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Molly and the Crack House Statute: Vulnerabilities of a Recuperating Music Industry

Jacob A. Epstein *

The normalcy of “club drug” use in today’s live music culture makes concert promoters and venue managers particularly vulnerable to prosecution under the “crack-house statute,” 21 U.S.C. § 856. Section 856(a)(2) makes it illegal for a promoter or venue manager to “manage any place . . . and knowingly and intentionally . . . profit from, or make available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.” In United States v. Tebeau, the Eighth Circuit Court of Appeals held that third parties could satisfy the statute’s “intent” requirement. This Note examines the Eighth Circuit’s interpretation and the uncertainty that it has created, which may lead to a situation where any promoter involved in any event where illegal drugs are consumed can be held liable under Section 856. This Note calls for an amendment to the statute, better designed (1) to curb dangerous club drug use, (2) to provide health and safety measures for patrons, and (3) to punish, specifically, rogue concert promoters who facilitate such dangerous situations, so that the many positive economic effects of the live music sector may continue to flourish.

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I. INTRODUCTION

Calvin Harris made an astounding \$46 million in 2012, and the estimated \$300,000 he made for one night's performance in August of 2013 was well worth the expense to his Las Vegas-based promoter.¹ Today, numbers like these are increasingly common as the music

¹ Ryan Mac and Zack O'Malley Greenburg, *Sin City's Latest Savior*, FORBES, Sept. 2, 2013, at 44.

industry continues to derive profits from festivals and concerts.² Music festivals like Ultra,³ Bonnaroo,⁴ Coachella,⁵ and Austin City Limits⁶ have become household names, as music fans young and old flock to cities all over the country each year to see their favorite musicians perform.

While those in the industry are excited by the rising prevalence of this source of revenue, the dangers associated with large crowds of people congregating in one, high-energy atmosphere are palpable.⁷ Drug use at music festivals and concerts is rampant.⁸ “Club drug” use, combined with high temperatures and the inevitable dehydration resulting from such situations, led to at least seven deaths between March and September of 2013.⁹ Should concert promoters and venue managers be held responsible for the drug use at their events? If so, how can they be expected to prevent these drugs, some of which are no smaller than your average Tylenol pill, from entering a venue? The pervasiveness of these drugs at music festivals today, and the lack of any comprehensive legal guidance as to how concert promoters and venue managers should handle the situation, has created a grey area where their liability for such activities is unclear.

Concert promoters and venue managers are especially vulnerable to prosecution under the “crack house statute,” 21 U.S.C. § 856, due to the statute’s over-inclusiveness and unclear language. The statute’s shortcomings are vividly illustrated in *United States v. Tebeau*, where the Eighth Circuit Court of Appeals found an organizer of an outdoor music festival criminally liable under Section 856(a)(2).¹⁰ Tebeau, the defendant, filed a petition for certiorari (the “Petition”) in July 2013, arguing that the Eighth Circuit’s finding that he “knowingly and intentionally” made his premises available for drug use was an invalid

² See Chris Parker, *The Economics of Music Festivals: Who’s Getting Rich, Who’s Going Broke?*, LA WEEKLY (Apr. 17, 2013, 4:00 AM), http://blogs.lawweekly.com/westcoastsound/2013/04/economics_of_music_festivals.php.

³ ULTRA MUSIC FESTIVAL, <http://www.ultramusicfestival.com> (last visited Sept. 19, 2014).

⁴ BONNAROO MUSIC AND ARTS FESTIVAL, <http://www.bonnaroo.com> (last visited Sept. 20, 2014).

⁵ COACHELLA VALLEY MUSIC AND ARTS FESTIVAL, <http://www.coachella.com/> (last visited Sept. 20, 2014).

⁶ AUSTIN CITY LIMITS MUSIC FESTIVAL, <http://www.aclfestival.com> (last visited Sept. 20, 2014).

⁷ See Ben Sisario & James C. McKinley, Jr., *Drug Deaths Threaten Rising Business of Electronic Music Fests*, N.Y. TIMES, Sept. 10, 2013, at A1.

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013).

and overly zealous conclusion.¹¹ The Supreme Court's hasty denial¹² of the Petition will likely have enormous implications for the music industry, creating a dangerous zone of liability for many concert promoters and venue managers who will be left with little guidance on how to prevent a situation analogous to Tebeau's. Moreover, corporate sponsors and promoters may be less inclined to participate in certain types of music festivals, especially those that are associated with heavy drug use, for fear of the inevitable liability that will eventually become associated with those festivals.

This Note will analyze the strengths and weaknesses of Tebeau's arguments and supplement his points with the business and drug-culture realities of the music industry today. Section II will specifically illustrate the current state of the live music industry, addressing both its positive and negative aspects. Section III will present the crack house statute, the purposes for its enactment, and the 2003 amendment to the statute that is at issue in the Petition. Section IV will explain the facts of the *Tebeau* case, the arguments put forth, and the Eighth Circuit's reasoning. Section V will argue that, as it stands, the statute is a hindrance to the music industry. Section V will subsequently propose another amendment to the crack house statute, one that would address the concerns outlined in this Note, suggesting additional requirements that venue managers and concert promoters take "reasonable precautions" to prevent illicit activities at their events and to ensure that medical attention for patrons is readily available. Section V will then clarify the reasoning behind the proposed amendment, the main goals of which are to allow a positive trend in the music industry to thrive and to protect the health and safety of live music fans.

II. SETTING THE STAGE

A. *The Trend Toward More Music Festivals Is Significant.*

The global recorded music industry in 2012 saw its first rise in revenue since 1999 largely due to the increase in digital music sales.¹³ Global digital revenues climbed nine percent, according to the

¹¹ See Petition for Writ of Certiorari, *Tebeau v. United States*, 134 S. Ct. 314 (No. 13-146) (2013).

¹² See *Tebeau v. United States*, 134 S. Ct. 314 (2013).

¹³ Richard Smirke, *IFPI Digital Music Report 2013: Global Recorded Music Revenues Climb for First Time Since 1999*, BILLBOARD (Feb. 26, 2013, 8:52 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/1549915/ifpi-digital-music-report-2013-global-recorded-music>.

International Federation of the Phonographic Industry's¹⁴ 2013 Digital Music Report,¹⁵ helping to raise global digital music revenues to \$5.6 billion, up from \$5.1 billion in 2011.¹⁶ While the media tends to focus on digital music's role in saving the recorded music industry,¹⁷ the lack of attention to live music's contribution to the industry as a whole is remarkable.

In 2010, corporate concert promoter Live Nation merged with ticket vendor Ticketmaster to create Live Nation Entertainment.¹⁸ Live Nation Entertainment, now a giant in the industry, had a record summer in 2013, bringing in \$2.3 billion of revenue.¹⁹ According to Billboard,²⁰ worldwide concert ticket sales increased approximately thirty percent between 2012 and 2013.²¹ Because hundreds of thousands of people are often willing to spend between three and four hundred dollars on one festival pass, corporate sponsors are inevitably attracted to such events. Live Nation Entertainment's Sponsorship & Advertising segment had a fifteen percent increase in revenue between the third quarter of 2012 and the third quarter of 2013.²² Although still a very new festival series, the Made In America Festival landed Budweiser as its corporate sponsor.²³ The 2014 Bonnaroo Music and Arts Festival had a list of major corporate sponsors that included, but was certainly not limited to, Miller Lite, Ford, Gap, and Ben & Jerry's.²⁴ Coachella's sponsors in 2014 included

¹⁴ The International Federation of the Phonographic Industry (the "IFPI") represents "the interests of 1,300 record companies from across the globe." See IFPI, <http://www.ifpi.org/about.php> (last visited Oct. 5, 2014).

¹⁵ *IFPI Digital Music Report 2013* <http://www.ifpi.org/content/library/dmr2013.pdf> at 6.

¹⁶ *Id.*

¹⁷ See Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES, Feb. 27, 2013, at B3.

¹⁸ TICKETMASTER, <http://www.ticketmaster.com/about/about-us.html> (last visited Sept. 20, 2014).

¹⁹ Live Nation, Quarterly Report (Form 10-Q) 3 (November 5, 2013) [hereinafter Live Nation Third Quarter Report].

²⁰ Known as "the world's premier music publication," Billboard's "popular music charts have evolved into the primary source of information on trends and innovation in music, serving music fans, artists, top executives, tour promoters, publishers, radio programmers, lawyers, retailers, digital entrepreneurs and many others." See BILLBOARD, <http://www.billboard.com/articles/news/467859/about-us> (last visited Oct. 5, 2014).

²¹ Ray Waddell, *Live and On Fire*, BILLBOARD, Dec. 21, 2013, at 44.

²² See Live Nation Third Quarter Report, *supra* note 19, at 34.

²³ BUDWEISER MADE IN AMERICA FESTIVAL, <http://budweisermadeinamericafestival.tumblr.com> (last visited Sept. 21, 2014).

²⁴ BONNAROO PARTNERS, <http://www.bonnaroo.com/get-involved/partners/> (last visited Sept. 21, 2014).

Heineken, H&M, Samsung, and Red Bull.²⁵ The prevalence of live music as a source of revenue, corporate sponsorship, and consumer involvement is now undeniable.

