UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

STEVEN McCLURE, CLAYTON SMITH, and MICHAEL BEHAN, Plaintiffs, v. JOHN D. ASHCROFT, sued in his capacity as Attorney General of the United States, Defendant.	]]]]]]]]]]	CASE DOCKET NO. DIVISION: SECTION: JUDGE:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government has effectively prohibited thousands of citizens from possessing items associated with raves and electronic music, all of which are perfectly legal and many of which have artistic or expressive value – a prohibition it surely could not issue on its own, but which it has undertaken here via an agreement with a private party acting to implement the government's will. Pursuant to a nationwide initiative to shut down electronic music concerts or "raves," the federal government prosecuted Barbecue of New Orleans, Inc.("Barbecue") and its corporate officers, Robert and Brian Brunet, under the Crack House Statute, 21 U.S.C. § 856(a)(2), for promoting electronic music concerts in the State Palace Theater, despite no evidence of illegal activity on their part. Facing a threat of life imprisonment and $2,000,000 in fines, the Brunets entered into a plea agreement in which they were exempted from any prison time. In exchange, the Brunets are required by the government to ban and confiscate a litany of legal, everyday items associated with rave culture–objects that glow, any object in the shape of a pacifier, vapor rub products, and all masks–brought by every single person attending electronic music concerts at the State Palace Theater.

By virtue of a binding plea agreement whose terms were proposed and will be enforced by the United States, the federal government is clearly effectuating its own anti-rave initiative, and in the process violates the constitutional rights of performance artists and audience members. An agreement, even a silent informal understanding, between the government and a private party constitutes governmental action. See Adickes v. S.H. Kress, 398 U.S. 144 (1970). Here, the agreement between Barbecue and the government is explicit in its directions and formally memorialized in writing. Requiring Barbecue to prohibit any and all attendees from using or possessing their legally owned property, including property used for artistic and expressive purposes,

the plea agreement embodies the government's unconstitutional assault against the electronic music culture and against Plaintiffs' rights under the first, fourth and fifth amendments.

The First Amendment stands as a clear barrier to any governmental effort to eliminate a particular form of dance or music. See Schad v. Mt. Ephraim, 452 U.S. 61, 65 (1981). Although many forms of dance and music have had some associations with drug use, no one has ever suggested prohibiting the artistic symbols of those genres as the government has done here. The plea agreement is a content-based restriction on electronic music and performance dance, attempting to eliminate this genre by prohibiting items vital to the intricate routines and costumes of electronic music performers and attendees. The government runs further afoul of the First Amendment by seizing iconic symbols of rave culture, items that constitutes protected "symbolic speech." See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

Under both the Due Process Clause and the Fourth Amendment, the government cannot summarily confiscate legal property from citizens without any basis in law. But that is precisely the intent and effect of the plea agreement here. Despite Defendant's attempt to justify the confiscation of these items by characterizing them as drug paraphernalia, none of the items are conceivably within the scope of the definition of "drug paraphernalia" under the Controlled Substance Act, 21 U.S.C. § 863(d). Thus, the due process clause clearly protects against the confiscation, or restricted use of, this legally owned property. See Buchanan v. Warley, 245 U.S. 60, 74 (1917). The government's blanket ban also violates the fourth amendment prohibition against unreasonable seizures of property. The seizures are supported by neither probable cause nor an articulable suspicion that any particular individual has committed a crime. See Reid v. Georgia, 448 U.S. 438, 440 (1980). Surely, the property interests of an entire group of people cannot be compromised because the government believes that some people in that group might be using drugs. In the end,

the government is pursuing a policy which essentially subjects any and all individuals enjoying the perfectly legal act of attending an electronic music concert to deprivation of his or her constitutional rights.

II. FACTUAL BACKGROUND

A. The Plea Agreement in United States v. Barbecue of New Orleans is the Result of a Coordinated Effort to Eliminate Rave Culture.

The plea agreement at issue here marks the culmination of the federal government's effort to eliminate an entire genre of music and dance from New Orleans, "a city favored by citizens and tourists alike for a culture grounded in live music." Lionhart v. Foster, 100 F. Supp. 2d 383, 388 (E.D. La. 1999). The State Palace Theater has been targeted as part of a coordinated federal anti-rave initiative, with the head of the Drug Enforcement Administration (DEA) declaring, "we are hopeful that more investigations along the lines of the State Palace Theater investigation will have an impact on shutting down raves." Hearing Before the Senate Caucus on International Narcotics Control, 106th Cong. (2001) (statement of Donnie R. Marshall) (emphasis added), attached as Exh. J to Boyd Decl. The Department of Justice has published a pamphlet providing a 'how-to' guide for shutting down these raves. See U.S. Dep't of Justice, Information Bulletin: Raves, Prod. No. 2001-L0424-004 (April 2001) ("Bulletin"), attached as Exh. K to Boyd Decl. The bulletin recommends a number of tactics to attack raves, which, according to the Department, are "high energy, all-night dance parties . . . which feature dance music with a fast, pounding beat and choreographed laser programs." Id. at 1. Although the Department's definition of "rave" centers on modes of expression – music, dance and visual arts – the goal of the carefully outlined strategy is to "force rave promoters to move or cease their operations." Id. at 6. The government does not even maintain the pretense of targeting drug use at raves but rather intends to eliminate the events themselves.

