77?t=1609373556834>.

²⁴ *Id.*

²⁵ Cook County Dep't of Public Health, *Opioid Epidemic in Suburban Cook County 2*, 22 (Feb. 2021), available at <https://cookcountypublichealth.org/wp-content/uploads/2021/02/CCDPH-Opioid-Epidemic-Report-2.18.21.pdf>.

²⁶ Multnomah County Medical Examiner Database.

²⁷ *Quick Facts: Washtenaw County, Mich.*, U.S. Census Bureau (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/washtenawcountymichigan,MI/PST045219>.

2018.²⁸ Los Angeles County had 497 opioid-related deaths in 2018.²⁹ And in Oakland City’s home of Alameda County, the number of fentanyl overdoses rose by 29% from 2019 to 2020,³⁰ with a 290% increase in total opioid-related overdose deaths from 2017 to 2020.³¹

Tolerating the preventable deaths of tens of thousands of Americans is not an option. So *amici* have been forced to explore additional strategies to address the opioid crisis. Sites like Safehouse ensure that health workers can administer naloxone in time to prevent overdose deaths, and can even prevent overdoses in the first place through on-site testing that detects fentanyl in drug samples.³²

²⁸ Washtenaw County Health Dep’t, *Opioid Report 1* (Apr. 2019), available at <https://www.washtenaw.org/ArchiveCenter/View-File/Item/940>.

²⁹ DEA 360 Strategy, *Reach and Impact Report: Los Angeles 3* (June 2020), available at <https://www.dea.gov/sites/default/files/Los%20Angeles%20DEA%20360%20Report.pdf>.

³⁰ Bill Chappell, *A Record Number of People Died From Drug Overdoses in the U.S. During the First Year of COVID-19*, KQED (Jul. 15, 2021), <https://www.kqed.org/news/11881276/a-record-number-of-people-died-from-drug-overdoses-in-the-u-s-during-the-first-year-of-covid-19>.

³¹ See *California Opioid Overdose Surveillance Dashboard*, California Dep’t of Pub. Health, <https://skylab.cdph.ca.gov/ODdash/> (last visited Sept. 24, 2021) (select “California Dashboard”; then choose “Select Display Options”; then use slider to filter by year to download each of 2017 and 2020 .csv data files).

³² See, e.g., Nat’l Harm Reduction Coal., *Fact Sheet: Fentanyl Test Strip Pilot*, available at <https://harmreduction.org/issues/fentanyl/fentanyl-test-strip-pilot/> (last modified Oct. 5, 2020) (fentanyl test strip pilot program); Carroll et al., *supra* note 11, at 8-9 (targeted naloxone distribution), 16-17 (screening for fentanyl in routine clinical toxicology testing).

The promise of overdose-prevention sites is not an empty one, nor a hypothetical one. It is based on facts, research, and real-world precedent. There are over a hundred sites operating worldwide, including sites in Canada, Australia, Germany, the Netherlands, and France, and scores of studies show these sites reduce overdose frequency and public drug use without increasing drug trafficking or crime.³³ Research also shows that overdose-prevention sites provide valuable community support for people who use drugs, resulting in reduced public drug use and syringe litter.³⁴ One example is InSite, which has been running in Vancouver for over 15 years.³⁵ Studies confirm the site has increased use of OUD treatment services, while reducing fatal overdoses in the vicinity of InSite by 35%.³⁶ And a comprehensive literature review released earlier this year confirmed that, based on available data, “no client” of an overdose-prevention site

³³ See, e.g., Beau Kilmer et al., RAND Corp., *Considering Heroin-Assisted Treatment and Supervised Drug Consumption Sites in the United States* 32-35 (2018), available at https://www.ehdc.org/sites/default/files/resources/files/RAND_RR2693.pdf (review of nine most rigorous of 65 outcome-related articles suggests that sites cause decrease in drug overdoses and drug use without increasing crime).

³⁴ See ICER Report, *supra* note 5, at 12, 32.

