

CHICAGO EVENT PROMOTER'S ORDINANCE:
UNCONSTITUTIONALITY AND ECONOMIC IGNORANCE

By: Jason D Keck

Submitted in Accordance to Satisfy the Requirements
of the Entertainment Law Seminar
Chicago-Kent College of Law

December 15, 2009

I. INTRODUCTION

A. The Windows

Brian, a young vibrant twelfth grader with a passion for melodic harmonies and knee slides loves nothing more than to practice with his band, “The Windows.” The Windows is a new band, consisting of Brian’s two soccer teammates and his neighbor. All members are over 18 years of age. The Windows practice only once a week in Brian’s basement or, when his mother is having Bible study, they practice in the garage. Two weeks from today, The Windows is playing in a battle of the bands at the local VFW. The VFW charges \$3 for every person through the door to offset costs and serves alcohol to those patrons over the age of 21. The VFW is unable to accommodate more than 80 individuals lawfully at once. Every band receives \$100 for playing in the battle of the bands and the winner will move on to play at the Chicago Public Battle of the Bands,¹ a local battle of the bands tournament held each year. The winner of the Chicago Battle of the Bands receives stage time at Lollapalooza.²

In anticipation of the battle of the bands at the VFW, Brian’s twin brother David offers to help get the band a decent “following” for the VFW show. The Windows pay David \$50 from its \$100 for his help. Brian and David, along with The Windows, print numerous flyers on Brian’s printer. The flyers are plain, with black print on orange paper. David and The Windows scatter these flyers all over the neighborhood, marking the band’s territory on every telephone pole, tack board, and vehicle windshield. Additionally, The Windows create MySpace and Facebook pages tipping their friends off to the “amazing” show the band anticipates putting on. David also passes out the flyers and tells every customer at Urban Outfitters, where David works, to attend The Windows’ show as it “will be insane.” Despite David’s and The Windows’ ambitions, they only really expect family and a few close friends to attend the battle of the bands at the VFW. After all, they do play on a Saturday at 7:20 in the morning.

Three days before The Windows big performance at the VFW, a Chicago Police Department Officer knocked on David’s and Brian’s parents’ front door. The officer asked Brian’s parents who was responsible for the distribution of the orange and black flyer the officer held in his right hand as well as the numerous printouts showing MySpace and Facebook advertisements. Brian approached the officer from his bedroom in the back hallway and affirmed that he and his brother were in fact responsible for the distribution of The Windows promotional flyers. The Officer exclaimed “very well,” and asked to speak with David. David called up from the basement by his parents, met the officer, who then handed David a citation for violation of the Chicago Event Promoter’s Ordinance requiring David to pay a \$5,000 fine. Two days later in the mail, David also received a note from the City of Chicago indicating that Brian was ineligible to apply for a promoter’s license for five years under the Chicago Event Promoter’s Ordinance. Brian did not receive any citation from the officer.

¹ This is a fictional event.

² Lollapalooza is an annual music festival held in Chicago featuring both popular music performances and less popular, indie music performances. See www.lollapalooza.com.

B. Thesis

This paper examines the all-too-plausible depiction of Brian and The Windows and concludes that the Chicago Event Promoter's Ordinance ("CPO") currently awaiting vote at the Chicago City Council is unconstitutional as written. Moreover, the economic motivations behind and remedial consequences of the CPO are invalid and unwarranted. Additionally, they are unprecedented in the United States.

Through the examination of Brian, The Windows, and the CPO, this paper first discusses the proposed legislation and addresses non-legal problems stemming from the potential passage of the CPO. Second, The CPO's legislative intent does not address any actual problem relating to the tragedy at E2 nightclub.³ Third, the passage of this ordinance would suffocate the indie music movement as a whole, affecting both artists and venues. Fourth, the passage of the CPO does not serve any public interest and, in fact, is opposite of what other cities in the United States are trying to accomplish. Finally, this paper discusses the legality of the CPO as its written today, concluding that the CPO is unconstitutional as written in that it violates the First Amendment to the United States Constitution.

II. BACKGROUND OF PROPOSED ORDINANCE

A. The Tragedy at E2 Nightclub

The Epitome Chicago and its upstairs dance floor, E2, was a popular nightclub in Chicago's Southside in 2003. In February 2003, a stampede occurred inside the nightclub killing 21 patrons and injuring as many as 50 others. The proximate cause of the stampede was reported to be use the pepper spray to break up a fight. Because of the noxious spray and the panic stemming from the altercation, many patrons rushed for the exits. Although at least one emergency exit was opened, there were disputed reports of another exit chained shut. The only exit most patrons were aware of was the steep front stairwell at the entrance, with narrow doors that opened inward, against fire code.