As the first step in this effort, the proprietors and promoter of the State Palace Theater in New Orleans, Louisiana, host to numerous raves popular with electronic music fans all over the southeastern United States, were singled out for criminal prosecution. The United States Attorney brought charges against Robert Brunet and Brian Brunet, proprietors of the State Palace Theater, and James Estopinal, the producer of raves at the State Palace, under the Crack House Statute. Indictment, U.S. v. Brunet, attached as Exh. A to Boyd Decl. 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. Brunet Decl. ¶ 4; Proposed Plea Agreement, U.S. v. Brunet, attached as Exh. C to Boyd Decl. Brian Brunet and James Estopinal filed a Motion to Dismiss, alleging Equal Protection and First Amendment violations, despite the government's threats of added charges of Continuing Criminal Enterprise, carrying a potential life sentence, if they opposed the indictment or demanded a trial. Brunet Decl. ¶ 5. In response, the government dismissed the charges against all three defendants, but promised to resume the investigation and return new indictments containing additional charges which could carry a life sentence in prison. Id.; Order Granting Government's Motion to Dismiss, attached as Exh. D to Boyd Decl.

In the end, the government settled for a plea arrangement that did not completely shut down the State Palace raves, but did ban the aspects of these events that identify them as raves, effectively undermining rave culture. In exchange for dropping any threat of prison time for the Brunets, the U.S. Attorney requested only a guilty plea from one of the corporate entities run by the Brunets. In addition, the Brunets agreed not to object to entry of a permanent, civil injunction banning pacifiers, objects that glow, masks, vapor rub products, massage tables and chill rooms from the State Palace. Proposed Plea Agreement, U.S. v. Barbecue of New Orleans, attached as Exh. G to Boyd Decl. However, when the U.S. Attorney learned that rave attendees would assert their own rights by

objecting to the injunction, the government withdrew its original proposal. Boyd Decl. ¶¶ 4-5; Brunet Decl. ¶ 13. Instead, the government included the terms of the proposed injunction within the plea agreement itself. Plea Agreement, U.S. v. Barbecue of New Orleans, attached as Exh. H to Boyd Decl.

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. Plea Agreement, U.S. v. Barbecue of New Orleans. Barbecue was sentenced, in accordance with the

recommendations of the plea agreement, on August 1, 2001. Statement of Reasons for Imposing Sentence, U.S. v. Barbecue of New Orleans, attached as Exh. I to Boyd Decl.

The government's goal was clear: eliminate raves at the State Palace. Failing to achieve this goal through the prosecution of Robert Brunet, Brian Brunet, and James Estopinal, it moved to end the rave phenomenon by suppressing the culture itself, striking a blow against this genre of music and dance. This notion of equating a form of music with a particular drug is not new. But the strategy of prosecuting the purveyors of music and attacking the cultural symbols associated with that genre sets a frightening precedent, one that would have given the government license to eliminate jazz, rock, punk, and many other kinds of music in years past. Allowing this attack on electronic music concerts would lead an entire genre of music to go unheard.

B. Electronic Music Concerts Provide a Unique Venue for Expression.

Electronic music concerts, or raves, provide a venue for expression by performers and attendees alike. Raves offer attendees "a dance culture that [is] focused on themselves, rather than on a celebrity performer. The scene is participatory, fosters a group dynamic, and is often a spiritual experience for the people in attendance." Rushkoff Decl. ¶11. An electronic music concert fosters "the democratization of dance, the notion that anyone can participate and perform." Shayna Samuels, They Also Dance Who Party the Night Away, N.Y. Times, Aug. 20, 2000, § 2, at 9.

Electronic music DJs are both musicians and performance artists, incorporating visual elements into their acts using light and glowing objects. The group Rabbit in the Moon, led by Plaintiff McClure, perform live "multimedia events" that include "songs," "video presentations", and "performance art pieces and costumes." McClure Decl. ¶ 7. One of the essential performance art pieces the group has performed since 1992 revolves around the "glow sticks costume," in which "a member of the group tap[es] hundreds of glow necklaces to his clothes to create a porcupine

effect[,] . . . . dances to the song and then jumps into the crowd." Id. ¶¶ 8-9. The piece is crucial to a Rabbit in the Moon performance because "it elevates the crowd and gets them excited and is meant to signify the connection / unification between the audience and the group, and everyone's connection to the music." Id. ¶ 11. 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." Id. ¶ 12.

The dance floor provides a forum for the practiced dance routines of 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 . . . ." Samuels, supra.

