

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

UNITED STATES OF AMERICA

CRIMINAL DOCKET NO. 01-010

v.

SECTION C MAG. 4

ROBERT J. BRUNET

VIOLATION 21 U.S.C. §846  
21 U.S.C. §856 (a)(2)  
18 U.S.C. §2

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**BRIEF FOR THE INTERNATIONAL ASSOCIATION OF ASSEMBLY  
MANAGERS  
AS AMICUS CURIAE  
IN MOTION TO DISMISS**

**INTEREST OF THE INTERNATIONAL ASSOCIATION  
OF ASSEMBLY MANAGERS, INC.**

This case concerns the criminal prosecution of a public assembly facility manager for the sale and use of controlled substances on facility property in violation of 21 U.S.C. §856(a)(2), also known as the “crack house” law. The International Association of Assembly Managers (“IAAM”) is a not-for-profit, 501 (c) tax-exempt organization incorporated in the State of Illinois. IAAM’s membership includes approximately 2,800 managers of stadiums, arenas, convention centers, amphitheaters and performing arts centers (“facility managers”). The IAAM members operate facilities across the country, including many within the State of Louisiana, that represent investments of billions of dollars of public and private funds. These facilities attract millions of patrons in Louisiana alone each year to a variety of professional and amateur events including, but not limited to, football, baseball, music concerts, theatrical productions, annual conventions and tradeshows. IAAM members, officers, and staff favor strict drug laws,

detering drug use at their facilities and enforcing existing drug laws, but do not support criminal penalties against facility managers and potential forfeiture of their facilities for the criminal behavior of patrons.

The United States District Court Indictment for Violation of the Federal Controlled Substances Act and the prosecution for alleged violations of 21 U.S.C §846, 21 U.S.C. §856 (a)(2) and 18 U.S.C. §2 in this case involves multiple incidents of drug sales and use during a “Rave” dance party at the State Palace Theater. Robert Brunet has not, nor have any of his co-defendants, been charged with personally engaging in the sale, distribution, or ingestion of controlled substances. Mr. Brunet has been charged with a felony based on admissions that drug use occurs during such Rave dance parties, and on allegations that he operated his facility in such a way to facilitate or accommodate those using MDMA, also known as Ecstasy and other so-called “club drugs”. Conviction of these charges would allow the United States to seek forfeiture of the facility under 21 U.S.C. §853(a)(2) and (3).

The legal issues presented herein largely center around the duties of a public assembly facility manager to respect the Constitutional rights of patrons under the First and Fourth Amendments, and the responsibility of facilities for the criminal acts of third parties. Criminal prosecution of facility managers for acknowledged drug use at their facilities leads to serious questions regarding Constitutional rights to Freedom of Assembly, Freedom of Speech, and Fourth Amendment Search and Seizure duties in enforcing a zero tolerance drug policy. Due to the fact many facilities are owned by municipalities and state agencies, the question of equal protection, selective enforcement, and even 11<sup>th</sup> amendment immunity for States under the crack house provisions may be

implied, since it could lead easily to the prosecution of many state employees and forfeiture of state-owned property to the federal government. If Mr. Brunet is successfully prosecuted as indicted, this will lead to a major upheaval in the public assembly facility industry, and necessitate a dramatic change in the practice and policies followed by facilities throughout the country. These issues threaten to subject many more facilities and their managers to criminal prosecution and potential criminal forfeiture over the basic and rather well settled question of the liability of business owners for the criminal acts of third parties. For these reasons, IAAM has a clear interest in the outcome of this litigation. Any decision by the United States District Court for the Eastern District of Louisiana in this case concerning the criminal liability of managers for the drug offenses of their patrons, the provision of adequate safety and crowd control, and facility's general liability for the criminal acts of third parties, will affect IAAM members throughout the State of Louisiana and may affect members in other states due to the watershed importance of the issues and the great respect and deference in which the Court is held. In this way, the decision of this Court will directly affect the policies and operations of all public assembly facilities across the country and their ongoing effort to provide safe and enjoyable entertainment experiences for all patrons.