B. This Trend is Beneficial and Should Be Encouraged.

Music festivals transform their host cities or towns into music-fan destinations, a transformation that not only helps the industry at large, but also pours millions of dollars into these cities' revenue streams. In 2012, the Washington Economics Group estimated that the Ultra Music Festival contributes approximately \$79 million into the Miami-Dade County economy each year.²⁶ The local economic benefits of music festivals are not limited to major tourist cities like Miami; indeed, dozens of other cities see their economies skyrocket in the weeks surrounding their major festivals. Every spring, some of the best jazz and rock musicians in the world travel to New Orleans, Louisiana, for The New Orleans Jazz & Heritage Festival.²⁷ It is estimated that "Jazz Fest,"²⁸ which began in 1970, now attracts approximately 400,000 attendees and generates approximately \$300 million each year.²⁹ These economic benefits are conspicuous and not just to the residents of a city like New Orleans, which is known for its vibrant live music scene.

Concerts and music festivals provide a stream of income to local food, alcohol, and merchandise vendors, hotels and restaurants, and taxi services. While the album cover and record store advertisements clearly do their parts, an artist's best publicity arguably comes from a great live performance. In addition to increasing their fan bases at music festivals by being exposed to attendees who had never before seen particular artists, most concert and festival promoters allow artists to sell their own merchandise at events.

While the economic benefits of concerts and festivals are plentiful, this sector of the industry has an unfortunate dark side. When thousands of young, dance-hungry patrons congregate in one confined space, health and safety problems are bound to surface. Dangerous drug use at these

²⁵ COACHELLA SPONSORS, <http://www.coachella.com/festival-info/sponsors> (last visited Sept. 21, 2014).

²⁶ Hannah Sampson, *Ultra Music Festival Pours Millions into Economy, Study Says*, MIAMI HERALD (Oct. 10, 2012), <http://www.miamiherald.com/2012/10/10/3042176/ultra-music-festival-pours-millions.html>.

²⁷ NEW ORLEANS JAZZ & HERITAGE FESTIVAL, <http://www.nojazzfest.com> (last visited Sept. 21, 2014).

²⁸ The New Orleans Jazz & Heritage Festival is more commonly known as "Jazz Fest."

²⁹ Adriana Lopez, *New Orleans Jazz Fest Comes Full Circle with Its Mission*, FORBES (May 6, 2013, 4:33 PM), <http://www.forbes.com/sites/adrianalopez/2013/05/06/new-orleans-jazz-fest-comes-full-circle-with-its-mission/>.

events has become a stark reality in recent years; as the public becomes aware of this reality, a looming threat to the live-music industry will continue to grow.

C. The Pervasiveness of Drug Use at Music Festivals Is Substantial.

It was 107 degrees on Governor's Island when twenty-year-old Matthew Rybarczyk collapsed at the 2013 Electric Zoo Festival in New York.³⁰ Fourteen hours after his grandmother visited him in the hospital, the young man was dead.³¹ A significant amount of the party drug, "Molly," was found in his system.³²

Deaths from drug use at music festivals are not uncommon; between March and September of 2013, at least seven people attending electronic dance music ("EDM") festivals died after exhibiting symptoms consistent with "party drug" overdoses.³³ When the death toll reached two at the 2013 Electric Zoo Festival, the entire event was cut short, as the dangers quickly began to outweigh any benefit of following through with the planned set list.³⁴ These tragic losses of life may have drastic effects on the music industry as "[e]xecutives say that deaths like these have the potential to scare off investors and the corporate sponsors that are eager to reach the genre's young, affluent and technologically connected fans."³⁵

Ecstasy, or MDMA, became prevalent in the late 1990s and early 2000s.³⁶ "Molly," which is slang for a pure, powder or crystal form of MDMA,³⁷ has become popular at music festivals in recent years.³⁸ While the media initially associated MDMA with a "deviant youth subculture,"³⁹ often tied to the "rave scene,"⁴⁰ modern EDM has arguably adopted many of the rave scene's problematic aspects, as

³⁰ Sisario & McKinley, Jr., *supra* note 7, at A1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Jon Pareles, *Dancing in the Eternal Present, Before Harsh Reality Intervened*, N.Y. TIMES, Sep. 2, 2013, at C1.

³⁵ Sisario & McKinley, Jr., *supra* note 7, at A1.

³⁶ Deborah Ahrens, *Drug Panics in the Twenty-First Century: Ecstasy, Prescription Drugs, and the Reframing of the War on Drugs*, 6 ALB. GOV'T L. REV. 397, 404 (2013).

³⁷ See DrugFacts: MDMA (Ecstasy or Molly), NATIONAL INSTITUTE ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-or-molly> (last visited Sep. 26, 2014).

³⁸ See Sisario & McKinley, Jr., *supra* note 7, at A1.

³⁹ Ahrens, *supra* note 36, at 412.

⁴⁰ Shadi Kardan, Comment, *The Government's New War on Drugs: Threatening the Right to Dance!*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 99, 100-03 (2003).

evidenced by the aforementioned MDMA-related deaths. Although raves were distinctive in the late 1990s and early 2000s, largely because of the electronic music and “underground” nature of such events,⁴¹ today such music has migrated from the fringes of society to the mainstream music culture.

There is a subtle, yet clearly problematic, endorsement of the rave culture in modern-day EDM. Madonna, known more for her pop music than her recent endeavor into EDM, titled her twelfth studio album “MDNA.”⁴² The pop star’s not-so-subtle play on words demonstrates how the mainstream music culture has come to embrace, albeit not directly, the club drug culture. Madonna, as a major pop star and representative of the mainstream music culture, has perpetuated the normalization of club drug use through her actions. During her 2012 performance at Ultra, Madonna allegedly screamed to the crowd, “How many people in this crowd have seen ‘Molly’?”⁴³

The EDM fan base is growing: as of September 2013, the EDM industry was estimated to be worth \$4.5 billion.⁴⁴ It is no secret that the artists and promoters in the business are aware of the rampant drug use at their festivals, so for the sake of continued growth of the live music industry, these problems must be addressed. And as long as this culture remains the status quo, there is at least one federal law⁴⁵ that poses a significant danger to the music industry.⁴⁶

III. THE CRACK HOUSE STATUTE

A. *The Substance and Purpose of the Original Crack House Statute*

Section (a)(1) of the Anti-Drug Abuse Act of 1986, also known as the “crack house statute,” made it illegal to “knowingly open or maintain any place, for the purpose of manufacturing, distributing, or using any controlled substance.”⁴⁷ Section (a)(2) of the statute made it illegal to

⁴¹ *Id.* at 101.

⁴² MADONNA, MDNA (Interscope Records 2012).

⁴³ Pareles, *supra* note 34, at C1. Madonna is not the only major pop star to make such a reference. “Today, stars like Miley Cyrus and Kanye West allude to molly in songs, and the term turns up repeatedly at festivals, on T-shirts, banners or body paint.” Sisario & McKinley, Jr., *supra* note 7, at A1.

⁴⁴ Sisario & McKinley, Jr., *supra* note 7, at A1.

⁴⁵ *See infra* Part III.

⁴⁶ *See infra* Part IV-V.

⁴⁷ 21 U.S.C. § 856(a)(1) (1986).

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.⁴⁸

The original crack house statute was designed to punish those who used their property to run drug businesses.⁴⁹ Congress explained that one of the 1986 Act's functions was to "outla[w] [the] operation of houses or buildings, so-called 'crack houses,' where 'crack,' cocaine and other drugs are manufactured and used."⁵⁰ The 1986 Act, as the name suggests, addressed a very specific problem during the height of the 1980's crack epidemic.⁵¹ The statute's nickname, the "crack house statute," was wholly appropriate as the original wording of the statute made it very clear whom the statute was targeting.⁵²

B. The 2003 Amendment to the Crack House Statute

In 2003, the statute was amended to its present language.⁵³ Although the "knowingly" and "for the purpose" clauses from the original 1986 version remain in Section (a)(1), the 2003 amendment broadened the statute to also include those who "lease, rent, or use . . . any place, whether permanently or temporarily."⁵⁴ Section (a)(2) of the statute now makes it illegal to

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

⁴⁸ § 856(a)(2).

⁴⁹ See *U.S. v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995).

⁵⁰ 132 CONG. REC. 26,474 (1986).

⁵¹ See 132 CONG. REC. 14,097-99 (1986) (statement of Sen. Chiles); H.R.J. Res. 678, 99th Cong. (1986).

⁵² § 856(a)(2). The original crack house statute targeted specifically those who controlled any building, room, or enclosure who made that property available for the use, distribution, manufacture or storage of illegal drugs.

⁵³ See *Illicit Drug Anti-Proliferation Act of 2003*, S. 226, 108th Cong. (2003).

