

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA**

|   |   |                            |
|---|---|----------------------------|
| STEVEN McCLURE, CLAYTON SMITH, and        | ] | CASE DOCKET NO.            |
| MICHAEL BEHAN,                            | ] |                            |
|   | ] | DIVISION:                  |
| Plaintiffs,                               | ] |                            |
|   | ] | SECTION:                   |
| v.  | ] |                            |
|   | ] | JUDGE:                     |
| JOHN D. ASHCROFT, sued in his capacity as | ] |                            |
| Attorney General of the United States,    | ] | <b><u>CLASS ACTION</u></b> |
|   | ] | <b><u>COMPLAINT</u></b>    |
| _____                                     | ] |                            |
| Defendant.                                | ] |                            |

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Steven McClure, Clayton Smith, and Michael Behan bring this class action on their own behalf and on behalf of a class of similarly situated performers and attendees of electronic music events at the State Palace Theater in New Orleans, Louisiana. Plaintiffs, on information and belief, hereby allege:

**I. INTRODUCTION**

1. This action seeks a declaration that performance artists at a musical concert have the right, protected by the First Amendment to the United States Constitution, to be free of

governmental restrictions on their artistic use of legal items, including glowing objects and masks, during their public performances. Further, this action seeks a declaration that attendees of a musical concert have the right, protected by the Fourth and Fifth Amendments to the United States Constitution, to be free of governmental measures requiring the seizure and confiscation of legally possessed items, including glowing objects, pacifiers, masks and massagers. Finally, plaintiffs seek injunctive relief against the enforcement of the provisions of a plea agreement barring the use and possession at a musical concert of legally possessed items, including glowing objects, pacifiers, masks and massagers.

2. The violation of plaintiffs' rights finds its source in a plea agreement entered into by the corporation that operates the State Palace Theater, one of New Orleans' oldest and most renowned venues for movies and live entertainment. For many decades, concert goers have listened and danced to live music of all sorts at the State Palace Theater. Depending on the kind of music, both the performers and attendees have long worn costumes (including masks) and carried accessories associated with the musical culture of that day. Even though jazz, rock, blues and every other modern genre of music includes some measure of characteristic drug use, no one has ever suggested that the music or its cultural symbols should be prohibited. Law enforcement rightly focused on drug use and distribution, rather than the associated music, dance or culture. All of this changed during the past year, when the Department of Justice declared a law enforcement goal of eliminating electronic music concerts or "raves." The prosecution of the State Palace Theater and its proprietors, while ultimately falling short of the government's goal of shutting down raves in New Orleans, did result in a plea agreement fulfilling one of the government's primary goals of eliminating many of the central elements of a rave. In doing so,

however, the government runs directly afoul of constitutional protections.

3. The government's insistence upon a ban of glowing objects, pacifiers and masks has no basis in law. None of these items are drug paraphernalia, as claimed by the government. Indeed, these items are all perfectly legal, whether possessed at an amusement park (a common location to find glow sticks), a baby shower (where pacifiers can be found), a Mardi Gras parade (an event replete with masks), or an electronic music concert at the State Palace Theater (where all three items were commonly found, until the government dictated otherwise). When the government causes these legally owned items to be seized and confiscated, Fourth and Fifth Amendment violations arise. And when these items are used, as here, for expressive and artistic purposes, the government runs afoul of the First Amendment protection of free speech.

4. The government's plea provisions have had their intended effect. Performance artists have been coerced into eliminating elements vital to their artistic endeavors involving glow sticks, glow suits and masks. Attendees have suffered the seizure and confiscation of items like glow sticks and pacifiers that one may possess without governmental interference in every corner of America – except the State Palace Theater. Of course, none of this artistic censorship or illegal taking of property has had any demonstrable effect on drug use or distribution. Rather, it grows from the government's unproven speculation that a systematic assault on electronic music and culture will somehow reduce drug use. Constitutional rights cannot be sacrificed on such flimsy grounds. The unconstitutional censorship and confiscation, or restricted use, of property will continue so long as defendant persists in requiring the State Palace Theater to prohibit legal items, including glowing objects, pacifiers and masks.