One of the defining characteristics of rave dancing is the use of objects that glow. "[D]ancing with glow sticks either in your hand or on strings around your neck is at the heart of the electronic music scene." Smith Decl. ¶ 9. 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. Id. ¶ 12. Because Smith is a talented dancer, other dancers and attendees form circles around him in order to watch his performances. Id. ¶ 13.

On August 4, 2001, Plaintiff Smith attended the electronic music concert at the State Palace Theater. See Smith Decl. ¶ 15. The glow sticks he brought to use during his performance dance were confiscated by security. See id. ¶ 22. Because of the governmental ban on glow sticks, Smith was unable to perform and express himself as he wished. See id. ¶ 23. The injunctive provisions of the plea have "singled out and stopped" his self-expression. Id. ¶ 27.

Plaintiff Behan is a dancer who uses both glow sticks and masks in his performances. Behan Decl. ¶¶ 7-8. Behan regularly attends events at the State Palace Theater. See id. ¶ 3. 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 and as somebody who would distribute candy and various toys." Id. ¶ 4. As part of his costume, Behan would wear masks decorated with "a rabbit" or "other designs painted with glow paint." Id. ¶ 6. Behan would also use "glow sticks and other objects that glow, such as flashing lights" during his dance performances. Id. ¶ 8. To heighten the visual effect of these performances, he would provide refractive glasses to fellow attendees who watched his dancing. See id. ¶ 9. These performances were well-rehearsed, practiced in advance and tailored to "be visually attractive to viewers who watched through refractive glasses." Id. ¶ 10. Other dancers and attendees "often cleared space for [Behan] on the dance floor and gathered around to watch [his] dances, even without refractive glasses." Id. ¶ 11.

On August 4, 2001, Plaintiff Behan attended the electronic music concert at the State Palace Theater. See id. ¶ 16. Because he knew that masks and glow sticks were banned, he did not bring any of these items with him. See id. ¶¶ 17, 20. As a result of the ban, "the cultural value of electronic music events have been severely diminished. The event on August 4, 2001, was entirely a show to watch instead of an event that attendees are a part of; the amount of self-expression has decreased since very few people come dressed up and the dance floor is dark." Id. ¶ 26. In addition, Behan is "no longer able to go in character and perform for others in attendance." Id. ¶ 27. His dancing is "severely limited as a performance" such that he no longer considers it to be expression that others can enjoy and participate in. Id.

Beyond the expressive aspects of performances, electronic music concerts characteristically are replete with political and artistic symbols – items of clothing and accessories designed to convey

a unique set of cultural values. Attendees don these symbols, pacifiers in particular, in order to identify their adherence to the values of rave culture. See, e.g., Smith Decl. ¶ 5. These values are widely known by the mantra: Peace, Love, Unity and Respect. Rushkoff Decl. ¶ 15. In addition, at some raves, "the aesthetic is dominated by themes of infancy and childhood. Young people bring glow sticks, dress up like children, and carry pacifiers and plastic keys." Rushkoff Decl. ¶ 13. These ravers are known as "candy kid[s]." Smith Decl. ¶ 6. Candy kids wear a "pacifier and other accessories" in order to "express a desire not to let go of childhood and to remain young and care free." Id.

Prior to the government ban on pacifiers at the State Palace Theater, Plaintiff Smith would regularly wear a pacifier around his neck to electronic music events held there. See Smith Decl. ¶ 5. The pacifier symbolized his "identity as a 'raver'" and his "interest in electronic music and dancing." Id. As a "raver" wearing a pacifier, Smith identified himself with the ideology of "candy kids," and marked himself as one of a group that shares "an interest in attending electronic music events," and are "more open-minded, love electronic music, and love to dance." Id. ¶ 6.

Plaintiff Smith brought a pacifier with him to wear for these expressive purposes to the electronic music event at the State Palace Theater on August 4, 2001. See id. ¶ 16. It was confiscated by security, and he was therefore unable to communicate the message that he wished to convey. See id. ¶¶ 18-19. As it is a cultural artifact of the rave movement, the prohibition of a pacifier "is just the first step towards ending our dance culture." Id. ¶ 28.

Plaintiffs Smith and Behan plan to attend the rave at the State Palace Theater scheduled for August 24, 2001, and they would again seek to perform with and display the banned items.

III. ARGUMENT

Both a temporary restraining order and a preliminary injunction should be granted here because Plaintiffs have demonstrated: "(1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest." Howells v. City of New Orleans, 2001 WL 823723, *1 (E.D. La. July 20, 2001) (citing Allied Mktg. Group, Inc. v. CDL Mktg., Inc., 878 F.2d 806 (5th Cir. 1989)) (temporary restraining order); Hoover v. Morales, 164 F.3d 221, 224 (5th Cir. 1998) (preliminary injunction); Sugar Busters LLC v. Brennan, 177 F.3d 258, 265 (5th Cir. 1999) (same).

A. Plaintiffs Show Substantial Likelihood of Success on the Merits

1. Symbols of Dance Culture Are Not Drug Paraphernalia but Rather are Lawful Objects of Personal Property Not Subject to Governmental Confiscation.