⁵⁴ 21 U.S.C. § 856(a)(1) (2012).

unlawfully manufacturing, storing, distributing, or using a controlled substance.⁵⁵

A person convicted under this statute may be sentenced to a prison term of up to twenty years or “a fine of not more than \$500,000, or both, or a fine of \$2,000,000 for a person other than an individual.”⁵⁶ Moreover, one who violates this statute may be liable for civil penalties.⁵⁷

The 2003 amendment expanded the range of people who may be affected by the statute, thereby increasing the possibility that Section 856(a)(1) could be deemed unconstitutionally vague if construed expansively.⁵⁸ The specificity of the 1986 crack house statute was diminished, as the 2003 amendment enabled the crack house statute to be applied to “single-event” activities, not just to ongoing drug distribution operations.⁵⁹ The amendment clarified that a “one-time event . . . where the promoter knowingly distributes [drugs] over the course of an evening . . . violates the statute the same as a crack house which is in operation over a period of time.”⁶⁰ Moreover, the amendment made the statute apply to outdoor as well as indoor venues in order to reach rogue promoters that used fields to distribute controlled substances.⁶¹

Drafted at a time when ecstasy usage was considered a grave problem, the 2003 amendment was originally referred to as the RAVE Act, which stood for “Reducing Americans’ Vulnerability to Ecstasy Act.”⁶² The RAVE Act, however, was highly criticized due to the findings section of the bill, which accused property owners and rave promoters of being intentional profiteers of illicit drug use.⁶³ As a result, the RAVE Act died at the end of 2002, until former Senator, and current Vice President, Joe Biden reintroduced a slightly modified version in February of 2003, which took out the controversial findings section.⁶⁴

⁵⁵ 21 U.S.C. § 856(a)(2) (2012) (emphasis added).

⁵⁶ 21 U.S.C. § 856(b) (2012).

⁵⁷ 21 U.S.C. § 856(d) (2012).

⁵⁸ *See* Shetler, F.3d at 1164.

⁵⁹ 149 CONG. REC. 1847 (2003) (statement of Sen. Biden).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See* Reducing Americans’ Vulnerability to Ecstasy (RAVE) Act, H.R. 718, 108th Cong. (2003).

⁶³ *See* 148 CONG. REC. 10,671 (2002).

⁶⁴ *See* Illicit Drug Anti-Proliferation Act of 2003, S. 226, 108th Cong. (2003); 149 CONG. REC. 1846, 1847 (2003) (statement of Sen. Biden).

The bill was re-named the “Illicit Drug Anti-Proliferation Act,” and it was attached as a rider to the Amber Alert Bill, which Congress passed.⁶⁵

C. The Purpose of the 2003 Amendment to the Crack House Statute

Senator Grassley, a co-sponsor of the 2003 bill, explained why the crack house statute needed to be updated: “[I]t is important that we update the laws that have been effectively used to shut down crack houses so they can go after temporary events used as a cover to sell drugs.”⁶⁶ He further explained, “as drug dealers discover new drugs and new methods of pushing their poison, we must make sure our legal system is adequately structured to react appropriately. I believe this legislation does that.”⁶⁷ Senator Biden emphasized that the 2003 version of the statute was specifically intended to prohibit ecstasy use and to simultaneously target the problematic “Rave Scene” at the time:

This legislation arises out of a hearing Senator Grassley and I held in the Senate Caucus on International Narcotics Control in December 2001 on the proliferation of Ecstasy and other club drugs generally, and the role of some promoters of all-night dance parties, known as “raves”, in distributing Ecstasy to young people. Our bill provides Federal prosecutors the tools needed to combat the manufacture, distribution or use of any controlled substance at any venue whose purpose is to engage in illegal narcotics activity.⁶⁸

Senator Grassley noted the dangers of ecstasy and detailed how certain promoters take advantage of the drug’s use at their shows:

Ecstasy raises the heart rate to dangerous levels, and in some cases the heart will stop. It also causes severe dehydration, a condition that is exacerbated by the high levels of physical exertion that happens at raves. Users must constantly drink water in an attempt to cool off—a fact that some unscrupulous event promoters take advantage of by charging exorbitant fees for bottles of

⁶⁵ See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003); 149 CONG. REC. 1847 (2003) (statement of Sen. Biden).

⁶⁶ 149 CONG. REC. 1849 (statement of Sen. Grassley).

⁶⁷ *Id.* at 1848.

⁶⁸ 149 CONG. REC. 1846 (2003) (statement of Sen. Biden).

water, after cutting off water to drinking fountains and rest room sinks. Too often, Ecstasy users collapse and die because their bodies overheat.⁶⁹

Senator Biden addressed, even at this introductory juncture, his critics' concerns with the bill, yet he explicitly denied that the amendment would be used to target concert promoters:

We know that there will always be certain people who will bring drugs into musical or other events and use them without the knowledge or permission of the promoter or club owner. This is not the type of activity that my bill would address. *The purpose of my legislation is not to prosecute legitimate law-abiding managers of stadiums, arenas, performing arts centers, licensed beverage facilities and other venues because of incidental drug use at their events.* In fact, when crafting this legislation, I took steps to ensure that it did not capture such cases. *My 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.*⁷⁰

Senator Biden continuously stressed that the statute would not target responsible promoters,⁷¹ noting, "neither current law nor my bill seeks to punish a promoter for the behavior of their patrons."⁷² He even described the type of promoters he was targeting:

[T]here are a few promoters out there who are taking steps to profit from drug activity at their events. Some of these folks actually distribute drugs themselves or have their staff distribute drugs, get kickbacks from drug sales at their events, have thinly veiled drug messages on their promotional flyers, tell their security to ignore drug use or sales, or send patients who need medical attention because of a drug overdose to a hospital across town so that people won't link emergency room visits with their club.⁷³

⁶⁹ *Id.* at 1848 (statement of Sen. Grassley).

⁷⁰ *Id.* at 1847 (2003) (statement of Sen. Biden) (emphasis added).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

Biden explained that he did not intend to provide “a disincentive for promoters to take steps to protect the public health of their patrons including providing water or air conditioned rooms, making sure that there is an ambulance on the premises, etc.”⁷⁴ He explicitly noted, “there are legitimate reasons for selling water, having a room where people can cool down after dancing, or having an ambulance on hand. Clearly, the presence of any of these things is not enough to signify that an event is ‘for the purpose of’ drug use.”⁷⁵ His statements indicate that the statute was not designed to discourage promoters from taking safety precautions nor was it designed to prevent these types of concerts from taking place. Biden clarified, “If rave promoters and sponsors operate such events as they are so often advertised as places for people to come dance in a safe, drug-free environment then they have nothing to fear from this law. In no way is this bill aimed at stifling any type of music or expression[;] it is only trying to deter illicit drug use and protect kids.”⁷⁶ The legislative record and the wording of the statute itself suggest that its goal was to curb drug use on a larger scale, however, the statute’s ambiguous nature has allowed it to be used for other purposes.

IV. UNITED STATES V. TEBEAU

A. *Introduction*

What happens when the crack house statute is used to go after a concert promoter?⁷⁷ When the court allows the intent requirement of the statute to be satisfied by third parties, it potentially creates a zone of liability where any concert promoter can be convicted under the statute due to the rampant drug use that occurs at many music festivals and concerts. In *United States v. Tebeau*, the Eighth Circuit Court of Appeals affirmed the validity of the crack house statute and effectively deemed an organizer of an outdoor music festival as criminally liable under the crack house statute.⁷⁸ Tebeau’s conviction and the Supreme Court’s denial of his Petition should raise awareness as to the problematic aspects of the statute’s current form.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1847-48.

⁷⁶ *Id.* at 1848.

⁷⁷ See *United States v. Tebeau*, 713 F.3d 955 (8th Cir. 2013).

⁷⁸ *Id.*

B. Facts and Procedural History of United States v. Tebeau

James Tebeau owned approximately three hundred acres of land in Shannon County, Missouri, which he frequently utilized to promote a series of weekend music festivals.⁷⁹ Festival attendees would pay sixty dollars to enter Tebeau's property for three-day festivals, and the number in attendance at each festival ranged from 3,600 to nearly 8,000.⁸⁰ After several drug-related arrests near the property, undercover law enforcement officers conducted an operation at his festivals, making over 150 controlled purchases of illegal drugs.⁸¹ "The officers observed 100 to 200 drug dealers at each festival and estimated that approximately \$500,000 worth of illegal drugs was sold at each event."⁸² The officers witnessed open drug use and open drug sales among festival attendees, as many dealers refrained from using any sort of discretion.⁸³

Tebeau was present at each of these festivals.⁸⁴ Aware that the drug use and drug sales were going on, Tebeau took the precaution to set up a medical facility on the premises known as "Safestock," where attendees who had overdosed on dangerous drugs could be treated.⁸⁵ He instructed his employees that certain types of drugs, including marijuana, LSD, and mushrooms, were permissible at the events.⁸⁶ "According to employees, Tebeau instructed security guards in the camp to move sellers away from the front gates to avoid detection by law enforcement officers."⁸⁷ After officers executed a search warrant in November 2010, Tebeau was later indicted for managing drug-involved premises in violation of 21 U.S.C. § 856 (a)(2).⁸⁸

Tebeau moved to dismiss the charge, arguing that the government did not allege sufficient facts to demonstrate that "he had the specific intent to sell drugs on his property."⁸⁹ After the district court denied the motion, Tebeau entered a conditional guilty plea reserving his right to appeal the motion.⁹⁰ In the plea agreement, the government stipulated that Tebeau had not personally participated in any drug sales, but Tebeau admitted that he had "intended [his property to] be made available" for

⁷⁹ *Id.* at 957.

