UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA.

STEVEN MCCLURE, CLAYTON SMITH, and MICHAEL BEHAN	**CIVIL ACTION**
VERSUS	**NO. 01-2573**
JOHN D. ASHCROFT, sued in his capacity as Attorney General of the United States	**SECTION "T" (5)**

Filed on February 1, 2002

PORTEOUS, District J.

Before this Court come the above-named Plaintiffs, on their own behalf and on behalf of all similarly situated plaintiffs[1], who have requested: 1) 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 during a public performance; 2) 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; 3) 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. The matter came for trial without a jury on December 17, 2001. The Court, having heard the testimony at trial and having considered the record, the evidence, the applicable law, and the memoranda submitted by the

[1] See Court Order of November 19, 2001, Granting Plaintiffs' Motion for Class Certification (Document No. 26).

parties, is fully advised on the premises and ready to rule.

ORDER AND REASONS

A. BACKGROUND

On or around December 1999, the Drug Enforcement Agency ("DEA") began to investigate alleged drug use at the State Palace Theater located at 1108 Canal Street in New Orleans, Louisiana. The DEA had reason to believe that patrons of specific events held at the State Palace Theater, events involving high energy music and dancing commonly known as "Raves", were using drugs, particularly the drug 3,4-methylenedioxymethamphetamine ("MDMA" or "ecstasy"). Subsequent to the investigations of ecstasy use at the State Palace Theater during Raves, the United States Attorney brought charges against Barbeque of New Orleans, Inc. d/b/a State Palace Theater and its proprietors, Robert and Brian Brunet under 21 U.S.C. § 856(a)(2), known as the Crack House Statute. Eventually, Barbeque of New Orleans, Inc. ("Barbeque") agreed to a plea agreement. Pursuant to Fed.R.Crim.P. 11(e)(1)(C), the corporation pled guilty to one felony count of conspiracy to violate the Crack House Statute. As part of the plea agreement, Barbeque was assessed a $100,000 fine and the Brunets agreed that they would refrain from the sale and distribution of certain items at their Raves at the State Palace Theater. In addition, the Brunets agreed that they would:

> 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 an admission is charged or at the State Palace Theater, 1108 Canal Street, New Orleans, Louisiana 70112.

These specific items were banned because they allegedly are "commonly used to enhance and support the physiological 'high' caused by the ingestion of ecstacy."[2]

Subsequent to this plea agreement, Barbeque banned the above-named items from Raves at the State Palace Theater. In addition, if a Rave patron tried to bring one of the above-named items into a Rave at the State Palace Theater, the attendee was allowed to return to his/her vehicle and leave the item in the vehicle, or the attendee was forced to discard the item.[3]

The Plaintiffs filed the instant suit on their own behalf and on behalf of all similarly situated plaintiffs. The named Plaintiffs are music, dance, and performance artists who use some of or all of the named banned items in their performances. The Plaintiffs claim that their First Amendment rights of free speech and expression were violated when the State Palace Theater, by virtue of the plea agreement with the government, banned inherently legal items. Plaintiffs also allege that their Fourth amendment rights were violated when legal items were seized and confiscated by members of the staff at the State Palace Theater. Plaintiffs seek injunctive relief against enforcement of the provisions of the plea agreement that violate their constitutional rights.

On August 23, 2001, this Court granted the Plaintiffs' Motion for a Preliminary Injunction enjoining the Defendant, John D. Ashcroft, Attorney General of the United States, his

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[2] See Affidavit of Michael E. Templeton, DEA investigator. Pacifiers are used to help alleviate the tightening of the jaw muscle and grinding of the teeth that ecstasy use causes. Objects that glow, including glow sticks, enhance the heightened visual sensory perception created by the use of ecstasy. Vapor rub is smeared on masks to enhance the heightened olfactory sensory perception created by the use of ecstasy. *Id.*

[3] The State Palace Theater did not have a set policy of how to deal with the banned items. Both confiscation and allowing a return to a vehicle were methods used by the State Palace Theater to ensure that patrons did not bring the banned items into the Theater.

agents, employees, assigns, and all persons acting in concert or participating with him from enforcing the following provision of the plea agreement in United States v. Barbecue of New Orleans, Inc., Criminal Action No. 01-153 "T"(5):

> 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 an admission is charged or at the State Palace Theater, 1108 Canal Street, New Orleans, Louisiana 70112.

On December 17, 2001, the Court held a Permanent Injunction hearing to determine whether the above injunction should continue. In addition to the hearing, the parties submitted memoranda both before and after the hearing on the law applicable to this matter.

