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Thank you for inviting me to testify today concerning H.R. 5519, the RAVE Act on behalf of the American Civil Liberties Union (ACLU) and its approximately 300,000 members. I appreciate this opportunity to share with this Subcommittee our analysis of the serious flaws in this proposed legislation.

The ACLU is a non-partisan, non-profit organization dedicated to preserving and advancing civil liberties. We do not accept government funding of any kind.

**I. Overview.**

The Senate version of the RAVE Act began as a non-controversial, bipartisan effort aimed at reducing drug use. But in targeting legitimate business owners who provide a popular form of musical entertainment, the bill has engendered enormous controversy, landing on the front page of the *Washington Post*, eliciting thousands of letters and calls from constituents, and ultimately causing some Senators to withdraw their sponsorship. The reasons for this turnabout can be summarized in three main points:

1. The language of the bill makes legitimate, innocent businesses into potential targets for a felony charge if the nature of their business makes it impossible to guarantee that no drug use will occur on their property.
2. Beginning with its very name, the bill makes one particular genre of music into a target for federal prosecution. In light of current DEA enforcement strategies, which use the Crack House Statute against innocent rave promoters, it becomes particularly troubling that the bill provides no protection for legitimate rave events. Whether intentional or not, the bill opens the door to decimation of electronic music and dance, one of the most popular and vibrant forms of popular culture today.
3. Rather than eliminating drug use or even entirely eliminating raves, the bill would drive raves underground and discourage basic health precautions. It would have

the perverse effect of making drug use more dangerous.

The RAVE Act expands Section 416(a) of the Controlled Substance Act, also known as the “crack house statute”, to make it easier for the federal government to fine and/or imprison business owners that fail to prevent their customers from committing drug offenses on their property. Although it is clear that proponents of the RAVE Act are trying to target Ecstasy and raves, the RAVE Act would allow federal prosecutors to target other events, such as Hip Hop concerts, country music events, and anywhere else drug offenses occur - which is essentially everywhere. It would apply to hotel and motel owners, cruise ship operators, stadium owners, landlords, real estate managers, and event promoters. It is so broadly written that anyone who used drugs in their own home or threw an event (such as a party or barbecue) in which one or more of their guests used drugs could potentially face a \$500,000 fine and up to twenty years in federal prison. If the offense occurred in a hotel room or on a cruise ship, the owner of the property could also go to jail.

Before analyzing the problems with this bill, some emphasis must be placed on the history of this issue. The “crack house statute” itself is notoriously broad, giving prosecutors the ability to punish business owners for the offenses of others. The saving grace of this broadly drafted statute has been a uniform practice of targeting only those business owners who commit substantive drug offenses or conspire with those that are committing drug offenses -- in other words, criminals who distribute drugs.<sup>1</sup> But, as part of a self-proclaimed anti-rave initiative, the

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<sup>1</sup> In the 15 years since its passage, every application of this statute prior to the State Palace case involved owners or managers of property who in some way assisted the manufacture, storage, distribution, or use of drugs. The majority of cases under the statute specifically involve the operation of a literal crack house. e.g., United States v. Morgan, 117 F.2d 849 (5th Cir. 1997); United States v. Verners, 53 F.3d 1400 (9th Cir. 1995); United States v. Cabbell, 35 F.3d 1255 (8th Cir. 1994); United States v. Banks, 987 F.2d 463 (7th Cir. 1993); United States v. Church, 970 F.2d 401 (7th Cir. 1992); United States v. Roberts, 913 F.2d 211 (5th Cir. 1990). Beyond these cases, every other case has involved a defendant who was directly involved in the sale or production of drugs. e.g., United States v. Becker, 230 F.3d 1224 (10th Cir. 2000) (defendant manufactured methamphetamine in his home); United States v. Meshack, 225 F.3d 556 (5th Cir. 2000) (defendant restaurant owner arranged and negotiated drug purchases, ran conspiracy to distribute cocaine, used business to conceal drug trafficking); United States v. Moore, 184 F.3d 790 (8th Cir. 1999) (defendant unloaded drug shipments, used his home for storage facility in drug conspiracy); United States v. Bilis, 170 F.3d 88 (1st Cir. 1999) (defendant bar owner purchased drugs, warned drug dealers of police surveillance); United States v. Soto-Silva, 129 F.3d 340 (5th Cir. 1997) (defendant handled money for drug trafficking enterprise, smuggled drugs, and provided his property for packaging); United States v. Gibson, 55 F.3d 173 (5th Cir. 1995) (defendant manufactured and possessed methamphetamine with intent to sell); United States v. Cooper, 966 F.2d 936 (5th Cir. 1992) (defendant distributed crack out of his private club); United States v. Clavis, 956 F.2d 1079 (11th Cir. 1992) (defendant used his home for temporary storage of drugs, distribution to drug sellers); United States v. Lancaster, 968 F.2d 1250 (D.C. Cir. 1992) (defendant arranged for drug sales on his property); United States v.