## **II. PARTIES**

### **PLAINTIFFS**

5. Plaintiff STEVEN MCCLURE is a founding member of the musical group Rabbit in the Moon. Rabbit in the Moon is an internationally renowned group that has performed four times at the State Palace Theater, and has an agreement to perform again in March, 2002. Mr. McClure is a professional artist, hired by the State Palace Theater, whose regular performance includes costumes decorated with objects that glow.

6. Plaintiff CLAYTON SMITH has been a member of the United States Air Force for the past four years. He was a member of the Air Force's prestigious Sabre Drill Team, performing acrobatic dance routines with swords. Mr. Smith is a skilled dancer, providing practiced dance routines using glow sticks for audiences of at least ten electronic music events at the State Palace Theater. During each concert, he wears a pacifier around his neck to express his embrace of the cultural and political themes associated with rave culture. As a result of the government's plea agreement, he suffered the censorship of his artistic performance and the seizure of his legally possessed property.

7. Plaintiff MICHAEL BEHAN has been employed as an insurance agent for the previous three years. He is a performance artist known under the moniker "Mr. Bunny." During the approximately thirty electronic music events he has attended at the State Palace Theater since 1997, he has used glow sticks and elaborately designed masks as an integral part of his performances. He has also utilized a hand-held massager to give back rubs to members of his audience. As a result of the government's plea agreement, he suffered the censorship of his artistic performance and the seizure of his legally possessed property.

## **DEFENDANT**

8. Defendant JOHN ASHCROFT is sued in his official capacity as Attorney General of the United States. As the official in charge of the United States Department of Justice, he is ultimately responsible for the conduct of the members of the office of the United States Attorney in New Orleans.

## **CLASS ALLEGATIONS**

9. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated pursuant to F.R.C.P. Rule 23(a) and (b)(2). The class, as proposed by plaintiffs, consists of:

All persons present and future who have attended an electronic music concert at the State Palace Theater and who either suffered the seizure and confiscation of their property (including objects that glow, objects in the shape of a pacifier, masks, or vapor rub products or vapor inhalers) pursuant to the August 1, 2001 plea agreement between Barbecue of New Orleans, Inc. and the United States, or, have suffered artistic censorship and loss of the use of their property (including objects that glow, objects in the shape of a pacifier, masks, or vapor rub products or vapor inhalers) due to the threat of enforcement of aforesaid plea agreement.

10. The requirements of Rule 23(a) and (b)(2) have been met as shown in the following paragraphs.

11. The class is so numerous that joinder of all members is impracticable. An estimated 3,000 individuals have already been subjected to the restrictions stated in the plea at a concert held at the State Palace Theater on August 4, 2001, and an unknown number are yet to be

affected in the future.

12. There are questions of law and fact common to the class. Each class member suffers from the same conduct by the same parties and in the same venue and every class member may state a claim based on a violation of the due process clause of the Fifth Amendment.

13. The claims of the representative parties are typical of the constitutional claims of the class. The representatives state claims under the First, Fourth and Fifth Amendments.

14. The representative parties will fairly and adequately represent the interests of the class as they are represented by counsel with extensive experience in class action litigation and constitutional litigation, including claims under the First, Fourth and Fifth Amendments, and none of the claims of the representative parties is antagonistic to those of the class members.

15. The parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole.

### **III. JURISDICTION AND VENUE**

16. This court has jurisdiction over all causes of action herein pursuant to 28 U.S.C. §§1331 and 1361.

17. Venue is proper in this court under 28 U.S.C. §1391(e).

### **IV. FACTUAL BACKGROUND**

#### **A. Rave Culture**

18. Electronic music concerts, or raves, provide a venue for expression by performers and attendees alike. The unique and non-judgmental atmosphere of a rave encourages the participation of all who are present.