## STATEMENT OF THE ISSUES

The International Association of Assembly Managers will address the following issues:

- 1. Public Assembly Facility Managers may not deny musical performances based on content in violation of the First Amendment.**
- 2. Public Assembly Facility Managers may not conduct searches that could not be performed by the State in violation of the Fourth Amendment.**
- 3. The criminal prosecution of Public Assembly Facility Managers under 21 U.S.C. §846 will lead to selective prosecution of facilities in violation of the Fourteenth Amendment.**
- 4. Public Assembly Facilities have Affirmative Duties and Standards of Care to Patrons under civil law that the State alleges facilitate the use of drugs and form the evidentiary basis of this prosecution.**
- 5. The Indictment Holds Robert Brunet Liable For The Criminal Acts Of Third Parties.**

## STATEMENT OF THE CASE

In the indictment dated January 12, 2001, the United States charged Robert J. Brunet, manager of the State Palace Theater in New Orleans, Louisiana, Brian J. Brunet, an employee of the State Palace Theater, and James D. Estopinal, promoter at the State Palace Theater, with violations of 21 U.S.C. §846, 21 U.S.C. §856(a)(2) and 18 U.S.C. §2, alleging that the parties “did knowingly and intentionally combine, conspire and confederate ... to manager and to control the State Palace theater ... and to knowing and intentionally make available for use, without compensation said building for the purpose of unlawfully distributing and using controlled substances”<sup>1</sup>, including MDMA, also known as Ecstasy and LSD. The factual basis for these allegations states that the State

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<sup>1</sup> Indictment, p.2, dated January 12, 2001.

Palace Theater conducted monthly “Rave” dance parties, featuring loud, rapid tempo music with light and laser shows, and other visual presentations. Several drug overdoses were alleged to have spawned an investigation of the State Palace Theater. The factual basis for the indictment includes allegations that Brain Brunet, an employee of the State Palace Theater, told a security guard not to be proactive in arresting persons selling or using drugs, that paraphernalia commonly used to enhance drug highs such as pacifiers, chemical light sticks and flashlight rings were sold. The facility is alleged to have sold water at inflated prices and provided “chill rooms” to allow patrons to cool down. Further, it is alleged that the Defendants knowingly provided medical assistance and ambulances at the Raves, leading to the conclusion that they were aware of the possibility of excess drug use and complicit in its use. The Defendants are also alleged to have allowed persons to have Vicks, a commercial cold treatment, at the facility, which the State alleges is used by those ingesting drugs. The State concludes that by its actions, the management and employees of the State Palace Theater not only knew of the drug use at its facility, but conspired to facilitate and encourage drug use, despite its zero tolerance drug policy and use of security personnel at the facility.

### **SUMMARY OF THE ARGUMENT**

Public Assembly Facilities are restricted from violating the Constitutional rights of patrons under the First and Fourth Amendments to the Constitution, and thus are restricted from prohibiting types of events based on content, and from performing intrusive searches on patrons that may or may not curtail drug use by patrons. Moreover, the “Crack House” laws charged in the instant case are being used by the Government against Robert J. Brunet in a manner never intended by Congress when enacting the laws.

The State is, in essence, taking the safety provisions provided by the State Palace Theater, as required under industry standards, and using this information as the basis for a criminal indictment against the Manager of the facility for the criminal activities of third parties, for which a business operator does not bear responsibility under civil law.

## **ARGUMENT**

### **1. Public Assembly Facility Managers May Not Deny Musical Performances Based On Content In Violation Of The First Amendment.**

The First Amendment of the Constitution states that “Congress shall make no law ...abridging the freedom of speech ...or the right of the people peaceably to assemble.”<sup>2</sup> In the instant case, both the rights of individuals to attend “raves” or techno-music concerts and their right to assemble in a public assembly facility are in jeopardy.

Public Assembly Facilities, such as the State Palace Theater, are just that- places where the public gathers to listen to and exchange ideas, whether that communication is through the presentation of speakers, theatrical performances, or music concerts, among other activities. As such, Facilities are prohibited from discriminating based on the content of the performances that appear within their walls. Any restrictions on presentations must follow the narrow and limited time, place and manner restrictions the Supreme Court has ruled permissible in regulating speech under the First Amendment.

The United States Supreme Court has ruled that the performance of music is protected by the first amendment.<sup>3</sup> Public Assembly Facilities have, from time to time, sought to restrict the performance of certain types of shows or music at their facilities, only to find, time and again, that the facility and its surrounding areas are largely

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<sup>2</sup> U.S. CONST. Amend. 1.

<sup>3</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

traditional or limited public forums for the exchange of ideas, where only narrow, content-neutral regulations as to time, place and manner are allowed, as long as other adequate alternative means of communication are available. For example, in Marilyn Manson, Inc. v. New Jersey Sports and Exposition Authority,<sup>4</sup> the Authority sought to prevent “Ozzfest ‘97” from Giants Stadium, because it found the band, Marilyn Manson and Pantera, objectionable. Despite the fact that these bands had performed publicly without any problems or incidents, the Authority felt it was not in the best interests of the facility to hold the concert, alleging the heavy metal bands might cause safety concerns. The District Court enjoined the Authority from canceling or prohibiting the concert on First Amendment grounds, stating the Authority could not cite any legitimate safety concerns involving Manson’s or Pantera’s performance.