⁸⁰ *Id.* at 958.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

people “who had the intent to sell and use controlled substances.”⁹¹ Although undercover officers alleged that they made some drug purchases in the presence of festival security, Tebeau did not stipulate to that fact in his plea.⁹² However, he did agree that 700 kilograms of marijuana had likely been distributed on his premises.⁹³

The district court sentenced Tebeau to thirty months imprisonment, two years of supervised release, and a \$50,000 fine, and he was required to forfeit his property to the government.⁹⁴ Tebeau appealed the district court’s denial of his motion to dismiss to the Eighth Circuit Court of Appeals, which affirmed the district court’s finding.⁹⁵ Most notably, the Eighth Circuit concluded that Tebeau did not need to have the illegal purpose proscribed by the statute⁹⁶; rather, the various people who attended the festivals on his property could fulfill the statute’s required illegal purpose.⁹⁷ Tebeau filed a petition for certiorari to the Supreme Court of the United States on July 29, 2013, challenging the Eighth Circuit’s decision.⁹⁸ However, the Supreme Court denied the Petition on October 7, 2013.⁹⁹

C. *Tebeau’s Textual Argument*

Tebeau argued that the district court’s reading of Section 856(a)(2) conflicted with the statute’s textual and legislative history and that the statute should be interpreted to require proof that he specifically intended illegal drugs to be manufactured, stored, distributed, or used on his property.¹⁰⁰ The district court found that no such proof was required; instead, the court found that the statute only required the government to show that Tebeau intended to make his property available for others who had that purpose.¹⁰¹

The Eighth Circuit, without any binding precedent in the context of music festivals, relied on other circuit courts of appeal to determine how

⁹¹ *Id.*

⁹² Transcript of Change of Plea Hearing at 18-20, *United States v. Tebeau*, No. 1:11-cr-00083-SNLJ (E.D. Mo. 2012) (No. 113).

⁹³ *Id.* at 19.

⁹⁴ Transcript of Sentencing Hearing at 18-25, *United States v. Tebeau*, No. 1:11-cr-00083-SNLJ (E.D. Mo. 2012) (No. 101).

⁹⁵ *Tebeau*, 713 F.3d at 963.

⁹⁶ 21 U.S.C. § 856(a)(2) prohibits one to “manage or control any place . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”

⁹⁷ *Tebeau*, 713 F.3d at 961.

⁹⁸ *See generally* Petition for Writ of Certiorari, *supra* note 11.

⁹⁹ *Tebeau v. United States*, 134 S.Ct. 314 (2013).

¹⁰⁰ *Tebeau*, 713 F.3d at 958-59.

¹⁰¹ *Id.* at 959.

to interpret the statute.¹⁰² More specifically, the Eighth Circuit examined the decision in *United States v. Chen*, where the Fifth Circuit Court of Appeals concluded that the government did not need to show that a property owner had the purpose of storing, distributing, using, or manufacturing a controlled substance in order to convict her under Section 856(a)(2).¹⁰³ In *Chen*, the Fifth Circuit concluded, “the phrase *for the purpose of* applies to the person who opens or maintains the place for the illegal activity.”¹⁰⁴ However, the Fifth Circuit also concluded that under Section 856(a)(2), “the person who manages or controls the [property] . . . need not have the express purpose . . . that drug related activity is taking place,” as long as others on the property have that purpose.¹⁰⁵ The Fifth Circuit reasoned, “[i]t is well established that a statute should be construed so that each of its provisions is given its full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided.”¹⁰⁶ Accordingly, the Fifth Circuit found that Section 856 (a)(2) would be redundant if it required the same actor-specific intent already necessitated by Section 856 (a)(1).¹⁰⁷

Moreover, the Eighth Circuit analyzed *United States v. Tamez*, where the Ninth Circuit Court of Appeals concluded that the “‘plain meaning and interrelation of the two [Section] 856 provisions suggest that Section 856(a)(2) does not require proof that the defendant intended to use a property for a prohibited purpose.’”¹⁰⁸ The Eighth Circuit also referenced *United States v. Wilson*, where the Second Circuit Court of Appeals found that any other reading of Section 856(a)(1) and Section 856 (a)(2) would “conflate [the] two subsections, rendering one superfluous.”¹⁰⁹ Based on the reasoning of the Second, Fifth, and Ninth Circuit Courts, the Eighth Circuit found that Section 856 (a)(2) did not require proof that Tebeau had the illegal purpose to use, manufacture, sell, or distribute controlled substances.¹¹⁰ Rather, it was sufficient that Tebeau intended to make his property available to others who had that purpose.¹¹¹

In the Petition, Tebeau argued that, because Section 856 (a)(2) adds “storing” to the list of prohibitions in the statute, that particular provision

¹⁰² *Id.*

¹⁰³ *Id.* (citing *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990)).

¹⁰⁴ *See Chen*, 913 F.2d at 190.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see 21 U.S.C. §§ 856(a)(1)-(2) (2012).

¹⁰⁸ *Tebeau*, 713 F.3d at 960 (quoting *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991)).

¹⁰⁹ *Id.* (quoting *United States v. Wilson*, 503 F.3d 195, 198 (2d Cir. 2007)) (internal quotation marks omitted).

¹¹⁰ *Id.* at 961.

¹¹¹ *Id.*

is not wholly superfluous with Section (a)(1) if read on its own.¹¹² His argument contrasted with the Eighth Circuit's reasoning, which maintained that, because Section 856(a)(1) contained an intent requirement for the actor, an identical requirement in Section 856(a)(2) would be "superfluous" or unnecessary.¹¹³ According to Tebeau, if the actor had as part of his illegal purpose renting the place to another for the purpose of *storing* a controlled substance, that person could be prosecuted only under Section 856 (a)(2) but not under Section 856 (a)(1).¹¹⁴ Tebeau argued that the Eighth Circuit violated a well-established statutory rule: that "identical words used in different parts of the same act are intended to have the same meaning."¹¹⁵ If the prohibited purpose in Section 856 (a)(1) unambiguously applied to the actor in the statute, then Section 856 (a)(2) had to be interpreted in the same manner because it shared the same grammatical structure with Section 856 (a)(1).¹¹⁶ "Although there is some overlap between the two provisions, each section captured [prohibited] conduct that the other did not."¹¹⁷

Finally, Tebeau argued that his interpretation of the statute was consistent with congressional intent¹¹⁸ and was mandated by the rule of lenity.¹¹⁹ Tebeau pointed to former senator, and co-sponsor of the 2003 Amendment to the statute, Joe Biden's comments,¹²⁰ which purportedly underscored his point that the actor in the statute must possess the illegal purpose prohibited by Section 856 (a)(2) to be convicted under the statute.¹²¹

¹¹² See Petition for Writ of Certiorari, *supra* note 11, at 20.

¹¹³ *Tebeau*, 713 F.3d at 960; see also *Wilson*, 503 F.3d at 198; *Chen*, 913 F.2d at 190.

¹¹⁴ Petition for Writ of Certiorari, *supra* note 11, at 8.

¹¹⁵ *Id.* at 20 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)).

¹¹⁶ Petition for Writ of Certiorari, *supra* note 11, at 21. Tebeau argued that the Eighth Circuit essentially read Section 856 (a)(2) as follows: "it shall be unlawful to manage or control . . . and knowingly and intentionally rent, lease, profit from, or make available for use . . . the place [to others who have] the purpose . . ." *Id.*

¹¹⁷ *Id.* at 8; see 21 U.S.C. § 856 (2012). The "storing" prohibition is found in section (a)(2), but not in section (a)(1).

¹¹⁸ See Petition for Writ of Certiorari, *supra* note 11, at 23.

¹¹⁹ See *id.* at 24. "The purposes underlying the rule of lenity [are] to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." See *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

¹²⁰ Petition for Writ of Certiorari, *supra* note 11, at 23; see 149 Cong. Rec. 1847 (2003) (statement of Sen. Biden); see also *infra* Part III-C.

¹²¹ Petition for Writ of Certiorari, *supra* note 11, at 24.

D. *Tebeau's Procedural Argument*

Tebeau also argued that his indictment was deficient pursuant to Rule 7(c)(1) of the Federal Rules of Criminal Procedure¹²² because there was no allegation that Tebeau was personally involved in any illicit drug transaction.¹²³ Therefore, he could not possess the illegal purpose proscribed by the statute.¹²⁴ The government conceded that there were no such allegations but argued that this was irrelevant because the indictment tracked the language of the statute, and the main purpose of many of the campers who attended the festival was to sell and use drugs.¹²⁵ The Eighth Circuit rejected Tebeau's procedural argument, concluding "[t]he indictment sufficiently described Tebeau's offense conduct in making his property available for illegal use."¹²⁶

E. *Tebeau's Due Process Argument*

Tebeau further argued that the court's interpretation of the statute as lacking a specific intent requirement rendered the statute unconstitutionally vague in violation of the Fifth Amendment.¹²⁷ Specifically, Tebeau contended that by allowing the statute's intent requirement to be satisfied by third parties, the defendant does not receive the necessary "notice" required by due process.¹²⁸ Such an interpretation would enable the government to enforce the statute selectively, thus giving festival promoters no guidance as to what level of precautions they could lawfully make available to treat attendees who use drugs at music festivals.¹²⁹

The Eighth Circuit, however, found that the statute provided sufficient notice.¹³⁰ The court utilized the Sixth Circuit Court of Appeals' decision in *United States v. Rosa*, which found that Section 856(a)(2) "furnishes fair notice that it is illegal for a homeowner to knowingly and intentionally allow her house to be used in the distribution of drugs."¹³¹

¹²² Fed. R. Crim. P. 7(c)(1). "The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means."

Id.

¹²³ Petition for Writ of Certiorari, *supra* note 11, at 6.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Tebeau*, 713 F.3d at 963.

¹²⁷ *Id.* at 961; *see* U.S. CONST. amend. V.