B. STANDING

In their memoranda, the Defendant asserts that the Plaintiffs in this matter do not have standing to challenge a plea agreement. The Defendant argues that a third-party cannot have standing to challenge a plea agreement that does not bind the actions of that third-party. Although the Defendant cites numerous cases in favor if its argument, none of the cited cases address the issue at hand. None of the cases involve a third-party who files a civil suit because his/her Constitutional rights have been violated. The Court is not trying to revoke its acceptance of a plea agreement, as in United States v. Ritsema, 89 F.3d 392 (7th Cir.1996); nor does this case involve a third-party appealing the sentence of a criminal defendant as in United States v. Johnson, 983 F.2d 216. In addition, Fed.R.Crim.P. 11(e)(1), cited by the Defendant, does not apply to civil cases such as the one at bar.

This Court believes that when the Constitutional rights of third-parties have been violated

by the government through a plea agreement with a criminal defendant, the third party non-defendants have standing to bring an action for injunctive relief. This standing arises from the fact that the government is allegedly violating an inherent right we all, as Americans, enjoy. The fact that the government is allegedly violating the rights of all through a plea agreement with a criminal defendant does not bear on a civil plaintiff's standing to redress the alleged wrong that he is suffering. "The First Amendment protects all of us, including the plaintiffs in this case, from over zealous government agents be they federal, state, or local, even those government agents who are, or who profess to be well intentioned." Torries v. Hebert, 111 F.Supp.2d 806 (W.D.La.2000).[4]

C. THE ACTIONS OF THE GOVERNMENT IN CONJUNCTION WITH BARBEQUE OF NEW ORLEANS, INC. CONSTITUTE STATE ACTION

As this Court discussed when it ruled on both the Preliminary Injunction and the Motion to Alter and Amend the Preliminary injunction, the actions of the Government in conjunction with the actions of the private actor in the instant case are "state action" based on the ruling in Communications, Inc. v. Mountain States Telephone and Telegraph Company, 827 F.2d 1291 (9th Cir.1987).

The government's attempt to characterize Barbeque of New Orleans, Inc.'s proposal of the terms in the plea negotiations as "voluntary" is irrelevant to the question of state action in this case. As this Court has already recognized, the Supreme Court has stated that "even assuming ... that the manager would have acted as he did independently of the existence of the ordinance"; simply by "commanding a particular result," the state has so involved itself that it could not

[4] There is no real argument that the Plaintiffs do not meet the traditional standing requirements set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); and Warth v. Seldin, 422 U.S. 490 (1975).

claim the conduct had actually occurred as a result of private choice.[5]

This Court still notes, as it did in the ruling on the Preliminary Injunction, that if the State Palace Theater on its own accord decides to keep the list of banned items out of its establishment, it absolutely has that right and this Court is powerless. However, contrary to the argument of the Defendant in this case, the Court finds that the actions of State Palace Theater were not voluntary, but were instead carried out subject to the plea agreement with the government. In this case, the actions were not that of private choice. Therefore, because the government 'commanded a particular result,' the actions were not the choice of the State Palace Theater.

D. FIRST AMENDMENT

The First Amendment states in relevant part: "Congress shall make no law ... abridging the freedom of speech." What this amendment actually protects and to what extent has been litigated countless times. However, it is clear that "speech" is not limited to the spoken word only, nor does it apply to a limitless variety of conduct. United States v. O'Brien, 391 U.S. 367 (1968). In order to be characterized as 'speech' and fall within the protective scope of the First Amendment, Plaintiffs' conduct must be "sufficiently imbued with the elements of communication." Spence v. State of Washington, 418 U.S. 405, 409 (1974). The Supreme Court has fashioned a two-part test to help courts in determining whether expressive conduct can be characterized as 'speech': "(1) whether an intent to convey a particularized message was present, and (2) whether the likelihood was great that the message would be understood by those who

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[5] See Transcript of Preliminary Injunction at 45; Peterson v. City of Greenville, 373 U.S. 244, 248 (1963); Carlin, 827 F .2d at 1297 (quoting Peterson).

viewed it." Littlefield v. Forney Independent School District, 108 F.Supp.2d 681 (N.D. Texas 2000)(citing Spence 418 U.S. at 410-411). In applying the test, "[i]t is critically important to examine the nature of the activity, combined with the factual context in which it was undertaken." Id.

1. SPENCE TEST.

The named Plaintiffs in this matter are dancers and performance artists. Part of their performances included items that the State Palace Theater must ban in order to comply with the plea agreement.[6] The performance actions of these artists convey any number of messages (freedom, identity with a certain culture) and any number of emotions. Each performance by each artist can convey and does convey a different message. Additionally, other Courts have held that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions." Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (1990)(en banc)(reversed on other grounds).[7] Therefore, the Court finds that there is an intent to convey a

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[6] Plaintiffs, at trial and in pre-trial briefs, allege that they use masks, glow sticks, and pacifiers in their performances to convey different messages. Vicks vapor rub has never been alleged as a performance prop. However, we treat all of the banned items the same for the purpose of this order because all of the items are contained in one list in the plea agreement at issue.