DEA and federal prosecutors have sought to use the crack house law to punish business owners that are not only not involved in drugs but are actively trying to prevent drug offenses on their property.

## **II. The Danger of Allowing Unfettered Discretion in Prosecution of Business Owners.**

The proponents of the Rave Act insist that new tools are needed to deal with unscrupulous rave promoters. They point to examples in Idaho and Arkansas, where rave promoters were convicted under drug distribution and conspiracy laws for selling ecstasy at their raves. Such conduct is, of course, illegal under existing laws, and no new laws are needed to deal with it.

The proponents of the Rave Act also argue that new tools are needed for rave promoters who have no connection themselves to drug activity, but who hold a concert where audience members use drugs. The case of the State Palace Theater in New Orleans is held up as the prototype of this kind of prosecution. A close examination of that case – one relying on the actual facts rather than rumors or innuendo – demonstrates the serious danger in allowing drug laws to expand to encompass individuals who have no actual involvement in drug activity. As a federal judge wrote in **the closing chapter of the State Palace case:**

**Although this Court recognizes the perils of drug use, especially by young people, and this Court recognizes that the intentions of the agents and prosecutors involved were pure, when the First Amendment right of Free Speech is violated by the government in the name of the War on Drugs, and when that First Amendment violation is arguably not even helping in the War on Drugs, it is the duty of the Courts to enjoin the government from violating the rights of innocent people.**

Put most simply, the federal government should return to the task of identifying and stopping illegal drug activity, whether it occurs at a rave or elsewhere. The government must not allow for harassment or punishment of innocent business owners who are unable to guarantee absolutely that drug use will not occur on their property.

Robert Brunet manages the State Palace Theater in New Orleans, following a long family tradition of providing movies and live entertainment to the local population. Mr. Brunet hired James Estopinal to arrange and promote electronic music concerts – what the government refers to as “raves” – but which are nothing more than musical exhibitions at which disc jockeys (DJs)

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Tamez, 941 F.2d 770 (9th Cir. 1991) (defendant used car dealership for cocaine trafficking, used cocaine, and purchased cars for business with proceeds from illegal drug activity); United States v. Chen, 913 F.2d 183 (5th Cir. 1990) (defendant motel owner alerted drug sellers of police presence, stored drugs on premises, loaned money for the purchase of drugs for resale); United States v. Onick, 889 F.2d 1425 (5th Cir. 1989) (defendant Tolliver manufactured and distributed drugs out of his apartment).

perform computer-generated electronic music for a crowd of dancers. Mr. Estopinal is one of the best known, widely popular promoters of electronic music in the southern United States and throughout the nation. The prosecution in this case made no claim that any of these men ever engaged in any drug related activity whatsoever.