Likewise, in Promotions Limited v. City of Southeast Charlotte,<sup>5</sup> the City sought to prohibit a production of the Broadway musical, HAIR, in part due to its six second nude scene. Despite evidence that the show was popular and would most likely sell out, the City felt it was not in keeping with their “family entertainment” image. The Court rejected this argument and enjoined the Facility from prohibiting the performance, stating

“It is much too late in the history of the First Amendment to seriously suggest that public officials managing a public facility may pick and choose the philosophical and ideological content of programs using public auditoriums.”<sup>6</sup>

*See also* Atlantic Beach Casino, Inc., d/b/a The Windjammer v. Morenzoni, 749 F. Supp. 38 (D. R.I. 1990) (town counsel’s attempt to revoke liquor and entertainment licenses in attempt to stop performance of “2 Live Crew”, a band known for songs with allegedly

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<sup>4</sup> 971 F. Supp. 875 (D. NJ 1997).

<sup>5</sup> 333 F. Supp. 345 (W.D. N.C. 1971).

obscene lyrics, was enjoined and held to constitute a prior restraint on free speech, bearing a heavy presumption of unconstitutionality); Ginsberg v. City of Miami 307 F. Supp. 675 (S.D. Fla. 1969) (poetry reading by Allen Ginsberg halted mid-performance based on alleged obscenity; Court held the interruption was impermissible and City was forced to make the Stadium available on another date at no cost to allow reading to continue uninterrupted); and Aubrey v. Cincinnati, 815 F. Supp. 1100(S.D. Ohio 1993) (Content of sign at baseball game could only be regulated as to size, not as to message, and constitute protected speech); Carreras v. City of Anaheim, 768 F.2d 1039 (9<sup>th</sup> Cir. 1985)(Area surrounding convention center and stadium were public forums for expression).

In part due to the vast interconnection between government, public assembly facilities, and the freedoms of expression and assembly granted under the First Amendment, Facilities are not as free as individuals would be in similar circumstances to control the expression of patrons, solicitors, or lessees. Even when faced with events that might pose potential security problems or be seen as attracting the “wrong element”, facilities have very little choice in preventing such a use of the facility without encountering First Amendment issues. Likewise in the instant case, the State Palace Theater cannot deny a lease of its facility based merely on the “type” or “content” of an event. Any regulation must be content neutral and evenly applied. The United States likewise is prohibited from discriminating against “raves” or techno-music dance parties, based on the content.

Despite the fact that the officials involved in the indictment surmised and had evidence of drug usage and procurement by third parties on the premises of the State Palace Theater, it may not use as evidence against Mr. Brunet the musical content and stage show of the

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6 Id. at 351.

“Rave” party as a basis for the allegation that he knowingly and intentionally made the State Palace Theater available for the use and distribution of controlled substances. The United States may not, on one hand, prohibit a public assembly facility from discriminating based on content the shows it houses, and then use the content of the same show as evidence of a criminal conspiracy to violate the law. To do so places all public assembly facility managers directly between the Scylla of Constitutional Law and the Charybdis of federal narcotics laws, wherein the manager has no ability to comply with both masters.

## **2. Public Assembly Facility Managers May Not Conduct Searches That Could Not Be Performed By The State In Violation Of The Fourth Amendment.**

Additional evidence used in the indictment against Robert Brunet includes his recorded statement that acknowledges the use of drugs at Rave parties. The indictment implies that security at the event was lax, and that drug use, while perhaps not encouraged, was tolerated to an extent unacceptable under the “Crack House” statute. Even a cursory review of the congressional record regarding the enactment of the statute makes it clear that it was never intended to be applied in the instant circumstances. In the hearing entitled “Implementation of the President’s 1989 National Drug Control Strategy,”<sup>7</sup> Senator Biden stated:

Mr. President, I ask unanimous consent to include a statement explaining my amendment on civil enforcement of the crack house statute at the appropriate place in the Record. There being no objection, the statement was ordered to be printed in the Record, as follows:

### **SUBTITLE D -- CIVIL ENFORCEMENT**

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<sup>7</sup> 101st Cong. 1st Sess. 135 Cong Rec S 12758 (1989).

Use of civil statutes to close crack houses. Section 416 of the Controlled Substances Act ( [21 U.S.C. 856](#)) makes it a crime to operate a place for the purpose of manufacturing, distributing or using a controlled substances. This covers places such as "shooting galleries" and "crack houses." Presently this provision is enforceable only as a criminal offense that carries a maximum term of 20 years or a fine of up to \$500,000.