[7] "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself.' 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all '[t]he varied manifestations of dancing ... lies the common impulse to resort to movement to externalize states which we cannot externalize by rational means. This is basic dance.' Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stephane Mallarme who declared that the dancer 'writing with her body ... suggests things which the written work could express only in

particularized message from the dancers and performers to the audience by using, among other things, items that are banned from the State Palace Theater by the terms of the plea agreement.

In addition, there is a great likelihood that the audience who viewed these messages would understand the messages. The attendees of Raves go not just for the music, but to dance and to watch the performance of other dancers, whether they be on a stage or on the dance floor. The likelihood that other attendees would understand the messages that are conveyed through the use of the banned items and the use of other items is great due to the fact that the attendees are going to Raves to either express themselves through performances or to watch the performances.[8] Just because the DEA agents who investigated the Raves did not understand the message that was conveyed does not mean that a message was not both conveyed and understood. Because a message, one of freedom or any other message conveyed by dance, was conveyed, and because the attendees of Raves are there to see this message conveyed, the Court finds that the actions of the named Plaintiffs and other similarly situated plaintiffs are protected speech under the First Amendment.

2. TIME, PLACE, MANNER TEST.

The Defendant alleges that even if the actions of the Plaintiffs are protected speech, the banning of the named items is a content-neutral regulation and passes Constitutional muster under the time, place, or manner test articulated by the Supreme Court in Ward v. Rock Against Racism, 491 U.S. 781 (1989). "The government may impose reasonable restrictions on the time,

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several paragraphs of dialogue or descriptive prose." ' Barnes v. Glen Theater, Inc., 501 U.S. 560, 587 [White dissent fn.1, citing Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (1990)(en banc)].

[8] It has not been argued that Raves are the only place were people take the drug ecstasy, and therefore the attendants of Raves are there only to take the drug ecstasy.

place, or manner of protected speech provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." ' Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

1.) CONTENT NEUTRAL.

In Ward, *supra*, the Supreme Court stated: "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of the disagreement with the message it conveys." Id at 791, *citing* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. Ward 491 U.S. at 791.

Although the Plaintiffs allege that the primary purpose for the government's forcing the State Palace Theater to ban the named items is due to the government's desire to eliminate Rave culture, this is not the case. The government had no intention of eliminating a culture of people. The intention of the government was to eliminate a major problem that was occurring at the State Palace Theater, that being the widespread use of ecstasy. The government believed that it could eliminate or reduce ecstasy use by banning the named objects. The Defendant did not object to any particular message by the Plaintiffs, but were instead trying to address a problem that plagues the New Orleans community and many other communities in this nation.

2.) NARROWLY TAILORED TO SERVE SIGNIFICANT INTEREST.

There is no 'least intrusive means' requirement when analyzing time, place, or manner restrictions. *See* Ward, 491 U.S. at 797. A ban can be narrowly tailored if "each activity within the proscription's scope is an appropriately targeted evil." Frisby v.. Schultz, 487 U.S. 474, 485 (1988). The requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 799, *citing* United States v. Albertini, 472 U.S. 675, 689 (1985). This standard does not mean that a regulation may burden substantially more speech than is necessary to further the government's legitimate interests. "Government may not regulate expression in such a manner that a substantial portion of the burden on the speech does not serve to advance its goals." Ward, 491 U .S. at 799.

As stated above, the substantial government interest in this matter is the elimination of ecstasy use at the State Palace Theater during Raves. Although this is a legitimate government interest, the manner in which the government is attempting to address this issue violates the First Amendment. The government cannot ban inherently legal objects that are used in expressive communication because a few people use the same legal items to enhance the effects of an illegal substance. Although this is not a least intrusive means analysis, the government has burdened substantially more speech than is necessary in order to achieve their stated purpose of eliminating ecstasy use by completely banning the named expressive objects.

In addition, there is no conclusive evidence that eliminating the banned items has reduced the amount of ecstasy use at Raves at the State Palace Theater. The use of a drug like ecstasy, which is ingested into the system orally by way of a pill or capsule, cannot be eradicated by eliminating legal items that some people use while on ecstasy. Although this Court recognizes

the perils of drug use, especially by young people, and this Court recognizes that the intentions of the agents and prosecutors involved were pure, when the First Amendment right of Free Speech is violated by the government in the name of the War on Drugs, and when that First Amendment violation is arguably not even helping in the War on Drugs, it is the duty of the Courts to enjoin the government from violating the rights of innocent people. The government cannot keep legal items out of places because of illegal activities they associate with these items.

E. CONCLUSION

For the reasons stated above, this Court finds that there has been a violation by the Defendant of the First Amendment Rights of the Plaintiffs.

Accordingly,

IT IS ORDERED that the Defendant John Ashcroft, Attorney General of the United States, his agents, employees, assigns and all persons acting in concert or participating with him are permanently enjoined and restrained from enforcing the following provision of the plea agreement between the United States and Barbeque of New Orleans:

> 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 an admission is charged or at the State Palace Theater, 1108 Canal Street, New Orleans, Louisiana 70112.