The Constitution protects the interest of performers and attendees at the State Palace Theater in the possession and use of the lawful objects of personal property banned by the government. Clearly, if the specified items were illegal contraband, performers and attendees would have no right to use and possess them, even for expressive purposes. However, where the government targets legal property, the Constitution erects a barrier against governmental interference and deprivation.

The government's only claimed justification for this ban is that the pacifiers, glow sticks and other items displayed or worn during "raves" constitute drug paraphernalia in violation of Section 863 of the Controlled Substances Act. A plain language reading of that provision makes clear that these items do not constitute "drug paraphernalia." The Controlled Substance Act defines "drug paraphernalia" as:

> any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

21 U.S.C. § 863(d) (2001).

In short, "drug paraphernalia," as defined in the statute, refers to objects used to create a controlled substance or to introduce it into the human body. Thus a syringe for injecting heroin or a pipe for smoking crack cocaine may be properly classified as drug paraphernalia, while the objects petitioners seek to enjoin (pacifiers, glow sticks, chill rooms, vapor rub, masks and massage tables) may not.

2. The Injunctive Provisions of the Plea Agreement Constitute Governmental Action.

By devising, insisting upon, and ultimately agreeing to the plea terms at issue in this case, federal officials caused the censoring of Plaintiffs' performances and the confiscation of Plaintiffs' property, thus violating the constitutional rights of performers and attendees of electronic music events. As we demonstrate below, the government surely could not itself execute a plan to seize legally possessed property, especially items that convey artistic and symbolic messages which the government seeks directly to suppress. Failing in its own authority to ban the symbols of rave culture, the government has recruited a private party to carry out its impermissible plan – a maneuver that courts have long recognized will not relieve the government of responsibility for unconstitutional conduct it proposed and propelled forward. See, e.g., Adickes v. S.H. Kress, 398 U.S. 144 (1970) (finding state action where private restaurant employee agreed with police officer to deny service to patrons on basis of race).

In determining whether state action exists, the Fifth Circuit has looked, in part, to "whether the government knew of or acquiesced in the intrusive conduct." United States v. Pierce, 893 F.2d

669, 673 (5th Cir. 1990). Here, the government not only knew of, but even directed, that the Brunets ban the listed items. When the government requests the unconstitutional actions and then memorializes this request in a court pleading (in this case, the plea agreement), "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).[1]

The judicial precedent in this area is straightforward and well settled: a simple agreement, showing that the private party is "a willful participant in joint activity with the State or its agents" constitutes state action, thereby implicating the full protection of the Constitution. Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, ____, 121 S. Ct. 924, 930 (2001) (internal citations omitted). In Adickes v. S.H. Kress, 398 U.S. 144 (1970), nothing more than an informal, non-verbal, understanding between a private lunchroom manager and a police officer was required to support finding of state action. Id. at 152; see also Phillips v. Vandygriff, 711 F.2d 1217, 1226 (5th Cir. 1983) (finding state action where private savings and loans associations voluntarily adhered to industry custom of submitting decision to hire all prospective savings and loan managers to approval by government officials). Where, as here, the terms of the agreement are in writing, state action is particularly evident. Chan v. City of New York, 1 F.3d 96, 106 (2d Cir. 1993) (private contractor's failure to pay wage required by federal law was state action where the terms of the municipal contract essentially dictated the sub-standard pay scale).[2]

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[1]The term "state actor" applies to both state and federal government actors, and the concept of state action governs suits brought against the federal government directly under the Constitution as well as suits brought against the states under the Fourteenth Amendment. Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1220 n.1 (5th Cir. 1982).

[2] Courts have applied a number of tests to the primarily fact-bound inquiry involved in questions of state action. Here, the level of government involvement in the plea agreement support a finding of state action under both the "nexus" test and the "joint action" test. See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("nexus" test); Adickes, 398 U.S. at 152 ("joint action" test).

The plea agreement here provides an even stronger basis for finding state action than the tacit understanding found in Adickes. Unlike the lunchroom manager in Adickes, who could freely alter his course of behavior at his own caprice, Barbecue is bound to enforce the terms of the plea agreement. Where, as here, a private party takes action that is intended to further the objectives of the government, as opposed to his own ends, state action is particularly evident. See Pierce, 893 F.2d at 673. Robert Brunet, as president of Barbecue, is clearly not pursuing this policy to further his own ends. Indeed, without the restrictions required by the plea, Robert Brunet would not only allow the items into the State Palace Theater, he would continue his longstanding practice of selling these items himself. See Brunet Decl. ¶ 30. The existence of the plea agreement, however, places him and all attendees and performers at the State Palace Theater under the restrictions insisted upon by the federal government.