³⁵ See Brandon DL Marshall, PhD et al., *Reduction in overdose mortality after the opening of North America’s first medically supervised safer injecting facility; a retrospective population-based study*, 377 *Lancet* 1429 (2011), available at <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2810%2962353-7/fulltext>.

³⁶ *Id.* at 1434.

“has *ever* experienced death from overdose within a facility.”³⁷

The available research indicates that overdose prevention sites would have similar effects in U.S. cities and localities like those represented by *amici*. Cost-benefit studies of the feasibility of opening sites in Baltimore, Philadelphia, and San Francisco all found that the costs of operation would be more than offset by the savings realized by preventing HIV, hepatitis, and other infections, increasing enrollment in medication-assisted treatment, and reducing hospitalizations and deaths from opioid overdoses.³⁸ And a recent study of an unsanctioned site operating since 2014 at an undisclosed location in the United States revealed that, like its international counterparts, the site was able to reverse every single one of the overdoses that occurred at the site.³⁹

³⁷ See ICER Report, *supra* note 5, at ES4 (emphasis added).

³⁸ See, e.g., Amos Irwin et al., *Mitigating the heroin crisis in Baltimore, MD, USA: a cost-benefit analysis of a hypothetical supervised injection facility*, 14 Harm Reduction J. (2017), available at <https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/s12954-017-0153-2>; Amos Irwin et al., *A Cost-Benefit Analysis of a Potential Supervised Injection Facility in San Francisco, California, USA*, J. Drug Issues (2016), available at <https://idhdp.com/media/531280/sifsanfrancisco.pdf>; Sharon Larson, PhD et al., *Supervised Consumption Facilities – Review of the Evidence* 6-7 (2017), available at https://dbhids.org/wp-content/uploads/2018/01/OTF_LarsonS_PHLReportOnSCF_Dec2017.pdf.

³⁹ Alex H. Kral, Ph.D. et al., *Correspondence: Evaluation of an Unsanctioned Safe Consumption Site in the United States*, 383 N. Eng. J. Med. 589 (2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMc2015435>.

B. Overdose-Prevention Sites Advance Federal Public Health Policy.

In addition to this robust body of evidence, guidance from federal health agencies aligns with the principles of overdose-prevention sites. The U.S. Department of Health and Human Services (HHS) advocates “[b]etter targeting of overdose reversing drugs,” which is a prime benefit of overdose-prevention sites.⁴⁰ Likewise, the CDC promotes values that reflect Safehouse’s approach to overdose-prevention sites, including the need to “meet people where they are” in their road to recovery.⁴¹ Overdose-prevention sites would greatly improve the efficacy of nearly every measure the CDC recommends, including medication-assisted treatment with methadone or buprenorphine, widespread distribution of naloxone, syringe-

⁴⁰ *5-Point Strategy To Combat the Opioid Crisis*, U.S. Dept. of Health & Human Servs., <https://www.hhs.gov/opioids/about-the-epidemic/hhs-response/index.html> (last reviewed Jan. 21, 2021); see also, e.g., Executive Office of the President, *An Update on the President’s Commission on Combating Drug Addiction and the Opioid Crisis: One Year Later* 17 (2019), available at <https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/05/Opioid-Commission-Report-One-Year-Later-20190507.pdf> (“Timing is critical when dealing with an overdose and having overdose reversing drugs readily available can be the difference between life and death. * * * After an overdose is reversed, it is critical the correct treatment is readily available.”); President’s Comm’n on Combating Drug Addiction & the Opioid Crisis, *Report of the President’s Commission on Combating Drug Addiction and the Opioid Crisis* 47 (2017), available at <https://houstonrecoverycenter.org/wp-content/uploads/2019/01/Presidents-Commission-Final-Report.pdf> (“To achieve the desired ultimate outcome — reduction in drug use — the campaign needs the support of locally implemented evidence-based prevention programming.”).

⁴¹ Carroll et al., *supra* note 11, at 4.

services programs, fentanyl testing strips, testing for HIV and hepatitis C, and linkage to medical, mental health, and social services.⁴²

The Third Circuit’s ruling, however, stops the work of organizations like Safehouse in its tracks. That will in turn undermine the work of federal public health agencies and the consistent goals of local communities across the United States.