DEA officials have implied in other Congressional hearings that the State Palace proprietors somehow condoned or encouraged drug use. This is not the case, nor was any such claim ever made in the actual State Palace case. The State Palace instituted a zero-tolerance policy that absolutely forbid possessing, selling or using drugs on the premises. Signs throughout the venue announced this policy, as well as an offer that free tickets were to be given to anyone who turned in a person with drugs. Security guards refused to admit people who appeared to be intoxicated. Over the past several years, the defendants arranged for many arrests due to their zero-tolerance policy. This includes the arrests of security guards who were found to be selling drugs.

During the recent federal trial (the transcript of which is attached to this testimony), Robert Brunet described how he had invited the DEA into the State Palace Theater, helping them dress as undercover “ravers” and allowing them to pose as security guards. Additionally, he had an arrangement whereby anyone caught with drugs would be detained, and the DEA and New Orleans Police Department (NOPD) would be notified of the situation and asked to arrest the detainee. Mr. Brunet enforced the zero-tolerance policy, repeatedly detaining those caught with drugs and arranging for their arrests. However, agents from the DEA and officers from the NOPD repeatedly ignored the notifications, and on more than one occasion, the detainee had to be released after the drugs were destroyed, because no one came to arrest them. Furthermore, the State Palace on multiple occasions requested the service of an NOPD detail to assist in the prevention of drug use at their rave concerts, but their requests were denied.

Despite the history of efforts to cooperate with law enforcement, the DEA decided to conduct a prolonged undercover investigation of electronic music concerts at the State Palace Theater. DEA Agents purchased what purported to be drugs from 82 individuals over the course of four or five events. As detailed in the attached testimony of two DEA agents, almost half of the purchases did not test positive as a controlled substance. The agents did not pursue investigations or prosecutions for any of the sales at the State Palace. The usual method of arresting drug dealers themselves was shunted aside in favor of pursuing the businessmen who provide the music that some drug users and non-drug users alike find entertaining.

The State Palace case has been justified by DEA officials as a last-resort response to a dire crisis. In testimony before the Committee that proposed the Senate’s version of the Rave Act, the past DEA Administrator claimed that “400 to 500 teenagers and young adults” had suffered drug overdoses at the State Palace raves. In truth, the Department of Justice has stipulated that, over the course of some 50 rave events, only 30-40 individuals needed medical attention because of possible drug use. (See attached trial testimony.) This is not to suggest that even a single incident is trivial, but the accurate facts simply do not support the extraordinary

move of seeking a felony conviction against entertainment providers who are not themselves involved in drug activity.

The owner of any venue where a concert takes place knows that a concert involves some risk of injury from overheating, exhaustion or fights, as well as some risk that some members of the audience may suffer the effects of drugs or alcohol. For these reasons, the State Palace ensured that medical personnel were on hand to assist or transport anyone in need. Again, the attached trial transcript includes Mr. Brunet's description of his actions in this area. He hired the City's own ambulance service and followed a protocol common for any large entertainment event. Yet prosecutors maintained that his reasonable precautions reveal connivance in running a drug operation. Finally, the government points to the fact that defendants sold bottled water (at the same \$3 price as the nearby SuperDome) and provided an air-conditioned cooling-off room at an event involving thousands of energetic dancers as evidence of a crime.

In short, a businessman who had never been charged with any crime in his life and who was following the business practices standard in his industry suddenly faced the prospect of up to 20 years in prison. No doubt Robert Brunet could have predicted that some drug use would take place at a concert (rave or otherwise), and he probably realized his sensible precautions could not prevent all such drug use. Yet, because he went ahead with holding a concert where drug use might occur, he was branded a criminal. Surely the Crack House Statute was never intended to reach so far, and yet this is precisely how federal agents used it.