The government will likely point out that a criminal defendant regularly waives constitutional rights as part of a plea agreement – an observation that is both correct and irrelevant. The proprietors of the State Palace Theater may well be free to waive their own constitutional rights as part of a plea agreement, but the government cannot abrogate the rights of innocent third parties who had no opportunity to even know that their constitutional rights were at stake. See Stoner v. California, 376 U.S. 483, 488-89 (1964) (holding consent by hotel clerk of search of hotel guest's room invalid because hotel clerk lacked any authority to waive rights of guest). The government proposes a dangerous course when it seeks to pursue an unconstitutional policy through private proxies entering into plea agreements. Could government officials settle a Medicaid fraud suit by having a hospital agree to stop performing abortions, thus denying the constitutional rights of women? Whether considering free speech, abortion or any other (sometimes controversial)

constitutional right, the government cannot achieve unconstitutional ends through the means of a private proxy.

3. The Ban on Items Named in the Injunctive Plea Provision Violates the First Amendment Guarantees of Free Speech.

The Government violates the First Amendment rights of performance artists and rave attendees by banning artistic performances and symbolic speech utilizing pacifiers, masks, and objects that glow. Electronic music concerts are not just exhibitions of music–they are also venues for performance art, expressive dance, and symbolic speech. The injunctive provisions of the plea target this expression and aim to suppress a cultural movement by eliminating its most salient symbols. This censorship of performance and speech violates the First Amendment rights of rave performers and attendees.

a. The injunctive plea provisions are content-based restrictions of artistic dance performances.

The First Amendment protects artistic expression of the sort at issue here, including "live entertainment, such as musical and dramatic works," from government interference and censorship. Schad v. Mt. Ephraim, 452 U.S. 61, 65 (1981); see also Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (music); Southeastern Promotions v. City of West Palm Beach, 457 F.2d 1016, 1018 (5th Cir. 1972) (theatrical productions); Lionhart v. Foster, 100 F. Supp. 2d 383, 386 (E.D. La. 1999) (street musicians). The government makes no secret of the fact that its ban on masks, glowing objects, and other rave-related items forms part of a purposeful attempt to address drug use by eliminating rave music, dance and culture. See supra at 4. "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964); accord 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502

(1996). Here, Congress has legislated against the use and possession of ecstasy – and Plaintiffs do not contest its authority to do so. The U.S. Attorney, however, has gone the next, impermissible step of attempting to restrict expressive, artistic performances simply because some members of a rave audience may use ecstasy.

Electronic music culture centers around inherently expressive, protected performance art, where the dance culture is focused on the attendees as much as a celebrity performer. See Rushkoff Decl.¶ 11. Rave dancers are not engaged in merely social dance, but their dancing is a performance, to be watched and enjoyed by other ravers. See Smith Decl. ¶ 11; Behan Decl.¶ 9 . Talented dancers are often well-known in circles of ravers, and their art is the product of hours of practice. See, e.g., Smith Decl. ¶ 13; Behan Decl. ¶ 11. Ravers regularly clear space on the floor so that individual dancers have sufficient room to display their craft and others have an opportunity to watch and enjoy the show being staged for their benefit. See Smith Decl. ¶ 13.

This expressive dance is protected by the First Amendment. Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995) ("The theater of expressive dancing may be limited only by the art and creativity of the performers"). While the performance of a professional artist like Plaintiff McClure is obviously protected, courts have equally recognized that performances, like those presented by Plaintiffs Smith and Behan, need not be professional or presented on a stage in order to warrant constitutional protection. See Schact v. United States, 398 U.S. 58, 62 (1970) (content of unrehearsed street skit protected by the First Amendment); Lionhart, 100 F. Supp. 2d at 386 (amateur street musicians). Nor does the potentially small size of the audience gathered around Smith and Behan for their performances make them any less worthy of First Amendment protection. "[T]he size of the audience has . . . been deemed wholly irrelevant to First Amendment issues. One has a right to freedom of speech whether he talks to one person or to one thousand." United States

v. International Union United Auto., Aircraft and Agric. Implement Workers of Am. (UAW-CIO), 352 U.S. 567, 595 (1957).

The ban on glowing objects and masks intentionally targets only one genre of performance – those involving electronic music. Singling out this particular form of artistic performance constitutes a content-based restriction of speech. Indeed, even as the government proposes to eliminate raves, supra at 4, it defines raves by reference to the artistic content of the event: "a 'rave' is an all-night dance event . . . that are [sic] characterized by loud, rapid tempo ('techno' music), 140 to 200 beats per minute, light and laser shows, smoke or fog, and psychedelic screen images." Factual Basis, U.S. v. Barbecue, at 2, attached as Exh. F to Boyd Decl. The government acknowledges, as well, that glow sticks and masks are a central element of raves. Bulletin at 4 ("Chemical glow sticks, bracelets, and necklaces are commonly worn at raves"; ravers wear "costumes to rave events, dressing as princesses, cartoon characters, or other fantasy figures that match the theme of the rave.").