¹²⁸ *Tebeau*, 713 F.3d at 961.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (quoting *United States v. Rosa*, 50 F. App'x 226, 227 (6th Cir. 2008)).

Based on the *Rosa* reasoning, the Eighth Circuit found that “the inclusion of a specific *mens rea* element¹³² provided[ed] fair notice to Tebeau and others that certain conduct [addressed in the statute] is prohibited.”¹³³ The court found no evidence to support the proposition that Section 856(a)(2) itself led to any arbitrary enforcement.¹³⁴ The Eighth Circuit concluded that the open and obvious drug-use taking place on Tebeau’s property was “precisely the conduct prohibited by [Section] 856(a)(2)’s plain language, and the statute therefore was not unconstitutionally vague as applied to Tebeau.”¹³⁵

The court failed to address what precautions a property owner could take to avoid liability under the crack house statute.¹³⁶ Tebeau asserted that the court mistakenly dismissed his arbitrary enforcement claim, when it summarily concluded that he had provided no evidentiary support for his argument.¹³⁷ Notably, the court failed to address his claim that the prosecution did not comport with existing DEA guidelines¹³⁸ and that it did not address the many instances of music festivals in Missouri and surrounding states with similar drug-related problems but no prosecutions.¹³⁹

Tebeau relied on Supreme Court reasoning that “[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates this first essential of due process of law.”¹⁴⁰ He distinguished *Rosa* on the basis that the defendant in that case allowed people to use and sell drugs in her house.¹⁴¹ Such a distinction was critical because controlling activities that occur in one’s house is substantially different than controlling activities of thousands of people spread over a 350-acre property.¹⁴²

¹³² BLACK’S LAW DICTIONARY 1134 (10th ed. 2014) (defining “*mens rea*” as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.”).

¹³³ *Tebeau*, 713 F.3d at 961.

¹³⁴ *Id.*

¹³⁵ *Id.* at 961-62.

¹³⁶ *See* Petition for Writ of Certiorari, *supra* note 11, at 14.

¹³⁷ *See id.*

¹³⁸ “Tebeau noted that his prosecution did not appear to follow the guidelines published by the Drug Enforcement Administration . . . on its own website.” *Id.* at 9-10.

¹³⁹ *Id.* at 14. “Tebeau noted that no other concert promoter and/or outdoor music festival organizer had been prosecuted in this district or surrounding district . . . Tebeau introduced evidence of a number of music festivals in Missouri and surrounding states where significant illicit drug activity was taking place, including drug-related injuries and deaths.” *Id.* at 10.

¹⁴⁰ *Id.* at 25 (citing *Connolly v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926)).

¹⁴¹ *Id.* at 26; *Rosa*, 50 F. App’x at 227-28.

¹⁴² *Id.*

Tebeau supplemented his vagueness argument by contending that the precautions he took to ensure the safety of festival attendees were used against him to establish his liability, just as they were used against the owners of the State Palace Theatre in the case of *McClure v. Ashcroft*.¹⁴³ In *McClure*, an analogous situation existed where owners of a theatre were prosecuted in violation of Section 856 (a)(2) after an investigation showed that approximately seventy patrons had been transported from their theatre to the hospital for drug overdoses.¹⁴⁴ Because of the statutory interpretation advanced in *Chen*, the government was able to prosecute the theatre's owners even though they were not personally involved in the sale or distribution of drugs.¹⁴⁵

Despite precautions taken by the owners, it was not enough to avoid liability; rather, such precautions were used against the owners to establish liability. For example, the theater had medical personnel and an ambulance service on hand to assist or transport anyone in need. Yet, the Government argued that this very fact showed that the owners and promoters knew that patrons were likely to suffer the effects of drugs and alcohol.¹⁴⁶

By allowing the purpose element to be satisfied by the acts of others, a property owner is placed in a "Catch 22."¹⁴⁷ If venue managers and concert promoters do not provide safety precautions for the inevitable drug users at their events, they may be prosecuted or sued for their failure to do so; but, if they take those precautions, Tebeau argued, it could be used against them for Section 856 (a)(2) purposes.¹⁴⁸ "Absent such a safe harbor, the only guaranteed way for a music promoter . . . to avoid liability under the [crack house] statute is to not hold the event at all."¹⁴⁹

¹⁴³ *Id.* at 28; see generally *McClure v. Ashcroft* 335 F.3d 404 (5th Cir. 2003).

¹⁴⁴ *McClure*, 335 F.3d at 406. The Fifth Circuit dismissed *McClure*, finding it non-justiciable because "in a civil proceeding, at least under circumstances similar to those presented in this action, a third-party collateral attack on a final criminal judgment is nonjusticiable." *Id.* at 414.

¹⁴⁵ Petition for Writ of Certiorari, *supra* note 11, at 28.

¹⁴⁶ *Id.* (citing *McClure v. Ashcroft*, No. CIV A 01-2573, 2002 WL 188410 (E.D. La. Feb. 1, 2002)).

¹⁴⁷ *Id.* at 29.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

F. Tebeau's First Amendment Argument

Because the statute leaves a promoter or venue manager with little guidance how to avoid liability, Tebeau contended, the Eighth Circuit's interpretation of Section 856(a)(2) violates his First Amendment rights by effectively preventing him, as well as other promoters, from organizing music festivals.¹⁵⁰ The cumulative effect of the court's statutory interpretation would be the "chilling" of free speech, particularly the freedom of expression associated with music festivals.¹⁵¹ In analyzing his argument, the Eighth Circuit utilized the standard set forth in *United States v. O'Brien*:

Where "'speech' and 'nonspeech' elements are combined in the same course of conduct," the government regulation is justified if (1) "it is within the constitutional power of the Government," (2) "it furthers an important or substantial governmental interest," (3) "the governmental interest is unrelated to the suppression of free expression," and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."¹⁵²

In Tebeau's case, only the third and fourth *O'Brien* elements are at issue.¹⁵³ With respect to the third element, Tebeau argued that Section 856(a)(2) fails "because it was originally aimed at eliminating music festivals with high drug use," and music festivals are a form of protected speech.¹⁵⁴ He further contended that "Section 856(a)(2) . . . fails to satisfy the fourth element because it too broadly punishes organizers and promoters of music festivals."¹⁵⁵ The Eighth Circuit, however, concluded the statute satisfied the *O'Brien* test and was therefore consistent with the First Amendment.¹⁵⁶ The court reasoned that "the government interest in regulating drug use is unrelated to any incidental impact the law has on music festivals"¹⁵⁷ and that "a prohibition on knowingly making premises available for drug use imposes only an incidental restriction on

¹⁵⁰ *Tebeau*, 713 F.3d at 962.

¹⁵¹ *Id.*; Petition for Writ of Certiorari, *supra* note 11, at 10.

¹⁵² *Tebeau*, 713 F.3d at 962 (quoting *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

music festival hosts which does not ‘significantly compromise’ their First Amendment rights.”¹⁵⁸ The Eighth Circuit also found that Tebeau’s concern about the statute’s “chilling effect” was overstated because he did not cite to any “case in which the government has charged another music festival organizer under the statute, and [because his] own involvement in the drug activities . . . was extensive.”¹⁵⁹

“Because a property owner is left guessing how to avoid liability,” owners might simply take the “prudent approach and not hold a musical event at all,” which would lead to the “chilling” effect of first amendment free speech.¹⁶⁰ Tebeau argued that “the Eighth Circuit conducted a superficial analysis” of the two *O’Brien* prongs at issue¹⁶¹ and that the Eighth Circuit failed to apply the court’s interpretation of the *O’Brien* test as modified in *Clark v. Community for Creative Non-Violence*.¹⁶² Tebeau claimed that the government could not pass the standard set forth in *Clark*, namely, that “in analyzing content neutral regulations the balancing must also take into account whether such regulations leave open ample alternative channels for communication of the information.”¹⁶³

In *United States v. Alvarez*, the Supreme Court of the United States explained, “the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.”¹⁶⁴ Tebeau argued that by adhering to the plain language of the crack house statute and by applying the *mens rea* requirement of the illegal purpose to the actor in the statute, the appropriate “breathing room” would be given to important First Amendment rights—playing and listening to music.¹⁶⁵ With an additional *mens rea* requirement in tow, promoters could continue holding festivals without the cloud of uncertainty concerning liability under the crack house statute.¹⁶⁶

¹⁵⁸ *Id.* (citing *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)).

¹⁵⁹ *Id.*

¹⁶⁰ Petition for Writ of Certiorari, *supra* note 11, at 10; *see generally* *N.Y. Times v. Sullivan*, 376 U.S. 254, 300-01 (1964) (The court noted its concern that an Alabama libel law would “chill” free speech. The court found the law unconstitutional).

¹⁶¹ Petition for Writ of Certiorari, *supra* note 11, at 30.

¹⁶² *Id.*; *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984)).

¹⁶³ Petition for Writ of Certiorari, *supra* note 11, at 30; *see Clark*, 468 U.S. at 293.

¹⁶⁴ *See* Petition for Writ of Certiorari, *supra* note 11, at 31-32 (quoting *United States v. Alvarez*, 132 S. Ct. 2537 (2012)). In *Alvarez*, the court held that the Stolen Valor Act was a content-based restriction on free speech in violation of the First Amendment.

¹⁶⁵ *Id.* at 32.