Further compounding the harms of the State Palace case, DEA decided to make it the centerpiece of its newly declared "Anti-Rave Initiative," described in the attached Department of Justice Bulletin. Taking New Orleans as the model, DEA agents are told to identify and then investigate rave promoters. The DEA agents who led the State Palace investigation describe in the attached trial transcript how they have traveled around the nation, training other agents at dozens of seminars in the techniques of shutting down raves using the Crack House Statute. Even as the proponents of the Rave Act assure legitimate businesses that the law is not aimed at them, the clear practice of DEA has been to select and pursue targets, not based on information about drug activity, but based on the fact that the event is a rave. Even the most law-abiding promoter of a rave can expect to be investigated, and in many cases threatened with prosecution unless he can perform the impossible feat of guaranteeing that no drug use will occur at his event. The passage of a law entitled the Rave Act will only bolster this misguided approach.

### **III. The RAVE Act Does Not Protect Innocent Business Owners**

The RAVE Act is disturbing because at the very time it is expanding the applicability of a law that already lacks adequate protection for innocent business owners, it lowers the standard of proof needed to punish them. It is quite simply too broadly written and could subject innocent business owners to enormous fines or prison sentences, especially restaurant and nightclub owners, concert promoters, landlords, and real estate managers.

The RAVE Act would enact provisions allowing the federal government to bring civil suits against alleged violators, instead of filing criminal charges. This is a remarkable reduction of the standard of proof that the government will have to meet to punish people and is clearly designed to compensate for the fact that federal prosecutors are having a difficult time making their cases. The bill's addition of the word "temporarily" undermines the very purpose of the "crack house statute" which was targeting property that was being used primarily for drug offenses, not making property owners liable for isolated actions that occur on their property, whether they are there or not.

Under the existing crack house law, several courts have accepted the argument that "knowingly" should apply to the business owner (as in knowingly opening your place of business to the public) and "for the purpose of" should apply to the customers (as in using a club or hotel room for the purpose of using or selling drugs). Aside from the State Palace Case, the prosecution has also presented evidence that the defendant was directly involved in drug activity, usually as a supplier or conspirator. Any adjustment to the law needs to make clear that such nexus to drug activity is a prerequisite, that an innocent person with no intent to violate the law cannot be punished – yet this is precisely how the language of the bill now reads.

Complicating the lives of business owners is the fact that there is simply no way for them to know what is legal or illegal until a court or jury decides. They will not know what steps they can take to protect themselves from fines and imprisonment. They will not even know what activities are suspect or not. On the one hand, such legal and mundane activities as selling bottled water, allowing people to dance with glow sticks, or hiring an ambulance service can become "proof" that they were encouraging drug use. On the other hand, such extraordinary measures as training DEA agents how to dress like ravers, hiring security guards, and holding suspected drug offenders until police arrive, offers no protection from prosecution.

If a realistic and fair effort were made to ensure appropriate business conduct, it would certainly include guidance about how to comply with the law. It is not sufficient to say that a businessman, like Robert Brunet of the State Palace, can fight his case in court. The cost and anxiety of doing so are enormous. What is critically needed is a "safe harbor" for business owners. What it means to knowingly make one's place of business available for drug offenses needs to be clearly defined. Property owners need to know what steps they can take to prevent being fined or prosecuted and those responsible owners that take those steps should not be fined or prosecuted. Business owners need to clearly know what is legal and illegal and what will and will not be used against them.

#### **IV. RAVE Act Will Curtail Free Speech and Musical Expression.**

The RAVE Act serves as a clear assault on raves and electronic music. The reality is that property owners, promoters, and event coordinators could be fined hundreds of thousands of dollars or face up to twenty years in federal prison if they hold raves or other events on their property - even if they work hard to deter drug use. Although the substance of this law is neutral

and would apply equally to all events and all locations, it is clear that it will not be enforced equally. If the bill becomes law, property owners may be too afraid to rent or lease their property to groups holding raves, other all-night dance parties, rock or Hip-Hop concerts, or any other event that federal prosecutors do not like. This will have a definite chilling effect on free speech and musical expression.