19. Raves are generally all night events, open to the public, focusing on the electronic or “techno” music performed by a DJ (disc jockey) and the dance of various performance artists, often accompanied by a barrage of visual stimuli.

20. Raves are often defined by the acronym PLUR, which stands for “Peace, Love, Unity and Respect.” This acronym was developed to solidify the genuine themes of rave culture as it faced incorporation into the mainstream.

21. Today, there are many styles and forms of raves. One such style is a “techno-plastic rave” where the governing aesthetic is one of infancy and childhood. Ravers at these events bring glowsticks, pacifiers, and other child-like objects to promote this aesthetic. These raves are “participatory” events, featuring the use of glowsticks as part of a dance ritual.

22. The group Rabbit in the Moon, led by Plaintiff McClure, performs live multimedia events that include songs, video presentations, and performance art pieces and costumes. One of the essential performance art pieces the group has performed since 1992 revolves around a glow sticks costume, in which a member of the group tapes hundreds of glow necklaces to his clothes to create a porcupine effect, dances to the song and then jumps into the crowd. Without the piece, a Rabbit in the Moon concert would not be complete or authentic, and attendees would be disappointed if a performance did not include the piece.

23. The rave dance floor provides a forum for practiced dance routines by performance artists attending an electronic music event. New York Times critic Shayna Samuels describes these raves as “probably the most significant and innovative American youth dance culture today... Ravers ... are as devoted to their dancing as ballerinas are to theirs ... rave dancing requires dancers to possess tremendous passion and discipline ...” Shayna Samuels, “They Also

Dance Who Party the Night Away,” N.Y. Times, Aug. 20, 2000, § 2, at 9.

24. Dancing with glow sticks is particularly associated with the electronic music scene. Completing the laser and light shows of the performers, glow sticks tied to the ends of a string, swirling and spinning in the hands of practiced dancers, illuminate the dance floor and are a spectacle in and of themselves. Rave dancers learn glow stick moves from each other, videos, and the internet, practice them, and then perform for others in circles on the dance floor.

25. In addition to expression through dance, attendees dress in outfits adorned with unique accessories, including masks. Some ravers dress to identify themselves as “candy kids.” A “candy kid” is a person who attends raves dressed as a child, wearing plastic jewelry, childish clothes, and oftentimes, a pacifier. The pacifier symbolizes a desire to cling onto childhood and to remain young and carefree.

26. Plaintiff Smith’s dancing with glow sticks is a performance, containing original dance moves developed by Smith and practiced in advance of a State Palace Theater electronic music concert. Because Smith is a talented dancer, other dancers and attendees form circles around him in order to watch his performances. Plaintiff Smith also has regularly worn a pacifier around his neck to electronic music events held at the State Palace Theater. The pacifier symbolizes his identity as a “raver” and his interest in electronic music and dancing, marking him as one of a community that shares an interest in attending electronic music events, are more open-minded, and love to listen and dance to electronic music.

27. Plaintiff Behan is a dancer who uses both glow sticks and masks in his performances. Prior to the ban on glowing objects and masks, he often came in character, dressed as “Mr. Bunny,” with his costume identifying him to other attendees as a performance dancer. As part of



his costume, Behan would wear masks decorated with a rabbit or other designs painted with glow paint. Behan would also use glow sticks and other objects that glow, such as flashing lights, during his dance performances.

**B. The Plea Agreement**

28. The government refuses to distinguish rave culture and electronic music from the ecstasy use of some (but certainly not all) members of the audience. The result is a government strategy to shut down the “rave scene” by prosecuting the producers and promoters of raves under the Crack House Statute, 21 U.S.C. § 856, and condemning all items associated with raves as illegal drug paraphernalia under 21 U.S.C. § 863.