C. The Third Circuit’s Decision Will Impact Overdose-Prevention Efforts Nationwide.

The Third Circuit’s decision is the first of a U.S. Court of Appeals to address the application of Section 856(a)(2) to a medical intervention intended to fight opioid overdose deaths. As such, the Court’s ruling in this case will reach far beyond Philadelphia. Other Third Circuit localities in Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands are also battling the opioid crisis and are desperate for every measure to stop residents from dying. Pittsburgh Mayor Bill Peduto, for one, has recognized that overdose-prevention sites have “a proven record of being able to lessen the number of people who die, of being able to provide a safe environment to stop blood-borne diseases, and provide[] the gateway for people to say, ‘I need help.’”⁴³

Other localities around the country, including *amici* New York City, San Francisco, Oakland, King County

⁴² *Id.* at 26.

⁴³ Rich Lord, *Bill Peduto: City’s Opioid Efforts Changing, May Include Safe Injection Sites*, Pittsburgh Post-Gazette, Feb. 1, 2018, <https://www.post-gazette.com/local/city/2018/02/01/Bill-Peduto-Pittsburgh-opioid-crisis-epidemic-safe-injection-sites-Philadelphia/stories/201802010122>.

(together with Seattle), and Somerville, Massachusetts, have studied sites like Safehouse and explored similar measures in their communities to combat the opioid epidemic.⁴⁴ And the Third Circuit’s decision in this case has generated uncertainty for localities outside the Third Circuit that wish to pursue these public health interventions in their own jurisdictions.

Overdose-prevention sites would help stop—or at the least, slow—the loss of lives in *amici’s* communities. A ruling from this Court on the proper interpretation of the CSA would determine whether sites like Safehouse are able to open where they are desperately needed, or alternatively would give a final answer to this open question and allow cities and localities to allocate their limited resources with certainty.

II. THE THIRD CIRCUIT’S DECISION IS INCONSISTENT WITH THE TEXT, STRUCTURE, AND HISTORY OF THE CONTROLLED SUBSTANCES ACT.

For all the reasons set forth in the Third Circuit’s dissent, Pet. App. 31a-52a, and Safehouse’s petition, *amici* respectfully request that this Court grant certiorari to review, and ultimately reverse, the Third Circuit’s decision. The panel majority’s decision stretches the text of Section 856(a) beyond its limit, in a manner that Congress never intended and that no prior court has ever endorsed. Where, as here, a site will not manufacture, store, prescribe, distribute, or administer controlled substances, and the purpose of

⁴⁴ See, e.g., Oakland City Council Resolution 87683: Resolution in Support of AB 362 – Overdose Prevention Programs (Apr. 25, 2019), available at <https://cao-94612.s3.amazonaws.com/documents/87683-CMS.pdf>.

the facility is to provide lifesaving medical treatment and wraparound rehabilitation services, there is no CSA violation under the plain language of Section 856. The Third Circuit's ruling vindicates the DOJ's curious desire to prosecute organizations running facilities that address public health needs and *combat* illicit drug use, while tying the hands of local officials who share the same goals.

That turns the CSA on its head. Congress unequivocally “declare[d] that it is the policy of the United States * * * to meet the problems of drug abuse through * * * the development and support of community-based prevention programs.” 21 U.S.C. § 1102(2). And this Court has stated in no uncertain terms that the CSA “manifests no intent to regulate the practice of medicine generally,” but instead is understood to regulate “illicit drug dealing and trafficking as conventionally understood.” *Gonzales v. Oregon*, 546 U.S. 243, 269-270 (2006). There is utterly no “conventional[] underst[anding]” of “illicit drug dealing and trafficking” that could encompass overdose-prevention sites, and neither Congressional intent nor common sense supports creating one here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ESTEBAN A. AGUILAR, JR.
City Attorney
 One Civic Plaza N.W.
 4th Floor, Room 4072
 Albuquerque, NM 87102