¹⁶⁶ *Id.*

V. ARGUMENT

A. *The Supreme Court Should Have Granted Tebeau's Petition for Certiorari.*

Because some of Tebeau's arguments have substantial merit and because of the potential implications of the decision on the music industry, there was significant reason for the Supreme Court to have granted his Petition and reviewed the Eighth Circuit's decision. In the Petition, Tebeau argued:

The Court should grant certiorari because the Eighth Circuit's decision threatens important public speech rights and creates uncertainty amongst musical festival promoters over what, if any, precautions can be taken to avoid liability under the crack house statute. Moreover, the Eighth Circuit's decision is inconsistent with this Court's prior decisions regarding statutory construction and the proper analysis to be conducted for vagueness and First Amendment challenges.¹⁶⁷

There is a three-part inquiry that must be satisfied in order for the Supreme Court to grant certiorari:

[T]here must be a reasonable probability that four [m]embers of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.¹⁶⁸

Tebeau's prosecution will likely set a dangerous precedent for other concert promoters.¹⁶⁹ Under the Eighth Circuit's opinion, a concert "promoter [could] be held liable under the statute if he makes his land available for others to use [illegal drugs], even though his primary purpose is to host a musical event."¹⁷⁰ Tebeau's argument that, "the Court should address this issue now and not wait for such an issue to

¹⁶⁷ *Id.* at 15.

¹⁶⁸ *See* *Beaver v. Netherland*, 101 F.3d 977, 978-79 (5th Cir. 1996) (citing *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983)).

¹⁶⁹ *See* Petition for Writ of Certiorari, *supra* note 11, at 17.

¹⁷⁰ *Id.*

percolate in the other circuits,”¹⁷¹ was quite tangible due to the realities of the live music industry today and the uncertainties created by the current version of the crack house statute.

As discussed previously,¹⁷² drug use at music festivals is prevalent and the music industry is deriving more of its profits than ever from its live music sector. Concert promoters and venue managers are not naïve; they are aware that drug use and drug sales are transpiring, despite any efforts to thwart such activities. Tebeau’s conviction and the Eighth Circuit’s affirmance of the conviction appear to be focused on Tebeau’s awareness that drug sales were going on at his festivals. While curtailing the distribution of drugs appears to be at the heart of the crack house statute,¹⁷³ what the Eighth Circuit and what Tebeau’s petition fail to address substantially is that the statute also makes it illegal to “make available . . . the place for the purpose of . . . *using* a controlled substance.”¹⁷⁴

Although most concert promoters are not as lax as Tebeau regarding drug *distribution* at festivals, drug *use* is inevitably happening. The primary purpose of these legitimate promoters is to promote and to present live music, but, because the Eighth Circuit’s reasoning was not overruled and because authorities are able to attack promoters for “knowingly” making their property available for drug use, these promoters may be subject to prosecution under the crack house statute based on the same reasoning by which Tebeau was convicted. The legal difference between the two potential situations—where promoters are facilitating the distribution or the use of drugs at their venues—is simply that one focuses on the “distribution” provision of Section (a)(2), while the other focuses on the “using a controlled substance” provision of Section (a)(2). Without a controlling decision as to how this statute ought to be interpreted and enforced in all federal Circuit Courts of Appeal, Tebeau is justified in contending that concert promoters are left with little guidance on avoiding prosecution under the crack house statute.

Although it is fairly clear that Tebeau made his property available for drug use and drug distribution, the Supreme Court should have granted certiorari in order to address these fundamental inconsistencies in the current version of the crack house statute, which may very well lead to its arbitrary enforcement. Under the Eighth Circuit’s decision, the crack house statute could potentially be used to prosecute any concert promoter or venue owner presiding over an event where drug use is occurring.

¹⁷¹ *Id.* at 18.

¹⁷² *See infra* Part II-A, C.

¹⁷³ *See* 21 U.S.C. § 856(a)(2) (2012); 149 CONG. REC. 1846-48 (2003) (statement of Sen. Biden).

¹⁷⁴ 149 CONG. REC. 1846 (2003) (statement of Sen. Biden) (emphasis added).

Such a result will likely affect the entire live music industry, which will in turn hurt the entertainment industry and the many local economies benefitting from the substantial revenue live music produces.

B. The Potential Implications of the Tebeau Decision Are Worrisome.

In an age of a growing live music economy and an even faster growing EDM market, copious “club drug” use is an inevitable problem. Due to the significant health risks associated with such drug use and the substantial number of drug-related deaths at EDM festivals,¹⁷⁵ the government may have good reason to eventually pursue and prosecute concert promoters and venue owners under the authority of the crack house statute. The constituents of various congressional districts may reasonably call on their representatives to rectify this problem, especially as drug overdoses at festivals continue to be reported in the news. Concert promoters and venue managers may very well become unwarranted targets in the fight against dangerous “club drug” use.

The *Tebeau* decision may yield a limitless number of concert promoter and venue manager arrests, even in situations where the facts are not as compelling as they were in *Tebeau*’s case. As long as a third-party can satisfy the “intent” requirement, concert promoters will be susceptible to prosecution under Section 856(a)(2). This is unfortunate for many reasons. In *Tebeau*’s case, he actually took several, arguably positive, safety precautions. He explicitly prohibited what he deemed to be more “dangerous” drugs like crack-cocaine, methamphetamine, and nitrous oxide at his events.¹⁷⁶ Cognizant of the on-going drug use, he set up medical aid facilities to treat patrons who had overdosed after ingesting illegal drugs.¹⁷⁷ He instructed security to remove people who were out of control.¹⁷⁸ He tried, in his own, however misguided, way to create a safe environment for his patrons to enjoy music, which he claimed to be the primary purpose of his festivals.¹⁷⁹

While the evidence shows that *Tebeau* intended to make his property available for drug use, an affirmance of his conviction, without further guidelines for concert promoters, may have dire consequences for the industry. The fact that it is not possible to completely eliminate drug use at music festivals was acknowledged by the applicable statute’s co-

¹⁷⁵ Sisario & McKinley, Jr., *supra* note 7, at A1.

¹⁷⁶ *Tebeau*, 713 F.3d at 958.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Tebeau*’s Petition repeatedly alleged that his primary purpose was to produce a music festival, not to provide a venue for people to use drugs.

sponsors.¹⁸⁰ For the same reason, it is nearly impossible to eliminate drug sales at music festivals. Because the statute prohibits making a property available for drug use and because the *Tebeau* case allows for a promoter's conviction even where such an activity is not the primary purpose of an event, the promoters of certain musical genres should prepare for a series of future prosecutions as long as the *Tebeau* decision stands and the text of Section 856 remains unchanged.

Further, given that the statute's broader purpose is to curb drug use and drug sales¹⁸¹ and that the 2003 amendment expanded the statute to apply to outdoor festivals,¹⁸² it is reasonable to expect the government to pursue concert promoters and venue managers who may be associated with genres of music known for substantial drug use. Just as ecstasy use at raves was the public policy concern in 2003,¹⁸³ the increasing number of deaths at EDM festivals today will likely catch the government's attention and may turn into someone's political agenda.

The government may plausibly rely on the rampant drug use and deaths at EDM concerns as ammunition to prosecute promoters of other genres of music. Consider the promoters of Phish concerts.¹⁸⁴ It is fairly common knowledge in the live music community that illegal drug use is common at Phish shows. As VICE writer Dick Corvette jested, "One does not simply walk into a Phish concert . . . not on drugs."¹⁸⁵ Corvette's VICE article highlights his experience attending his first Phish show and the market of illegal drugs available there:

As with the Grateful Dead, there's a weird little economy that operates within the context of Phish. People follow the band around, and then other people follow those people around selling stuff to the people following Phish around. It's magical in its own way, and more than a little exploitative. One of these streets, and by far the most interesting one is called Shakedown Street, which if you've ever been to a Phish show (or Bonnaroo) before, is the "street" (read: row of cars) that you can buy drugs and other stuff on.¹⁸⁶

¹⁸⁰ 149 CONG. REC. 1847 (2003) (statement of Sen. Biden).

¹⁸¹ See *infra* Part III-C.

¹⁸² 149 CONG. REC. 1847.

¹⁸³ *Id.* at 1847-48.

¹⁸⁴ See Dick Corvette, *I Survived A Phish Show*, VICE (Jul. 11, 2012), <http://www.vice.com/read/i-survived-a-phish-show>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Due to the common knowledge that drug use occurs among the fans of many varieties of musical genres, it is foreseeable under a *Tebeau* regime that the promoters of these concerts, who are certainly aware of the inherent drug use, will be prosecuted under the crack house statute. During the first three nights of Phish's 2013 Madison Square Garden residency, at least 228 fans were arrested on drug charges.¹⁸⁷ This Note is not advocating for the legalization of drugs¹⁸⁸ but rather for a realistic assessment of the pervasiveness of drug use at many concerts and music festivals. Phish is merely a paradigmatic example of drug use being associated with a band's fan base.¹⁸⁹ This example emphasizes the facts that drug use and drug sales are occurring, concert promoters are aware of their occurrence, and such a reality breeds potential abuse of the crack house statute by authorities beyond the envisioned legislative purpose.