Just as the government could not prohibit the central element of nudity in the play "Hair," see Southeastern Promotions v. City of West Palm Beach, 457 F.2d 1016, 1018 (5th Cir. 1972), likewise here it cannot prohibit the central element of masks and glowing objects in rave performances. As argued above, artistic performance is speech for the purposes of the First Amendment, and so a targeting of one genre of performance is a content-based denial of free-speech rights. See Cinevision Corp. v. City of Burbank, 745 F.2d 560, 571 (9th Cir. 1984) (holding that ban on "hard rock" concerts is a content-based restriction on speech); Reed v. Village of Shorewood, 704 F.2d 943, 950 (7th Cir. 1983) (rejecting effort to close bar because of playing "rock" music); Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060, 1063 (1st Cir. 1980), rev'd on other grounds, 453 U.S. 247 (1981) (finding ban on "rock" concert is content-based restriction on speech); Torries

v. Hebert, 111 F. Supp. 2d 806, 818 (W.D. La. 2000) (holding suppression of "gangster rap" constitutes content-based restriction on speech). Again, the principles here are longstanding and familiar: the ban on rock concerts in Cinevision grew from concern of drug use at those concerts; the attempt to close a bar in Reed grew from antipathy to the combination of liquor and "rock" music; the effort to ban a rock concert in Fact Concerts, Inc. grew from concerns of "unruly" crowds; and the restrictions on rap music in Torries responded to concerns of guns and violence. But in all cases, the government could not fight drugs, alcohol, unruliness, guns or violence through censoring artistic performances of a genre believed to be associated with the identified problem.

A claim for content-based discrimination need not be founded upon "a narrow, succinctly articulable message. . . . [Otherwise, the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995). Rather, the First Amendment equally protects the more inchoate message conveyed by rave dance and enhanced by the essential accessories used in that dance, including glowing objects and masks.

The glow sticks costume used by Plaintiff McClure is an essential part of his group's performance and critical to encouraging the audience participation Mr. McClure desires at his concerts. See supra at 8. For Plaintiffs Smith, Behan and other rave attendees, the use of glow sticks and other lighted objects is an integral part of their dance performance – they are used for the purpose of expression, including the expression of a "futuristic" attitudes, with an emphasis of electronic music and other technology. See Smith Decl. ¶ 8; supra at 7. The ban on masks also censors the artistic expression of Plaintiff Behan, whom fellow ravers recognize by his masked character, Mr. Bunny. See Behan Decl. ¶ 4; supra at 8.

Dance performances at raves are enhanced by the use of these items, conveying a message of futurism and the embrace of developing technologies that is central to the computer-generated music and ideology of rave culture. See Rushkoff Decl. ¶ 8; Smith Decl. ¶ 8; cf. Barnes v. Glen Theatre, 501 U.S. 560, 570-71 (1991) (holding that where the dance is enhanced by nudity and the message conveyed is eroticism, the dance and erotic message are protected by the First Amendment).

As a content-based prohibition, then, the injunctive provisions must be evaluated under the "strict scrutiny" standard, which requires that limitations on speech be narrowly tailored to serve a compelling governmental interest. See Boos v. Barry, 485 U.S. 312, 321 (1988). Insofar as these items are not themselves illegal, the government can articulate no compelling interest in their ban. Further, the ban is anything but narrowly tailored. It seeks to eliminate a genre of artistic expression with no basis for believing it will have any impact upon drug use. The Controlled Substances Act, which was enacted expressly for the purpose of combating illegal drug use, provides the government with a panoply of avenues to achieve its objective, without resorting to the uncertain, unconstitutional tool of censorship.[3]

b. Defendant's plea terms prohibit the wearing of expressive symbols, thus violating by the First Amendment.

The ban on "pacifiers or any object in the shape of a pacifier" violates the First Amendment rights of concert attendees to use symbols to express their identity, interests and values. The First Amendment protects not only verbal and written expression, but also symbols and conduct that constitute "symbolic speech." See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (holding that wearing black arm band in protest against Vietnam war is expressive

[3]Even if the injunctive provisions were content-neutral, they could not withstand constitutional scrutiny. A content-neutral injunction may not burden any more speech than necessary to serve a significant government interest. Madsen v Women's Health Ctr., 512 U.S. 753, 765 (1994). As it is here, a broad ban on expressive activity cannot stand in the absence of an articulable government interest.

conduct protected by first amendment free speech); accord Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (striking down school's ban on Freedom button in school attended by African-American students).

Mr. Smith has worn a pacifier around his neck at concerts in the State Palace Theater to communicate to others that he is someone interested in electronic music and dancing, and that he is a member of the community of "ravers." See Smith Decl. ¶ 5; supra at 9. Clothing and accessories can constitute protected speech (expressive conduct) when "coupled with communicative content." Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001). Just as wearing a cross communicates membership in the Christian community, so does a pacifier show that the wearer identifies with and promotes the values of rave culture. See Smith Decl. ¶ 5. The wearing of pacifiers, then, is expressive conduct, implicating the full protections of the First Amendment. It is intended "to convey a message," and, given the widely shared values of the dance culture, "the likelihood is great that the message [is] understood by those who view[] it." Spence v. Washington, 418 U.S. 405, 410-11 (1974).