*Counsel for the City of
 Albuquerque, NM*

ANNE L. MORGAN
City Attorney
 MEGHAN L. RILEY
*Litigation Division
 Chief*
 P.O. Box 1546
 Austin, TX 78701-1546

*Counsel for the City of
 Austin, TX*

CELIA MEZA
*Corporation Counsel of
 the City of Chicago*
 2 N. LaSalle Street,
 Suite 580
 Chicago, IL 60602

*Counsel for the City of
 Chicago, IL*

CATHERINE E. STETSON
Counsel of Record
 HOGAN LOVELLS US LLP
 555 Thirteenth Street, N.W.
 Washington, D.C. 20004
 (202) 637-5600
 cate.stetson@hoganlovells.com

VIRGINIA A. GIBSON
 STEPHEN A. LONEY
 ALEXANDER B. BOWERMAN
 CAITLYN A. MANCUSO
 HOGAN LOVELLS US LLP
 1735 Market Street
 Philadelphia, PA 19103
 (267) 675-4600

JOSEPH TAYLOR SPOERL
 HOGAN LOVELLS US LLP
 4085 Campbell Avenue
 Suite 100
 Menlo Park, CA 94025
 (650) 463-4000

*Counsel for Amici Curiae
 Cities of New York, NY;
 Pittsburgh, PA; and Seattle,
 WA; King County, WA; and
 Multnomah County, OR*

HOWARD PHILLIP
SCHNEIDERMAN
Senior Deputy Prosecuting Attorney

KING COUNTY
PROSECUTING
ATTORNEY'S OFFICE
1191 Second Avenue
Suite 1700
Seattle, WA 98101

*Counsel for King
County, WA*

ROBERT E. SINNOTT
Sr. Assistant County Attorney
501 SE Hawthorne
Boulevard
Suite 500
Portland, OR 97214

*Counsel for Multnomah
County, OR*

BARBARA J. PARKER
City Attorney
One Frank Ogawa Plaza
Sixth Floor
Oakland, CA 94612

*Counsel for the City of
Oakland, CA*

RODRIGO A. CASTRO-
SILVA

County Counsel

SCOTT KUHN
Assistant County Counsel

CESAR J. DEL PERAL
Senior Deputy County Counsel

STEVEN DE SALVO
Senior Deputy County Counsel

500 West Temple Street
Sixth Floor
Los Angeles, CA 90066

*Counsel for Los Angeles
County, CA*

GEORGIA M. PESTANA
*Corporation Counsel of
the City of New York*

100 Church Street
New York, NY 10007

*Counsel for the City of
New York, NY*

MARA W. ELLIOTT
City Attorney
 KEVIN KING
 1200 Third Avenue
 Suite 1620
 San Diego, CA 92101

*Counsel for the City of
 San Diego, CA*

PETER S. HOLMES
Seattle City Attorney
 JOHN SCHOCHET
Deputy City Attorney
 701 Fifth Avenue
 Suite 2050
 Seattle, WA 98104

*Counsel for the City of
 Seattle*

ELI SAVIT
*Washtenaw County
 Prosecuting Attorney*
 200 N. Main Street
 Suite 300
 Ann Arbor, MI 48107

*Counsel for the
 Washtenaw County
 Prosecuting Attorney*

YVONNE S. HILTON
*Solicitor for the City of
 Pittsburgh*
 City-County Building
 414 Grant Street
 Pittsburgh, PA 15219

*Counsel for the City of
 Pittsburgh, PA*

DENNIS J. HERRERA
*San Francisco City At-
 torney*
 CITY ATTORNEY'S OFFICE
 City Hall Room 234
 One Dr. Carlton B.
 Goodlett Plaza
 San Francisco, CA
 94102

*Counsel for the City and
 County of San Fran-
 cisco, CA*

FRANCIS X. WRIGHT, JR.
City Solicitor
 City of Somerville
 93 Highland Avenue
 Somerville, MA 02143

*Counsel for the City of
 Somerville, MA*