The clear intent of this law was to close so-called crack houses or shooting galleries, areas of high drug sales and use that have been a blight on neighborhoods throughout our country. In review of the Congressional Record, there has been much discussion of the proliferation of the use of "club drugs", increasing the enforcement of laws to discourage the recreational use of MDMA, also known as Ecstasy, that includes the appropriation of \$10,000,000 for carrying out the Ecstasy Anti-proliferation Act of 2000 for Fiscal Year 2001.<sup>8</sup> It is clear that the indictment and charges brought against Mr. Brunet is in part due to this Act, and the increased pressure on law enforcement to control and discourage club drug use. The indictment in essence forces the State Palace Theater to institute a "zero tolerance" drug policy, stricter than their current "zero tolerance" policy, mandating more invasive searches of patrons at Raves and any other event where drug use could be "anticipated".

Such "zero tolerance" drug policies are still not effective in removing all drug use at music events. Recently, in Florida v. Iaccarino et. al.,<sup>9</sup> individuals were subjected to searches at the entrance to a two-day, outdoor rock concert known as "Zen Fest". In the planning of Zen Fest, the promoter, property owner and sheriff's officials held several meetings, at which conditions for holding the event including the prohibition of bottles, cans and other projectiles for safety concerns, a zero tolerance drug policy, and the use of

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<sup>8</sup> See Appendix A, Ecstasy Anti-Proliferation Act of 2000.

<sup>9</sup> 767 So. 2d 470 (Fla. App. 2000).

the sheriff's office as lead security agency were discussed.<sup>10</sup> As part of the zero tolerance drug policy and the permit conditions issued by the county commission, the promoter published 250,000 anti-drug brochures stating drugs should not be brought to the event, and if any drug use occurred, future concerts would be banned.<sup>11</sup> The promoter also agreed to post professional signs at all automobile and patron entrances, pay 100 sheriff's officers to provide security and conduct searches, and hire 80 additional security personnel, referred to as "black shirts" due to their attire, to patrol the grounds. The promoter assumed the patrons would be subjects to pat down searches and possible metal detectors to search for drugs, and at other concerts, when illegal drugs were found, they were confiscated and destroyed, but no arrests were typically made.<sup>12</sup>

Despite verbal warnings of the searches to be conducted from the "black shirts" and signage that warned of prohibitions and searches, forty-three arrests for drug possession were made by sheriff's officers during Zen Fest.<sup>13</sup> At trial, the Circuit Court for Pasco County granted the numerous arrestees' motions to suppress drug contraband found during the searches, and the State appealed. The Court of Appeals, in examining the search procedure concluded the following:

- a) The officers had complete discretion as to how thorough a search to conduct.<sup>14</sup>
- b) The officers, although paid by the Promoter, were acting on behest and assigned by the Sheriff's office, and were in full uniform when performing searches.<sup>15</sup>
- c) None of the arrested individuals expressly consented to any search, and none of the officers requested consent.<sup>16</sup>

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<sup>10</sup> Id. at 473.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id. at 474.

d) Yelled warnings of upcoming searches by “black shirts” was not sufficient warning to conclude implied consent to searches on the part of patrons, or that patrons even heard such warnings.<sup>17</sup>

The Court reviewed the actual searches conducted, including the groping of genitals, taking off caps, removing socks and shoes, emptying pockets, opening purses, and displaying contents of wallets.<sup>18</sup> Despite objections made by the promoter to the invasiveness of searches, the Court found that the sheriff’s command office reported nothing could be done.<sup>19</sup> The Court reviewed at length the case law on the constitutionality of searches at rock concerts and other public events, and noted that while courts have routinely upheld searches conducted at airports and courthouses, searches at music concerts and festivals have been treated differently.<sup>20</sup> Such searches at airports and courthouses have been upheld based on underlying vital safety interests, where, in this case, the State’s underlying vital interest in supporting such searches was the illegality of the drugs themselves.<sup>21</sup> The Court of Appeals stated that:

If this Court permitted the illegality of the substances themselves to rise to the level of “vital interests”, then a similar sign posting would justify any search of any person at any time and to any degree. For example, such a “vital interest” could seemingly justify a search at a high school football game, where each student, teacher, and parent could be directed to take off shoes and socks, pull out their bras, empty their pockets and contents of wallets and have their crotch and genitals frisked.<sup>22</sup> ...The evidence reflects that the [rock concert] searches were very intrusive and not very

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<sup>14</sup> Id. at 475.

<sup>15</sup> Id.

<sup>16</sup> Id. at 476.

<sup>17</sup> Id. at 478.

<sup>18</sup> Id. at 474.