The government's ban on "infant pacifiers or any object in the shape of a pacifier" is directly "related to the suppression of expression" and is therefore subject to strict scrutiny. See Texas v. Johnson, 491 U.S. 397, 407 (1989). The prohibition of pacifiers and pacifier-shaped objects is a direct affront to the symbolism of electronic music culture. While the government's putative rationale for the ban is that "[m]any ravers chew on baby pacifiers...to offset the effects of involuntary teeth grinding caused by MDMA," Bulletin at 4, the breadth of the ban illustrates that it is not tailored to combat the drug-related use of these items. The ban includes all objects shaped like a pacifier, regardless of what the objects are made of, how large they are, or whether or not they could conceivably be used to alleviate tooth grinding. In addition, the ban does not include a

number of other objects that could help ameliorate the same symptoms a pacifier supposedly addresses. For example, a mouth guard that is used by athletes would be much more effective at preventing tooth grinding than would a pacifier. Yet the use of a mouth guard is not forbidden by the government.

The ban, therefore, is targeted directly at the expressive value of pacifiers as symbols that promote and embrace electronic music and dance culture. Regulations such as this one that strike at the content of symbolic expression carry with them a heavy presumption of invalidity. Rosenberger v. University of Virginia, 515 U.S. 819, 828 (1995). That presumption is particularly strong when the government is motivated by its hostility to the opinion. See Johnson, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). In order to overcome this presumption and support the ban on pacifiers, the government must be able to prove that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Boos, 485 U.S. at 321. The government fails to meet this burden.

4. The Injunctive Provisions of the Plea Constitute a Deprivation of Property Rights Without Due Process of Law.

Through the injunctive provisions of the plea, the federal government has caused the summary confiscation of attendees' legal property, thereby violating their Fifth Amendment Due Process rights and offending "the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." Fuentes v. Shevin, 407 U.S. 67, 81 (1972). Of course, the government enjoys the power to confiscate illegal contraband or even evidence of a crime, but here the government has mandated that the State Palace Theater deprive all of its patrons of the use and possession of a wide range of legally acquired,

legally possessed property. These deprivations, taken without any legal authority or judicial process, cannot be squared with the Fifth Amendment.

The Fifth Amendment guarantees that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." U.S.C.A. Const. Amend. V. Due Process guarantees that an individual's dominion over his property is "subject only to the control of lawful enactments curtailing that right in the public interest." Buchanan v. Warley, 245 U.S. 60, 74 (1917). Here, there is no statutory foundation for the government's limitations on the possession and ownership of banned items at the State Palace Theater. As discussed supra, the listed items are not drug paraphernalia. Nor are they otherwise illegal. In fact, a wide range of establishments offer these items for sale, from local drug stores to Wal-Mart to Disney World.

An attendee's property interest in pacifiers, vapor rub, vapor inhalers, masks, objects that glow, and massage-related items (i.e., the various items banned under the plea) is sufficiently substantial to warrant constitutional protection. Due Process does not prioritize rights in different forms of real and personal property. "[U]nder our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else." Fuentes, 407 U.S. at 90. A court adjudicating due process rights does not evaluate these choices in order to determine which warrant constitutional protection. Id.

As it safeguards the right of possession, so does the Fifth Amendment protect a person's interest in the use of her property. Buchanan, 245 U.S. at 74. As a result, the interest rave attendees have in the use of their property while at the State Palace Theater is protected by the requirements of due process. Even "temporary or partial impairments to property rights" warrant constitutional protection. Connecticut v. Doehr, 501 U.S. 1, 12 (1991). Thus, the injunctive provisions equally

violate the due process rights of all State Palace Theater attendees who have either had their property confiscated or who are unable to use their legal property where and as they choose.

5. The Injunctive Plea Provisions Violate the Fourth Amendment Prohibition of Unreasonable Seizures.

The seizure of glow sticks, vapor rub products, masks, and pacifiers from every person who enters the State Palace Theater to attend a concert is unreasonable because no probable cause, or even an articulable suspicion, exists to suggest that the items are related to criminal conduct. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S.C.A. Const. Amend. IV. Generally, "seizures conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." United States v. Paige, 136 F.3d 1012, 1022 (5th Cir. 1998) (quoting Minnesota v. Dickerson, 508 U.S. 366, 372 (1993)).

Although exceptions to the warrant requirements exist, the government must have, at a minimum, either "probable cause to believe that the item seized is contraband or evidence of a crime," United States v. $7,850.00 in U.S. Currency, 7 F.3d 1355, 1358 (8th Cir. 1993); see Texas v. Brown, 460 U.S. 730, 742 (1983), or a reasonable and articulable suspicion that a particular person has "committed or is about to commit a crime." United States v. Jones, 234 F.3d 234, 239-40 (5th Cir. 2000); see United States v. Place, 462 U.S. 696, 701 (1983) (extending Terry stops to property and adopting same standards for investigatory seizures of persons and personalty); Terry v. Ohio, 392 U.S. 1, 21 (1968). Where, as here, neither probable cause nor an articulable suspicion exists, a seizure is unconstitutional under the Fourth Amendment.