29. The current government strategy to “force rave promoters to move or cease their operations” is carefully laid out in an Information Bulletin on Raves. U. S. Dep’t of Justice, Information Bulletin: Raves, Prod. No. 2001-L0424-004 (April 2001). The prosecution of the State Palace Theater is the primary case on which this strategy is based. That prosecution, dubbed “Operation Rave Review,” is “the most successful anti-rave initiative” in the country. The Department has developed a five-step strategy to be employed “in other areas experiencing high levels of rave activity” based on the success of the anti-rave campaign in New Orleans. Recommended steps for stopping raves include: identifying rave promoters, compiling emergency medical service records, conducting undercover operations inside the venue, placing an undercover officer on a security team, and executing search warrants for the venue, offsite offices, and homes of rave promoters.

30. The government’s anti-rave initiative was launched in New Orleans with the selection of the State Palace Theater for prosecution under the Crack House Statute, the first

prosecution of its kind in the country. The United States Attorney brought charges against Robert Brunet and Brian Brunet, owners of Barbecue of New Orleans, and James Estopinal, the producer of raves at the State Palace, under the Crack House Statute. All defendants were offered plea deals that included at least one year in prison, despite the lack of any evidence that these men were involved in any way with drug activity.

31. Brian Brunet and James Estopinal filed a Motion to Dismiss, alleging Equal Protection and First Amendment violations, despite the government's threats to add charges of Continuing Criminal Enterprise, carrying a potential life sentence, if they opposed the indictment or demanded a trial. In response, the government dismissed the charges against all three defendants, but promised to resume the investigation and return a new indictment containing new charges carrying up to a life sentence in prison.

32. Public reaction against the government's prosecution mounted. The New Orleans Times Picayune editorial condemned the misuse of the crack house law. The conservative Weekly Standard called for the dismissal of U.S. Attorney Eddie Jordan. And the case received scrutiny in articles in such national publication as Time Magazine, The Los Angeles Times and The New York Times.

33. In the end, the government dropped any threat of prison time for the Brunets, in exchange for the State Palace Theater's agreement to carry out the government's proposal to prohibit particular items associated with rave culture. Initially, the U.S. Attorney proposed a plea in which the Brunets would not object to the entry of a permanent, civil injunction banning pacifiers, objects that glow, masks, vapor rub products, massage tables and chill rooms from the State Palace. However, when the U.S. Attorney learned that rave attendees would assert their

own rights against the government by objecting to the injunction, the government withdrew its original proposal. Instead, the government inserted the terms of the proposed injunction into the plea agreement itself. At no time during the plea negotiations did Robert Brunet request that the injunction or the injunctive provisions issue. Rather, he merely accepted the government's terms in order to avoid the government's threat of a possible life sentence.

34. The terms of the plea, entered on June 13, 2001, are as follows: Barbecue of New Orleans pled guilty to one count of conspiracy to violate the federal Crack House Statute, 21 U.S.C. § 856(a)(2). The corporation was assessed a fine of \$100,000. Under the agreement, the original defendants were exempted from any prison time. However, Robert and Brian Brunet were forbidden from introducing, selling, distributing, or providing the following items at the State Palace Theater:

- “1. Infant pacifiers or any object in the shape of a pacifier
2. Objects that glow, including but not limited to glow sticks and flashing rings
3. Vapor rub products and vapor inhalers
4. Dust masks or masks of any description
5. Masseur, masseuse or massage tables
6. ‘Chill rooms’ or areas in the theater which are purposely kept 15 degrees cooler than the rest of the theater.”

The plea agreement further requires that Barbecue “take all reasonable steps to prohibit the introduction of infant pacifiers or any object in the shape of a pacifier, objects that glow, including but not limited to glow sticks and flashing rings, vapor rub products and vapor inhalers, dust masks or masks of any description by any person” attending an event at the State

Palace Theater.

35. The plea agreement went into effect on August 1, 2001, when Barbecue of New Orleans, Inc., was sentenced in federal court.

36. The State Palace Theater hosted an electronic music concert on August 4, 2001 at which the injunctive provisions of the plea agreement were implemented.

**C. Impact on Plaintiffs**

37. Plaintiff MCCLURE's performance, scheduled for March, 2002, will be censored by the terms plea agreement, thereby violating his First Amendment right to free expression.