<sup>19</sup> Id.

<sup>20</sup> Id. at 478.

<sup>21</sup> Id.

<sup>22</sup> Id.

effective. Although [the State] did seize some contraband, drug and alcohol use at the [rock concert] was not eliminated.<sup>23</sup>

The Court further stated that in the instant case, the searches conducted were at best questionable and the degree of intrusion was found to be severe especially when the corrections officers conducted searches as extensive as if booking a patron into jail.<sup>24</sup> In reviewing the totality of the circumstances, the Court held that the atmosphere at the gate was intimidating, none of the officers informed patrons of the right to refuse to be searched and the right to obtain a refund, and thus the Court could not conclude that patrons provided informed consent to the invasive searches conducted, and thus upheld the suppression of all drug contraband used as the basis of arrest for the appellees.<sup>25</sup>

In the instant case, the prosecutors are concerned that the searches conducted by the State Palace Theater security at the Raves were ineffective, and thus led to the conclusion that the facility and its manager were complicit in the illegal activity taking place therein. However, even invasive, unconstitutional searches at rock concerts, such as those used by officers in Florida v. Iaccarino et. al. *supra*, have been found to be ineffective at eliminating illicit drug use at the event in question.

The question therefore arises as to the practicality of searches to eliminating the use of illegal drugs at facilities. Clearly, signs, searches, warnings, postings and the like may deter some people from engaging in illicit drugs while on premises, but there seems to be no fool-proof way to enforce a zero tolerance drug policy at a mass gathering, and ensure no drug will be taken or sold on premises. The State must also show some interest, beyond the illegality of the drugs themselves, in order to be able to justify any more

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<sup>23</sup> Id. at 479, citing *Gaioni v. Folmar*, 460 F. Supp. 10 (M.D. Ala. 1978) and *Jacobsen v. Seattle*, 658 P.2d 653 (Wash. 1983).

<sup>24</sup> Id. at 479.

intrusive search other than a mere pat-down. While one North Carolina Court suggested that a baggage check system could potentially be utilized, or genuine voluntary consent to searches be obtained before searching a person or his belongings,<sup>26</sup> any search conducted will unlikely fully eradicate the use of drugs in public assembly facilities. IAAM does not mean to suggest that any of its members condone turning a blind eye to drug use at mass gatherings, since any such use poses security and safety hazards to patrons. However, IAAM does feel that the total elimination of drug use at public assembly facilities is impractical in the real world, and thus subjecting its managers to criminal penalties for merely acknowledging the problem is against common sense and public policy. It is well known that drug use occurs among the young, particularly teenagers and college-aged individuals. At colleges and universities across the nation, drugs and alcohol are used by under-age students in dormitories, at fraternities' houses, as well as in private residences. However, due to the privacy rights of individuals, dorm rooms, frat rooms and apartments rented by students are not searched for illegal substances, despite the fact that many a University President would probably acknowledge the use of drugs on campus, despite all efforts to curb or eliminate such problems on the part of the administration. In contrast to the instant case, the United States is not seeking the arrest and indictment of College and University provosts, deans and presidents for being complicit in the use of drugs on campus.

Nor, might we add, has the criminal or civil law provided facility managers, club owners, or others similarly situated with guidelines as to what would constitute sufficient deterrent to drug use to avoid criminal prosecution such as that facing Mr. Brunet in the

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<sup>25</sup> Id.

<sup>26</sup> See *Wheaton v. Hagan*, 435 F. Supp. 1134 (MD.N.C. 1977).

instant circumstances. Mr. Brunet acted reasonably in providing security guards and conducting minimally invasive searches at the State Palace Theater. To require more invasive searches would be to impose requirements upon private individuals and businesses that would not withstand constitutional scrutiny were the same searches to be performed by State or Federal law enforcement agents. Once again, the indictment in the instant case places facility managers in a quandary between their obligations under Federal Drug Enforcement law and the proscriptions of the Fourth Amendment regarding search and seizures without warrants or probable cause, in which a facility manager has no ability to adequately serve both masters.

**3. The Criminal Prosecution Of Public Assembly Facility Managers Under 21 U.S.C. §856 (a)(2) Will Lead To Selective Prosecution Of Facilities In Violation Of The Fourth And Fourteenth Amendments.**

Public Assembly Facilities are primarily of two types- those that are privately owned and operated, and those that are created, funded, and maintained by governmental entities. Due to the large expense of funding new stadiums and arenas, many are financed by the taxpayers.