Various investigations and eye-witness reports conclude that the doors at the top of the stairwell opened outward and as the crowd pushed them open, people standing on the small upper landing were forced to tumble down the stairs. The doors, which were reportedly normally open, were closed after security guards removed the participants in the fight. As more patrons attempted to exit, they were forced on top of the bodies of those that had already fallen. This created a waterfall effect with fallen bodies on the stairwell being trampled on by patrons exiting the club in a panic. Security guards attempted to remove the fallen bodies, however, more people were falling on the trampled bodies than could be removed. It is reported that more than 1,100 people tried to escape the nightclub when the club lawfully could only support 300.

In July 2002, more than six months before the tragedy, the City of Chicago, acting through its Corporation Counsel, had obtained a "mandatory order not to occupy" [E2] from the Circuit

³ See Section II(A), *supra*.

Court of Cook County.⁴ Subsequent reports and anecdotal information disclosed that the E2 Club had been routinely operating for months after the entry of the July 2002 Order.⁵ Previously, on January 10, 2003, the operator of the epitome and E2 businesses was served with a Suspension Order, for suspension of its license to serve liquor.⁶ The licensee was subsequently cited by the Chicago Police Department for operating the premises while under the suspension in January 2003.⁷ La Mirage, Ltd, the holding company for the E2 nightclub had a significant history of license violation cases with approximately 32 separate reports sent to the City for action in the 5-year period from June 1996 to March 2001.⁸ Of those reports, only one violation actually was sustained which led to the license suspension in January 2003.⁹ As mentioned, the Corporation Counsel's office obtained an order preventing occupancy of the second floor of that building, while another City agency, the Chicago Police Department, was unaware of the Order and was, ironically, regularly and routinely active in disputes and issues arising from occupancy of E2.¹⁰ This lack of communication also led to one arm of the Corporation Counsel obtaining an Order preventing occupancy of E2 and another arm of the Corporation Counsel, without knowledge of the Order, and while it was in effect, obtaining and causing to be served a liquor license suspension of E2.¹¹

The mistakes made by E2 that night were the cause of the injuries and deaths. First, the club contained approximately 800 more individuals than it could lawfully hold. Additionally, another 21 building and fire codes were violated that night. Third, community activists sought to shut the club down for previous violations of building and fire codes, thus, putting the city and licensing bodies on notice that the club was a habitual violator. Finally, security staff did not respond appropriately to the altercation or the stampede that night. In fact, the very cause of the stampede was the use of pepper spray inside the venue. The Illinois States Attorney criminally charged the owners of the club with involuntary homicide stemming from the 2003 stampede.¹² The owners were acquitted from the involuntary manslaughter, however, on November 24, 2009 the owners of E2 were sentenced to two years prison for violating the Do Not Occupy Order.¹³

B. Selected CPO Language

i. Legislative Intent

In its preamble, the CPO says that “[t]he event promoter industry has radically transformed within the last decade by the ease with which the Internet and other forms of

⁴ Independent Review Panel of Building Safety Enforcement Powers, Final Report, Honorable Justice William Cousins, Jr. (Retired)(co-chair); Andrew L. Zopp (co-chair). July 2, 2003. P. 1.

⁵ *Id.*

⁶ *Id.* at 14.

⁷ *Id.*

⁸ *Id.* at 16.

⁹ *Id.*

¹⁰ *Id.* at 19

¹¹ *Id.*

¹² CBS Broadcasting, *E2 Nightclub Owners Guilty of Indirect Contempt*.

<http://cbs2chicago.com/local/E2.Nightclub.Owners.2.1205490.html> (November 24, 2009).

¹³ The Huffington Post, *E2 Nightclub Stampede: Owners Dwain Kyles and Calvin Hollins Get 2 Years For Contempt*, http://www.huffingtonpost.com/2009/11/24/e2-nightclub-stampede-own_n_369299.html. (November 24, 2009).

electronic communication enable event promoters to reach masses of people and to draw ever-larger crowds to promoted events.”¹⁴ It continues, “as crowds have increased at promoted events, so too have complaints . . . from venue operators presenting these events.”¹⁵

To address this, the CPO reports that the Chicago Independent Review Panel, which was appointed by Mayor Richard Daley to make public safety recommendations following the E2 nightclub tragedy, concluded, “promoters who produce events with attendance by more than 100 persons should be licensed.”¹⁶ Nowhere in the CPO does it address the 21 other violations committed by E2 nightclub that night. Additionally, with no factual evidence, the CPO states, “non-fixed seating venues are frequently accompanied by public disturbances outside the venue.”¹⁷ Unlike non-fixed seating venues, the CPO claims that fixed seating events do not have public disturbances because the disturbances are the “direct result of large crowds of people waiting in line in the hope of gaining admission to the promoted event.”¹⁸ The illogical conclusion by the Chicago City Council fails to recognize that venues with fixed seating also experience large crowds waiting in line to gain admission or upon exiting the venue and are just as likely to incur “public disturbances.”