As noted by the Supreme Court in evaluating the impact of improper prosecutions of civil rights advocates in the 1960's, **“the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”** Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). The same holds true today. The mere threat of prosecution will surely serve to eliminate protected expression, even if that is not the intent of Congress in enacting the measure.

This chilling effect is made all the more likely by the bill's vagueness, the fact that there is no safe harbor that lets business owners know what they can do to prevent prosecution, and the lack of criteria for them to know what is legal and illegal. The bill's addition of the word “temporarily” will allow business owners to be punished for isolated incidents, as opposed to patterns of abuse. Thus, the RAVE Act will likely be used against business owners that host controversial or unpopular events on their property simply because a drug offense occurs despite good security. They could be punished for this one event, and other business owners may be too afraid to host such events in the future. That this bill allows punishment without the guarantees available in criminal cases makes the stifling of free speech and musical expression a certainty.

#### **V. The RAVE Act Will Harm the People It Is Meant to Help.**

The RAVE Act will likely make youth less safe and put them in greater danger. At the very time that rave culture is becoming mainstream and holding events at some of the most reputable and safe nightclubs in the nation, this bill will have the perverse effect of driving raves and other events underground and away from emergency care and hospitals. If legitimate and responsible business owners are scared away from holding raves and other all-night dance parties, raves will simply move back into abandoned warehouses and cornfields. Moreover, because this law will allow prosecutors to insinuate that selling bottled water, offering air-conditioned “cool off” rooms and having ambulances present is proof that owners are encouraging drug use, the bill may make business owners too afraid to implement the kind of safety measures that will save lives. Such health measures as freely available water and air-conditioned rooms are common sense for any large gatherings.

#### **VI. RECOMMENDATIONS**

The RAVE Act expands an already problematic law while lowering the standard of proof needed to punish people. It will chill free speech and make our youth worse off. It is so flawed that the best thing to do is reject this law altogether, allowing all interested parties to come together to build more constructive approaches. Short of tabling this bill, there are a number of

amendments that would greatly improve the bill.

- The RAVE Act should be amended to ensure that the term “For the specific purpose of” relates to the intent of the manager or controller of the location and not to the intent of patrons or attendees.

- The civil provisions (Section 3) should be removed. If not removed, it should be amended to provide a conviction before civil penalties can be applied.

- An amendment should be added stating out what business owners can do to prevent being prosecuted under this law (a ‘safe harbor’ provision) and declaring that business owners should only be punished for illegal activity, not legal activity. Such an amendment is essential to protecting free speech, public health, and innocent business owners.

- The RAVE Act should be amended to ensure that substance abusers do not receive twenty years in federal prison for using drugs. Essentially, the word “use” needs to be dropped from the bill’s addition of “lease, rent, use”. Under the current RAVE Act, any one who uses any place (their apartment, motel room, park) to use an illegal drug could potentially be subject to 20 years in jail and hundreds of thousands of dollars. Federal law already provides for punishment of drug users. The RAVE Act would enact penalties out of line with the actual offenses.

- The addition of the word “temporary” to the crack house law should be removed. This addition fundamentally changes the nature of the law from one meant to target property that was being used primarily for drug offenses to one that makes property owners liable for isolated actions that occur on their property, whether they are there or not. It is also one of the additions to the crack house law that will do the most damage to the First Amendment, by chilling property owners from allowing events based on the kind of music or expression taking place.

## **CONCLUSION**

The RAVE Act is overly broad, targets innocent business owners, and endangers the health of our youth by driving raves and other events underground.

The RAVE Act is also unnecessary. The federal government already has the ability under existing law to prosecute music promoters, nightclub owners or their employees who sell or distribute drugs. Prosecutors are already using the existing “crack house statute” to target nightclub owners and rave promoters that fall into this category.

We all want to protect our children, but it is essential that we find solutions that really work to keep our children safe. Enacting legislation such as the RAVE Act that does more harm than good is a step in the wrong direction and only puts the safety of our children in jeopardy.