As a by-product of criminal prosecution under 21 U.S.C. §856, property used in the alleged crime is subject to criminal and/or civil forfeiture provisions. It is clear that prosecutors will be more inclined to seek enforcement of 21 U.S.C. §856 against private owners and operators of assembly facilities, since these individuals have more personal property at stake, and any such forfeiture will inure to the government's interest. In comparison, enforcement of the same provisions against State operated facilities would lead to Eleventh Amendment issues as to the prosecution of a State and its employees by the Federal Government, and the potential state or federal seizure of State-owned

property. This absurd construction of the federal government indicting State employees in state-run facilities for violation of the “Crack-House” statutes, so that the state property could be seized by the federal government, would surely lead most prosecutors to concentrate their enforcement efforts naturally on privately owned and operated facilities. This presents facial problems regarding equal protection and due process that potentially unravels any ulterior motive being pursued by prosecutors, that being the ultimate criminal or civil forfeiture of the State Palace Theater and its closing, to prevent any future Raves at the site.

**4. Public Assembly Facilities Have Affirmative Duties And Standards Of Care To Patrons Under Civil Law That The State Alleges Facilitate The Use Of Drugs And Form The Evidentiary Basis Of This Prosecution.**

In stadiums, arenas, theatres, and other public facilities, no patron is guaranteed absolute safety and security. Public Assembly Facilities serve millions of patrons each year within the State of Louisiana. In events ranging from theater and dance productions to large professional sporting events, the public depends on our facilities to provide them with a quality entertainment experience. The International Association of Assembly Managers (IAAM) provides education, training, and information to facility managers on a variety of subjects, including safety and crowd control. However, no amount of training, security, or preparation can guarantee absolute safety and constrain any and all illegal behavior at any mass gathering. Some patrons may display unruly behavior, may become intoxicated, use controlled substances, and some may even commit criminal acts.

It is the well established duty of a business owner to protect their invitees from harm by exercising reasonable care. It is a basic premise of tort law in the United States that:

A business owner has an affirmative duty to protect invitees against known dangers and also those which are discoverable with reasonable care... The occupier is not an insurer of the safety of invitees and his duty is only to exercise reasonable care for their protection.<sup>27</sup>

Basic duties to invitees under textbook tort law include not injuring invitees by negligent activities, warning of hidden dangers known to the owner, reasonable inspection of the premises to discover possible dangerous conditions, and to take reasonable precautions to protect invitees from dangers that are foreseeable from the arrangement and use of the property.<sup>28</sup> Under the Restatement of Torts, an occupier of land must also act reasonably to render first aid or to care for them when he knows or should know that the invitee is ill or injured.<sup>29</sup>

Certain events held at public assembly facilities have associated risks attendant in their production. For example, it has been widely recognized that while attending a baseball game, a patron may be accidentally hit with a fly or foul ball. Any injuries resulting from such an accident are not compensable from the player involved, nor the facility, based on the theory of assumption of risk.<sup>30</sup> However, it is well settled within Louisiana and elsewhere that a facility is obligated, as a business invitee, to provide adequate safety measures for its patrons.<sup>31</sup> Specifically, a proprietor must refrain from any conduct likely to cause injury to a guest, and must maintain his premises free from unreasonable risks of harm or warn patrons of known dangers thereon.<sup>32</sup>

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<sup>27</sup> Prosser and Keaton on Torts, 5<sup>th</sup> edition, p.425.

<sup>28</sup> Id.

<sup>29</sup> Restatement of Torts, §314A.

<sup>30</sup> See *Gunther v. Charlotte Baseball, Inc.*, 854 F. Supp. 424 (D. SC 1994) (baseball patrons assume the risk, and even novice spectators are deemed to assume the risk of injury from errant balls providing due care exercised on the part of the stadium).

<sup>31</sup> See *Toups v. Hawkins*, 518 So.2d 1077, 1081 (La. App. 1987); *Harris v. Pizza Hut of La., Inc.*, 455 So.2d. 1364 (La. 1984).

<sup>32</sup> *Toups* at 1081.

One of the main pieces of evidence used in the indictment to show Mr. Brunet was complicit in the use of drugs at the Rave dance parties held at the State Palace Theater, was the provision of cooling or “chill” rooms for patrons, the ready availability of ambulances and medical assistance, and the provision of water at inflated prices. Under basic tort law, Mr. Brunet would have been liable for any injuries to patrons resulting from a lack of “areas of refuge” or the chill rooms, inadequate medical aid, or failing to provide refreshments, given the crowd and prior knowledge of activities surrounding a Rave dance party. Consequently, Mr. Brunet is being indicted, in part, for providing those accommodations for which he would have faced civil suit or tort liability should he have chosen not to provide such amenities. Clearly, it should be unacceptable to use the safety provisions provided for guests and patrons of State Palace Theater, mandated to be used by any prudent facility manager, as evidence of acquiescence or the condoning of illicit drug use and sales. To use such safety provisions as evidence of wrongdoing places facility managers in a classic “catch-22”, where a facility manager will potentially subject themselves to criminal prosecution for providing such services, yet be subject to civil litigation, liability, and placing their patrons at risk of harm, should they opt not to provide such facilities. IAAM does not believe the eroding of safety measures, developed over many years and put in place to protect the safety of patrons, in order for managers to avoid criminal prosecution for the criminal acts of third parties at public assembly facilities, is in the public interest. The legal system and the prosecutors in this case cannot have it both ways. It is patently unjust for one branch of jurisprudence to require that certain safety precautions be taken to ensure public safety, and for another