38. Plaintiff CLAYTON SMITH's dancing with glow sticks at electronic music events is a practiced, performance art watched by many. Mr. Smith has also worn a pacifier to these events on several occasions as a symbol of his association with "rave" culture. On August 4, 2001, Mr. Smith brought glow sticks and wore a pacifier to the State Palace Theater. They were confiscated by security. Mr. Smith plans to attend the rave at the State Palace Theater scheduled for August 24, 2001, and he plans again to attempt to perform using glow sticks and to wear a pacifier. If the injunctive provisions of the plea agreement remain in effect, his First, Fourth, and Fifth Amendment rights will be violated.

39. Plaintiff MICHAEL BEHAN is a performance dancer known by his character, "Mr. Bunny." His character's costume includes masks and glow sticks. On August 4, 2001, he attended the electronic music event at the State Palace Theater. Because he knew they were prohibited, he did not bring masks or glow sticks to that event. He did bring his hand-held massager, as he has to every event for five years, and was forbidden entry with it because of the plea agreement entered into by Barbecue of New Orleans. Mr. Behan plans to attend the rave at

the State Palace Theater scheduled for August 24, 2001, and he would again seek to perform wearing a mask and using glow sticks and to bring his massager. If the injunctive provisions of the plea agreement remain in effect, his First, Fourth, and Fifth Amendment rights will be violated.

40. At the electronic music concert on August 4, 2001, over 30 specifically identified people, including Plaintiffs SMITH and BEHAN, had their expression chilled or silenced by the ban on objects that glow. Over 10 specifically identified people had their legal property seized by security.

## **V. CLAIMS FOR RELIEF**

### **FIRST CAUSE OF ACTION**

41. Plaintiffs reallege and incorporate by reference ¶¶ 1 through 40 as if fully set forth herein.

42. The First Amendment to the U.S. Constitution provides in relevant part: “Congress shall make no law...abridging the freedom of speech.”

43. Defendant’s plea agreement with Barbecue of New Orleans censored the artistic expression of Plaintiff SMITH and chills the artistic expression of Plaintiffs MCCLURE and BEHAN by requiring Barbecue of New Orleans to prohibit lawful objects integral to each plaintiffs’ performance, in violation of the First Amendment.

44. In addition, Defendant’s plea agreement with Barbecue of New Orleans silenced the speech of Plaintiff SMITH by requiring Barbecue of New Orleans to confiscate his pacifier, a symbol with expressive content, in violation of the First Amendment.

45. The actions taken by Barbecue of New Orleans flow directly from the plea agreement

with the government and constitute state action.

### **SECOND CAUSE OF ACTION**

46. Plaintiffs reallege and incorporate by reference ¶¶ 1 through 45 as if fully set forth herein.

47. The Fourth Amendment to the U.S. Constitution provides in relevant part: “The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

48. Defendant’s plea agreement with Barbecue of New Orleans required Barbecue of New Orleans to unreasonably seize the personal property of Plaintiff SMITH by prohibiting the introduction of lawful items regularly brought to electronic music events, in violation of the Fourth Amendment.

49. The actions taken by Barbecue of New Orleans flow directly from the plea agreement with the government and constitute state action.

### **THIRD CAUSE OF ACTION**

50. Plaintiffs reallege and incorporate by reference ¶¶ 1 through 49 as if fully set forth herein.

51. The Fifth Amendment to the U.S. Constitution provides in relevant part: “No person shall...be deprived of life, liberty, or property, without due process of law.”

52. Defendant’s plea agreement with Barbecue of New Orleans required Barbecue of New Orleans to deprive Plaintiffs SMITH and BEHAN of the possession or use of their personal property without due process of law, in violation of the Fifth Amendment.

53. The actions taken by Barbecue of New Orleans flow directly from the plea agreement

with the government and constitute state action.