While the potential for increased prosecution against promoters becomes a distinct possibility in the aftermath of the *Tebeau* decision, the precise goals of the statute's co-sponsors¹⁹⁰ remain overlooked. Senators Biden and Grassley emphasized that the statute was crafted to go after (1) promoters who seek to "profit" from drugs being used and sold at their events and (2) those individuals whose main purpose is to provide a venue for such activities.¹⁹¹ Rather than accomplish these goals, in upholding *Tebeau*'s conviction and rejecting his Petition, the Supreme Court implicitly authorizes the punishment of a promoter (1) who shared in none of the profits from the drug sales at his event and (2) whose main purpose was to merely facilitate a music festival. The affirmance of *Tebeau*'s conviction, therefore, has the effect of punishing the sort of promoter whom the statute was *not* designed to pursue.

C. *The Crack House Statute Threatens the Profitability of the Live Music Industry.*

The *Tebeau* case primarily addresses the criminal repercussions for a concert promoter for violating Section 856, but early critics of the 2003 version of the statute recognized the dangers of the civil penalties for

¹⁸⁷ Eli Rosenberg & Michael Schwirtz, *Phish Fans Encounter Crackdown at Garden*, N.Y. TIMES, Jan. 1, 2014, at A14.

¹⁸⁸ But see, e.g., David Elkins, *Drug Legalization: Cost Effective and Morally Permissible*, 32 B.C. L. REV. 575 (1991); James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607 (1990); Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242 (1991).

¹⁸⁹ It must be noted that I personally have several friends who are life-long Phish fans, and they do *not* use illegal drugs.

¹⁹⁰ 149 CONG. REC. 1846-49 (2003) (statements of Sen. Biden and Sen. Grassley).

¹⁹¹ *Id.*

which the statute provides.¹⁹² What will happen once a few more concert promoters are criminally prosecuted under the crack house statute and the families of drug overdose victims realize that those promoters are also liable for civil penalties? In addition to possible wrongful death suits and criminal prosecutions, promoters of all kinds could potentially face a series of lawsuits under the crack house statute.

Rather than attracting additional corporate sponsors, the existing sponsors previously mentioned in this Note¹⁹³ may shy away from such involvement once they realize that the promoters with whom they are doing business are civilly and criminally liable under the statute. Under Section 856 (d)(2), “[i]f a civil penalty is calculated . . . and there is more than [one] defendant, the court may apportion the penalty between multiple violators, but each violator shall be jointly and severally liable for the civil penalty under this subsection.”¹⁹⁴ If sponsors are determined liable as co-defendants, their wallets, in addition to their reputations, will likely suffer.

While there is no guarantee that such arrests or lawsuits will continue to occur, recent deaths at EDM festivals¹⁹⁵ and the rising popularity of the genre¹⁹⁶ will likely prompt awareness of the crack house statute under which festival promoters may be prosecuted. Although Tebeau is not a “major” concert promoter like Live Nation Entertainment,¹⁹⁷ his conviction should sound the alarm bells for corporate concert promotion companies and their sponsors. If the government can make a case, with analogous facts to the *Tebeau* precedent, against promoters who are aware of the drug use present at their festivals, it is only a matter of time before the major promoters and venue managers are attacked.

The dangers of “club drugs,” like ecstasy, have been a federal public policy concern since the crack house statute was amended in 2003.¹⁹⁸ As the popularity of EDM continues to evolve, there is good reason to believe that the government’s next target for prosecution could be EDM concerts,¹⁹⁹ in the same manner “raves” were targeted back in 2003.²⁰⁰ As the profitability of concerts and music festivals continues to grow and these event revenues continue to support the music industry, the threat of

¹⁹² 149 CONG. REC. 9378 (2003) (statement of Sen. Leahy).

¹⁹³ See *infra* Part II-A.

¹⁹⁴ 21 U.S.C. § 856(d)(2) (2012).

¹⁹⁵ Sisario & McKinley, Jr., *supra* note 7 at, A1.

¹⁹⁶ See *infra* Part II-C.

¹⁹⁷ See *infra* Part II-A.

¹⁹⁸ See 149 CONG. REC. 1846-49 (2003) (statements of Sen. Biden and Sen. Grassley).

¹⁹⁹ Other musical genres, known for substantial drug use, may also be targeted. See *infra* Part V-B.

²⁰⁰ See 149 CONG. REC. at 1847-48; see also *infra* Part III-C.

major promoters and venue managers being arrested and sued, combined with the possibility of major sponsors abandoning their interest in live music, may have extremely damaging effects on the industry and reverse the positive industry trends of the last several years.

D. The Music Industry Should Lobby on Tebeau's Behalf.

As demonstrated, Tebeau's case is representative of the dangerous path that lies ahead for the live music industry.²⁰¹ It is in the interest of the industry, and of the many sectors of the economy that profit from live music, to lobby in support of Tebeau's contentions and to raise awareness of the issues at hand. To be successful in their efforts, these potential Tebeau supporters should be aware that although Tebeau put forth several respectable statutory arguments that can greatly help their cause, his conviction was likely justified.

Because Tebeau allegedly gave his security staff clear permission to allow certain types of drug sales at his events,²⁰² it would have been very difficult to overturn the conviction under the current version of Section 856(a)(2). Although Tebeau did not profit from the drug sales directly,²⁰³ he arguably profited indirectly because certain drug dealers, who would have likely known about the festival security's laissez faire attitude toward drugs like marijuana, mushrooms, and LSD, likely paid for admission to the festival for the specific purpose of selling illegal drugs. Tebeau's best chance to overturn his conviction would have been to focus on his arguments that the statute is unconstitutionally vague and that its effects are contrary to the statute's purpose.

Because a festival promoter or venue manager can be held liable for the acts of others who use his property, there is little guidance as to what precautions ought to be taken to avoid liability under the statute. While the major concert promoters take significantly more safety precautions than Tebeau did with regard to drug sales at their events, Tebeau's proponents can argue that, under the statute, the commonplace nature of drug use at such events remains problematic. As long as the current iteration of the statute remains and the *Tebeau* precedent stands, the shadow of his conviction will loom over concert promoters nationwide who surely cannot prevent all drug distribution and use at their events.

Although Tebeau's First Amendment argument may appear overstated,²⁰⁴ the inevitability of pervasive drug use at many music festivals may lead certain promoters and venue managers to abandon

²⁰¹ See *infra* Part V-C.

²⁰² *Tebeau*, 713 F.3d at 958.

²⁰³ *Id.*

²⁰⁴ See *id.* at 962.

specific endeavors for fear of prosecution, with the resultant effect being the “chilling” of free speech.²⁰⁵ In the Petition, Tebeau should have dedicated more time to this argument and should have provided the Supreme Court with the factual background highlighting the substantial scope of the statute’s reach. The cumulative effects of a *Tebeau* precedent may very well curb the number of music festivals and concerts in certain genres of music for as long as promoters and venue managers lack the guidelines necessary to take sufficient precautions to immunize themselves against prosecution under the statute.

Moreover, Tebeau’s proponents should dissect both the 1986 version and the 2003 version of the statute and emphasize the reasons and purpose for each version’s enactment.²⁰⁶ They should argue, in detail, that the goals of the 2003 version are not being realized by the *Tebeau* decision. Just as the 1986 version was meant to address a specific problem dealing with crack houses,²⁰⁷ the 2003 version was meant to address a specific problem dealing with high instances of ecstasy use among young people in the rave scene.²⁰⁸ Congressional intent for both of these bills focused on cutting down the instances of drug use, the specific drug depending on the time period.²⁰⁹ If legitimate promoters and venue managers are attacked under Section 856 and legitimate venues are shut down, it is reasonable to surmise that young people will seek alternative, illegitimate venues to enjoy their music and to potentially use drugs. The more guidance and support the government can give to legitimate promoters and venue managers, the more the congressional intent of the statute can be realized.

Lobbyists on Tebeau’s behalf should not underestimate the potentially devastating impact on certain local economies that may result from the Supreme Court’s decision to let the Eighth Circuit’s holding stand. While Tebeau’s festivals took place in rural Missouri,²¹⁰ host cities of major festivals around the nation, which have grown accustomed to the jobs and economic boost that such festivals yield,²¹¹ may be significantly affected if the festivals were substantially scaled back or fully shut down. The impact on the national economy could be substantial, as the live music industry has come to generate billions of dollars per year.²¹²

²⁰⁵ See *infra* Part IV-F.

²⁰⁶ See *infra* Part III-A, C.

²⁰⁷ See *infra* Part III-A.

²⁰⁸ See *infra* Part III-C.

²⁰⁹ See *infra* Part III-A, C.

²¹⁰ *Tebeau*, 713 F.3d at 957.

²¹¹ See *infra* Part II-B.

²¹² See *infra* Part II-A-B.

Moreover, as long as the statute is not applied universally,²¹³ and only certain promoters are prosecuted under its current form, it leaves open the potential judicial discretion that allows a court to twist the content of the statute to reach a variety of conclusions in different situations. Music industry lobbyists must stress that if Section 856 were actually applied universally under the *Tebeau* rationale, **all promoters aware of drug use at their festivals could theoretically be prosecuted**. Based on the realities of the live music culture today and the fact that most promoters and venue managers are aware of what is going on, such a class of potential convicts would be enormous.