No probable cause exists to believe that seizure of these items from every attendee of each concert is supported by a "fair probability that contraband or evidence of a crime will be found."

United States v. Sokolow, 490 U.S. 1, 7 (1989); see also Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 301-02 (1967) (discussing scope of permissible seizures as limited to only contraband, fruits, instrumentalities and evidence of crime). Despite the government's attempt to characterize glow sticks and pacifiers as drug paraphernalia, see Press Release at 3, attached as Exh. L to Boyd Decl., none of the items can be considered contraband. See supra at 10-11. Furthermore, all of the items seized are legal and commonly used by the general public for everyday uses. Nor are these items evidence of a crime. Given the wide-ranging and completely innocuous uses of these products, possession of any of them cannot indicate with any degree of certainty that a crime has occurred.

Seizure of these items is not even sustainable on an articulable suspicion that a crime has occurred or that the item contains contraband or evidence of a crime. See Place, 462 U.S. at 701; Jones, 234 F.3d 234, 239-40 (1983). The suspicion required for a seizure based on less than probable cause must be based on more than an "inchoate and unparticularized suspicion or 'hunch.'" Sokolow, 490 U.S. at 7; see Reid v. Georgia, 448 U.S. 438, 441 (1980). Again, as above, the fact that a dance attendee is carrying these items is neither a crime nor evidence of a crime.[4]

B. Irreparable Injury

If a preliminary injunction were not to issue, Plaintiffs would most assuredly suffer irreparable harm – the curtailment of the constitutionally protected right to free speech, the

[4]Seizure of the glow sticks, masks and pacifers is particularly serious because these items are protected by the First Amendment. See supra at 10-11. Even where law enforcement officers believe that certain types of speech are associated with illegal drug activity, Fourth Amendment rights cannot be abrogated where no evidence of a crime exists other than exercise of First Amendment rights. See United States v. Ramon, 86 F. Supp. 2d 665, 674-75 (W.D.Tex. 2000) (holding that, while police were trained to suspect drivers displaying religious decals as drug smugglers, stop of vehicle was not reasonable on display of religious symbols without other strong evidence of criminal activity). Here, there are no grounds to justify seizure the items except that the government believes that some people who express themselves with the items use ecstasy, which is clearly impermissible under the Fourth Amendment.

unconstitutional seizure of property, and the unconstitutional denial of property rights without due process. As a matter of law, federal courts at all levels have recognized repeatedly that constitutional rights violations constitute irreparable harm. Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 619 (E.D. La. 1999). It is undisputed that the "loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." Ingebretsen, 88 F.3d at 280 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). Likewise, irreparable harm results from deprivations of due process rights, Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981), as well as deprivations of Fourth Amendment rights. See Causeway Med. Suite, 43 F. Supp. 2d at 619 (citing Deerfield Med. Ctr., 661 F.2d 328 (5th Cir. 1981)); Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992); Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1502 (9th Cir. 1996).

Plaintiffs Smith and Behan plan to attend the rave at the State Palace Theater scheduled for August 24, 2001, and they would again seek to perform with and display the banned items. If the injunctive provisions of the plea agreement remain in effect, their First, Fourth, and Fifth Amendment rights, along with the rights of thousands of other attendees, will be violated.

C. Threatened Injury to Plaintiffs Outweighs Any Injury Injunction Would Cause Defendant

The curtailment of Plaintiffs' constitutional rights clearly outweighs any damage Defendant would suffer under a preliminary injunction. The only effect of a preliminary injunction against the government would be the cessation of actions for which the government had no lawful authority–namely, the unconstitutional censoring of protected speech and performance art and seizures of property in violation of the fourth and fifth amendment. See Torries v. Hebert, 111 F. Supp. 2d 806, 823 (W.D. La. 2000). The government would be free to pursue crime control through other lawful means, such as the prosecution of those who have engaged in illegal drug activity. Id.;

see also Allied Mktg. Grp., Inc. v. CDL Mktg Grp., Inc., 878 F.2d 806, 810 n.1 (5th Cir. 1989) (holding that where alternative methods of promoting defendant's goals exist, balance of harms tips in plaintiff's favor).

D. Public Interest

Injunctive relief will serve the public interest because it will protect the constitutional rights of Plaintiffs and other attendees and performers at the State Palace Theater. The public simply has no interest in effectuating an unconstitutional law. See, e.g., Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1056 (5th Cir. 1997). Curtailing constitutionally protected speech will not advance the public interest, and "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." American Civil Liberties Union v. Reno, 217 F.3d 162, 181 (3rd Cir. 2000), cert. granted, Ashcroft v. American Civil Liberties Union, 121 S.Ct 1997 (May 21, 2001).

V. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court grant their motion for a temporary restraining order and preliminary injunction.

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