## **VI. IRREPARABLE HARM**

54. Plaintiffs have suffered and will suffer irreparable harm due to the government's insistence upon including and enforcing terms of a plea agreement entered into between the government and Barbecue of New Orleans that ban glowing objects, pacifiers, masks and other objects legally possessed and used by plaintiffs.

55. Plaintiffs have a constitutional right to free expression through performance.

56. The prohibition denied Plaintiff SMITH his right to free expression by requiring the seizure of his glow sticks, an integral part of his performance dance, and he is chilled in the future exercise of his right to free expression by virtue of the continuing prohibition against glow sticks.

57. The prohibition chilled the free speech rights of Plaintiff BEHAN who did not bring personally designed masks adorned with glow paint or glow sticks, both integral to his performance dancing, in order to avoid having them confiscated. He is chilled in the future exercise of his free speech rights by virtue of the continuing prohibition against glowing objects and masks.

58. The prohibition has chilled Plaintiff McCLURE in his plan to perform at the State Palace Theater using glowing objects, thus violating his right to free expression by forbidding him and his musical group to include a crucial and distinctive piece of his performance art at his next concert at the State Palace Theater.

59. Plaintiff SMITH also has a constitutional right to wear and carry symbolic items with expressive content. The prohibition against the introduction of infant pacifiers and objects in the

shape of pacifiers into the State Palace Theater silenced Plaintiff SMITH in violation of his free speech rights.

60. Plaintiff SMITH has a constitutional right to free enjoyment of his personal, lawful property without unreasonable seizure. The prohibition requires the seizure of his legal property without probable cause, or even an articulable suspicion, that the items are related to criminal conduct.

61. Plaintiffs SMITH and BEHAN have a constitutional right not to be deprived of their personal, lawful property without due process of law. The prohibition provides for either summary confiscation or interference with the use of lawful property without any statutory basis or procedural protections.

62. The denial of Plaintiffs' constitutional rights constitutes irreparable harm.

## **VII. PRAYER FOR RELIEF**

WHEREFORE,

Plaintiffs accordingly pray for the following relief:

A. A preliminary and permanent injunction enjoining defendant John Ashcroft, Attorney General of the United States, his agents, employees, assigns, and all persons acting in concert or participating with him from enforcing the following provisions of the plea agreement in United States v. Barbecue:

“BARBECUE OF NEW ORLEANS, INC. d/b/a State Palace Theatre or Theater, Robert J. Brunet, Brian J. Brunet and any other corporation or business that these two individuals are associated with (hereinafter referred to as the subjects) will not engage in the following particular activities:



The introduction, sale, distribution or providing of the following items at or into the State Palace Theater, 1108 Canal Street, New Orleans, Louisiana 70112 during a concert or an event where an admission is charged:

1. Infant pacifiers or any object in the shape of a pacifier
2. Objects that glow, including but not limited to glow sticks and flashing rings
3. Vapor rub products and vapor inhalers
4. Dust masks or masks of any description
5. Masseur, masseuse or massage tables
6. "Chill rooms" or areas in the theater which are purposely kept 15 degrees cooler than the rest of the theater.

Further the defendant agrees that the subjects will take all reasonable steps to prohibit the introduction of infant pacifiers or any object in the shape of a pacifier, objects that glow, including but not limited to glow sticks and flashing rings, vapor rub products and vapor inhalers, dust masks or masks of any description by any person entering a concert or an event where admission is charged or at the State Palace Theater, 1108 Canal Street, New Orleans, Louisiana 70112."

B. A declaration pursuant to 28 U.S.C. §§ 2201 and 2202 that glow sticks and objects that glow, pacifiers and objects in the shape of a pacifier, dust masks, vapor rubs and vapor inhalers, massage tables, and chill rooms are not drug paraphernalia under 21 U.S.C. § 863, and a plea agreement may not prohibit the possession or use of these items by persons not party to the plea agreement.

C. Allow Plaintiffs' reasonable attorneys' fees and costs;

D. Such other relief as this Court may deem necessary and proper.

Dated: August 21, 2001

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