arm to use such precautions as evidence of participation in the use and dealing of illegal drugs.

Prosecution of Mr. Brunet under 21 U.S.C. §846, 2 U.S.C. §856 (a)(2) and 18 U.S.C. §2, based on the Factual Basis purported to support the indictment, in fact shows that Brunet was acting as a reasonable and prudent Public Assembly Facility manager by providing areas of refuge for patrons, arranging emergency medical attention and transportation to be available, and by providing bottled water at prices charged in similar public assembly facilities throughout the industry. A failure to provide any of the above, once aware that the need for the same was necessary, may subject a facility to a civil suit for negligence, in the event any patron was injured.

Within the last year, Bill No.1714 in the California Assembly proposed requirements that all public assembly facilities accommodating more than 500 people, wishing to hold a concert or rave and have open floor or festival seating to comply with various requirements, including:

- Have an EMT on duty whenever patrons are present;
- Have a facility to accommodate up to ten people at one time for first aid;
- Have staffing to meet the need of the event, including training on dealing with drug and alcohol induced illness or injury;
- Have equipment to treat dehydration, broken and sprained bones, back and spinal injuries;
- Have telephone access to obtain emergency medical assistance by phone;
- The EMT on duty must have radio communication with an ambulance service, and be in communication with security personnel; and
- Comply with documentation of first aid treatment rendered, and injury incurred, reportable annually to the Emergency Medical Services Authority.

This bill was proposed in part, due to the death of a young boy at a “Rave”, due in part, allegedly, to the lack of adequate on-site medical treatment. Yet, in the instant case, providing emergency medical treatment for patrons of the Rave at the State Palace

Theater is being used as evidence of acquiescence to illegal activity and participation in a conspiracy, rather than as the actions of a reasonable, prudent, and well-informed public assembly facility manager. Once again, the United States places Mr. Brunet in a position of choosing the safety of his patrons or his own personal freedom from criminal prosecution, when these safety provisions are being utilized as the evidentiary basis for his indictment under 21 U.S.C. §856(a)(2). IAAM objects to the use of safety and security measures in this way, as it will have an adverse effect throughout the industry, and has the potential to undo years of efforts to develop standards of practice to ensure the safety and enjoyment of all patrons at Public Assembly Facilities throughout the United States.

##### **5. The Indictment Holds Robert Brunet Liable For The Criminal Acts Of Third Parties.**

This indictment seeks to hold Mr. Brunet and his co-defendants responsible for the criminal behavior of its patrons, ingesting and selling controlled substances, despite the fact none of the named individuals has been personally alleged to have sold or ingested any illegal substance, or otherwise directly involved or profiting from the illegal trafficking of narcotics. It is a well settled principal in many states, including Louisiana, that businesses are generally not liable for the criminal acts of third parties, absence a showing of a special relationship or negligence. For example, in *Noble v. Los Angeles Dodgers*,<sup>33</sup> the plaintiffs had attended a night baseball game at Dodgers stadium. After the game, when they were returning to their car in the stadium parking lot, two drunks standing near their car attacked them. The plaintiffs sued the Dodgers for their injuries, alleging inadequate security and a jury awarded them damages, but found one Plaintiff 55

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<sup>33</sup> 168 Cal. App. 3d 912 (Cal. Ct. App. 1985).

percent responsible for his injuries, and his girlfriend 35 percent responsible for her injuries. The Dodgers appealed the decision, and the Court reversed the lower court's jury verdict. In a well reasoned opinion reviewing premises liability, the Court stated:

It is a sad commentary but it can be said that in this day and age anyone can foresee or expect that a crime will be committed at any time and at any place in the more populous areas of the country. That fact alone, however, is not enough to impose liability on a property owner when a crime does in fact occur on his or her property.<sup>34</sup>

The Court also stated that:

We understand the law still to require that a plaintiff, in order to establish liability, must prove more than abstract negligence unconnected to the injury. In cases in which the specific conduct of third parties is brought to the attention of a defendant property owner sufficiently in advance of the injury to give the defendant an opportunity to act to prevent the injury, the causal connection between the failure to act and the injury is patent. ... We are, however, unaware of any case in which a judgment against the property owner has been affirmed solely on the basis of a failure to provide an adequate deterrence to criminal conduct in general.<sup>35</sup>

The question then to be determined by the jury is what reasonable steps could have been taken to prevent the Plaintiff's injury? The purpose of a trial in this type of case is not simply to critique defendant's security measures and to compare them to some abstract standards espoused by a so-called "security expert". The objective is to determine whether a particular defendant should, under the circumstances, be held liable for a plaintiff's injury because of a failure to prevent the criminal actions of a third party. We submit that causation is a critical question.<sup>36</sup>

No one can reasonably contend that even a significant increase in police personnel will prevent all crime or any particular crime. Police officials and security experts ... may differ in their opinion on just how police or security personnel should be deployed, but *that dispute is in the context of how to achieve the greatest degree of suppression with the resources available and not to prevent all crime or any particular crime.*<sup>37</sup> [Emphasis added].

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<sup>34</sup> Id. at 914.

<sup>35</sup> Id. at 916.

<sup>36</sup> Id. at 917.

<sup>37</sup> Id. at 918.

The Court then reversed the jury decision, stating that the evidence was simply insufficient to support the judgment.

Similarly, in Moye v. A.G. Gaston Motels, Inc.,<sup>38</sup> the Supreme Court of Alabama stated that:

This Court has not yet decided a case whose facts have commanded us to impose liability on a business for injuries to its invitees as a result of the criminal conduct of a third person....”It is difficult to impose liability on one person for an intentional criminal act committed by a third person.”<sup>39</sup>

Likewise, in Henderson v. Louisiana Downs, Inc.,<sup>40</sup> the Court of Appeals reviewed whether adequate security was provided in order to have prevented an injury to a patron by another patron at a racetrack. The Court reviewed a long line of Louisiana case law, concluding that “As to criminal acts performed by third parties specifically, there is generally, no duty to protect others from the criminal acts of those parties.”<sup>41</sup>

In the instant case, the United States seeks to hold a facility manager liable for the criminal acts of third parties within his facility. Although in contrast, the harm is not a classic tort harm against another patron, but one against the federal drug enforcement laws, it is nonetheless an accurate analogy of the charge. It is clear from the cases cited supra that many courts are of the opinion that the criminal acts of third parties cannot be controlled, and that no matter what preventative measures are used, total elimination of crime is unlikely. Security measures are implemented seeking to suppress crime, but can never hope to eliminate it completely, which, under the current set of facts, would still leave facility managers open to prosecution under the federal crack house laws. This schema is patently unjust, whether under the criminal or civil context.

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<sup>38</sup> 499 So.2d 1368 (Ala. 1986).

<sup>39</sup> Id. at 1370, citing in part CIE Service Corp v. Smith, 460 So.2d 1244, 1247 (Ala.1984).

<sup>40</sup> 566 So.2d 1059 (La. App. 2d Cir. 1990).

## SUMMARY

IAAM believes that the prosecution of Robert Brunet under the “crack house” statutes will not serve public policy and the public interest. Not only is such a prosecution against the original congressional intent, it will serve to chill the First Amendment freedoms of Speech and Assembly enjoyed at Public Assembly Facilities across the Country on a daily basis. Further, the indictment in this case serves to impose a duty to ensure a drug-free environment at all public assembly facilities, which cannot be accomplished within the confines of Fourth Amendment restrictions on search and seizure. The provisions of safety measures is necessary for the security of patrons, and to avoid tort liability, but should not be evidence of criminal action and condoning of drug use. Lastly, the indictment seeks to hold a facility manager liable for the criminal acts of third parties. Years of civil case law support the contention that facilities are not liable for the criminal acts of third parties absence gross negligence, and to reverse this well-settled premise under these circumstances would have an adverse effect throughout the industry and country.

**Respectfully Submitted,**

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<sup>41</sup> Id. at 1061.

**Certificate of Service**

I hereby certify that a true copy of the foregoing Brief In Support Of Defendant's Motion To Dismiss was mailed postage pre-paid this 6th day of March, 2001 to the United States Attorney, Eddie J. Jordan, Jr., New Orleans, LA, Counsel for the Defendants, Frank DeSalvo, 201 S. Galvez, New Orleans LA and Graham Boyd, ACLU Drug Policy Litigation Project, 160 Foster Street, 3<sup>rd</sup> Floor, New Haven, CT 06511..

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