E. Popular Culture's Acceptance of Drug Use Is Problematic.

Clearly, music festivals and concerts need to be made safer, and attacking the drug use and drug sales at these events seems to be a rational method of achieving such a goal. The 2003 amendment to the crack house statute, while primarily aimed at rogue concert promoters,²¹⁴ was also an attempt to attack the “club drug” epidemic on a larger scale.²¹⁵ When addressing some of the critics of his bill, Senator Biden explained,

the answer to the problem of drug use at raves is not simply to prosecute irresponsible rave promoters and those who distribute drugs. There is also a responsibility to raise awareness among parents, teachers, students, coaches, religious leaders, etc. about the dangers of the drugs used and sold at raves.²¹⁶

Senator Grassley noted the problematic acceptance of such drug use among young people claiming, “[m]any young people perceive Ecstasy as harmless.”²¹⁷ The social and cultural acceptance of Ecstasy has arguably increased since the EDM scene emerged from the underground to the mainstream. Now, young people are ingesting MDMA at major music festivals²¹⁸ rather than at “underground raves.”²¹⁹ While the statute’s co-founders sought to raise awareness of the dangers of club

²¹³ An underlying theme of this Note is that the government chose, selectively, to prosecute Tebeau under the statute predominantly because he was aware of the drug sales going on at his festivals and did little to prevent it.

²¹⁴ See *infra* Part III-C.

²¹⁵ 149 CONG. REC. 1847 (2003) (statement of Sen. Biden).

²¹⁶ *Id.* at 1848.

²¹⁷ *Id.* at 1849 (statement of Sen. Grassley).

²¹⁸ See Sisario & McKinley, Jr., *supra* note 7, at A1; see also *infra* Part II-C.

²¹⁹ See 149 CONG. REC. 1846 (2003) (statement of Sen. Biden).

drugs among “parents, teachers, [and] students,”²²⁰ a more concerted effort must be made to address the actual festival attendees. It would be in the best interest of all involved if the amount of drug use in the live music scene were curtailed. In order to do this successfully, upgrading standard security measures at concerts and music festivals will likely be insufficient. The culture itself needs to change.

Madonna’s 2012 antics and her decision to title her album “MDNA”²²¹ exemplify the popular culture’s acceptance of “club drug” use.²²² She provides an excellent example of precise behavior that musicians should avoid in front of impressionable, young music fans. Musicians like Madonna and EDM DJs like Calvin Harris have the power and influence to help diminish the acceptance of ecstasy in the EDM culture. These artists have the opportunity to highlight the dangers of “club drugs” and to encourage their fans to enjoy their music without the “aid” of those drugs. The music industry should give serious consideration to a marketing campaign demonizing the use of these drugs in a similar fashion to anti-cigarette and drunk driving campaigns that have become so prevalent in our society.

In the same way many famous rappers have been vocal proponents in anti-violence campaigns, often expressing such sentiments in their songs,²²³ EDM artists have a real opportunity to make a difference. Although such an idealistic and likely all-too-hopeful plan to help shape the culture may be unlikely to succeed without the backing of serious players in the industry, it just may suffice for a new beginning. However, until a plan with similar goals gets moving and has time to yield results, drug use will remain rampant, and concert promoters and venue managers will consequently remain vulnerable to prosecution.

F. There is an Inherent Problem With the Current Wording of the Statute.

Tebeau presents a valid argument regarding the unambiguous nature of the statute because the statute’s language is clear on its face.²²⁴ Although promoters and venue managers are undoubtedly aware that

²²⁰ *Id.* at 1848.

²²¹ MADONNA, *MDNA* (Interscope Records) (2012).

²²² *See infra* Part II-C.

²²³ *See, e.g.,* NAS, *I Gave You Power*, on *IT WAS WRITTEN* (Columbia Records 1996) (rapping about the horrors of gun violence growing up in New York); JAY-Z AND KANYE WEST, *Murder to Excellence*, on *WATCH THE THRONE* (Def Jam Records 2011) (decrying the rampant gun violence in Chicago, IL and its effects); SNOOP LION, *No Guns Allowed*, on *REINCARNATED* (RCA Records 2013) (calling for no more gun violence).

²²⁴ *See* 21 U.S.C. § 856 (a)(2); *See* Petition for Writ of Certiorari, *supra* note 11, at 9-10.

illegal activities are occurring at certain events, this awareness does not mean that they are *intentionally* making the venue available for that *purpose* as the statute prohibits.²²⁵ This begs the question of whether the Eighth Circuit's reading of the statute can be deemed an example of excessive judicial discretion. By allowing the "intention" requirement of the statute to be substituted by third parties, the precise wording of the statute appears to be ultimately ignored.

If the goal of the statute is to curb drug use and drug sales,²²⁶ then the repercussions for violating the statute should be designed to achieve that purpose. Punishing promoters and venue managers for activities that will inevitably occur at such events hardly accomplishes that goal. As the recent deaths at music festivals have shown, the current version of the statute is doing little, if anything, to keep festival patrons from using dangerous drugs. The focus of the concert promoters and venue managers should be on curtailing the drug use and drug sales at these festivals, and the statute needs to help facilitate such efforts. Searches by security, removal of overly intoxicated patrons, and medical aid stations are all necessities that the current version of the statute fails to address.

Rather than being used merely to prosecute concert promoters and venue managers, the statute should provide guidelines for these actors to appropriately curb the drug use and drug sales at their events. As written, the statute provides a blanket provision that gives no such specifications. Until the current version is amended, the state interest of curbing drug use is not being achieved, and promoters are exposed to arbitrary prosecution. If courts are attributing the statutory "intention" requirement to third parties, an additional legislative provision to the statute is necessary to prevent inequitable application.

G. *The Best Solution Is to Amend the Statute, Again.*

In order to address all of these issues in a permanent and substantial fashion, a simple reversal of the *Tebeau* decision by the Supreme Court may not have sufficed. If the Court had taken the case and issued an opinion, concert promoters would likely still have little guidance about how to avoid liability while simultaneously providing the safest possible environment for their patrons. To avoid such a situation, Congress should consider another amendment to the crack house statute.²²⁷ In the same fashion that the 2003 amendment sought to address a pressing issue at

²²⁵ See 21 U.S.C. § 856 (a)(2).

²²⁶ See *infra* Part III-C.

²²⁷ See, *c.f.*, Lindsay M. Korey Lefteroff, *Excessive Heckling and Violent Behavior at Sporting Events: A Legal Solution?*, 14 U. MIAMI BUS. L. REV. 119, 137 (2005).

the time,²²⁸ a 2014 amendment to the statute could address the dilemma that has presented itself today. My proposed amendment to Section 856 (a)(2) would make it illegal to:

[M]anage or control any place . . . and knowingly and intentionally . . . make available for use . . . the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance²²⁹ **[if the actor does not take reasonable precautions (1) to prevent these activities and (2) to provide necessary health and safety measures for patrons].**

Such a “reasonableness” test allows for different levels of precautions to be taken at different types of events. For example, EDM concerts with teenage and young adult fans will likely require more health and safety precautions than a jazz concert with an older patronage. A balancing test would encourage courts to issue judgments based on the necessities demanded by a particular genre of music, the location city, the particular venue, those in attendance, and the time of year. Outdoor festivals like Electric Zoo, in the heat of a New York summer, will inevitably require more precautions than an indoor, air-conditioned venue. Although this suggestion appears initially vague in and of itself, and may be susceptible to the same analogous possibility of judicial discretion that this Note has previously critiqued,²³⁰ such an amendment would, at the least, give concert promoters some sort of standard by which they can conduct their affairs. A fact-specific inquiry is justified due to the virtually unlimited number of scenarios that can occur.

Courts will be able to consider several factors under the new test. Were there enough law enforcement personnel on site or nearby? What instructions were given to venue security? Were security personnel targeting all types of drug use and drug sales, or were they being selective? Could security reasonably eliminate all drug use, or did they do the best they could under the circumstances? Were enough medical precautions taken to ensure the safety of patrons? Were overtly intoxicated individuals removed and given adequate medical attention? Were there enough water stations?

All of these factors need to be addressed in order to achieve the state interests of curbing drug use and drug sales at these events and protecting the wellbeing and the safety of concert patrons.²³¹ While such an

²²⁸ See *infra* Part III-C.

²²⁹ 21 U.S.C. § 856(a)(2) (2012).

²³⁰ See *infra* Part V-F.

²³¹ See *infra* Part III-C.

amendment would help to protect festival promoters and venue managers from arbitrary prosecution, it would not diminish the central purpose of Section 856, which is to combat the problematic drug use of the day and the related dangers.²³²

VI. CONCLUSION

The current version of Section 856 (a)(2) reaches an unreasonably large class of people, namely concert promoters and venue managers, who are left with little guidance about how to avoid liability when hosting a music event. A second amendment to the statute, adding a reasonableness test, would address Tebeau's textual, due process, and First Amendment concerns, while maintaining the statute's core purpose. Just as the 2003 amendment was passed to address a public policy concern of the day, this second amendment is needed to address a modern substantial policy concern.²³³ As the statute currently stands, Tebeau's conviction was likely justified. However, as long as the intention element in Section 856 (a)(2) can be transferred from third parties to the defendant in crack house statute cases, concert promoters and venue managers around the country are in danger of being prosecuted for merely being passively aware of the drug use at their events.

To protect promoters and venue owners, to save the industry, and to protect the health and safety of music festival patrons, Congress needs to fix these statutory problems. Although the Supreme Court would have been wise to take the *Tebeau* case in order to address these concerns, Congress would save significant time and unnecessary litigation costs for the government, and for countless future defendants, by passing a new bill as soon as possible. Such a change is necessary for the future of the music industry and the national economy as a whole, as billions of dollars are at stake. For live music's sake and for the sake of the music industry at large, the crack house statute needs to be amended, again.

²³² See *id.*

²³³ See *infra* Part II.