The CPO also specifically states that venues should be responsible for safety at events; however, the CPO does not mandate venues take responsibility for that safety. Instead, the CPO places requirements on promoters to obtain, *inter alia*, licensing and insurance. Additionally, the CPO states “crowd[s] in a non-fixed seating venue [are] fluid and, with little warning, can take on a life of its own [and] [i]f the crowd panics or shoves in one direction, the probability of death by stampede is greatly increased.”¹⁹ This observation, however, also applies at fixed-seating venues where crowds are not at or over capacity. The CPO specifically states that “[a]ccountability is best assured under circumstances where both the event promoter and venue operator understand that their respective business licenses may be at stake if the common sense steps required by this ordinance. . . are not followed,”²⁰ however, the CPO does not mandate venues follow the CPO’s enumerated “common sense” steps.²¹ The steps enumerated by the CPO include requiring *event promoters*, but not venues, to do the following:²²

- To enter into a written contract with the establishment hosting the promoted event so that there is no misunderstanding about the venue’s maximum occupancy capacity, about how much security will be provided at the event and by whom, and about whether any potentially dangerous special effects, such as pyrotechnics, will be used;

¹⁴ Chicago Municipal Code, (Ill.) Title IV, Chapter 4-157, *Proposed Event Promoters*, January 7, 2009. Preamble.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Footnote 22, *infra*.

²² *Id.*

- To carry at least minimal insurance to compensate persons who may be injured or suffer other losses at the promoted event;
- To designate an on-site representative to be physically present throughout the event in order to address any problems that may arise;
- To ensure, along with the venue operator, that the maximum occupancy of the venue is not exceeded;
- To call the police to report any unlawful activity observed or reported during the promoted event, such as fights, drug sales, the display of weapons, locked stairwell doors, blocked exits, operations within an area of the premises subject to a closure order and other potentially dangerous activities or conditions.

One of the CPO’s most troubling propositions and contentions is that the Chicago independent music industry will not suffer if the Chicago City Council passes the CPO. Conversely, the CPO states that the “music and entertainment industry in Chicago will flourish if event promoters are licensed.”²³ The CPO also makes an unwarranted and unsupported contention that “many venue operators are reluctant to host promoted events at their establishments because irresponsible event promoters, those whose promoted events have resulted in death, personal injury, property damage or public disturbances, have given the event promoter industry a bad name.”²⁴ Nowhere in the CPO or the respective comments or literature surrounding the CPO, are any facts to warrant this contention. Instead, as discussed in Section III, *infra*, of this paper, the facts and economics arguments imply the contrary.

ii. Selected CPO Language.

Section 4-157-020 of the CPO says that no person shall engage in the business of event promoter²⁵ without first having obtained an event promoter license under this chapter. In its initial provisions, the CPO narrows the scope of an “event promoter.” Non-exhaustive examples include:²⁶

- (1) any print or broadcast media paid for page space or broadcast time;
- (2) off-premises ticket sellers who sell admission tickets in advance but exercise no other financial responsibility;

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at Section 4-157-010, Definitions. .Event promoter is defined as any person who: (1) is directly or indirectly responsible for the organization of amusement or event, as evidenced by activities such as contracting with the principals, selecting entertainment, advertising or otherwise holding out an amusement or event to members of the general public, inviting participants to an amusement or event, or renting or controlling the site of an amusement or event; (2) directly or indirectly receives or shares in any of the following: (a) admission or entrance fees paid by participants or spectators at the amusement or event; or 9b) compensation, consideration or other revenue from sponsors of or private donors to the amusement or event; or (c) revenues from concessions or other sales at the amusement or event.

²⁶ Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-020(B).

- (3) any performer that is paid for his or her performance but exercises no other financial or non-performance related operation responsibility;
- (4) any agent of an athlete or performer who is compensated for negotiation his or her clients' contract to perform at an event but exercises no other financial responsibility;
- (5) the City of Chicago or its sister agencies;
- (6) any not-for-profit corporation, to the extent that the not-for-profit corporation personally plans, prepares or executes an amusement or event on its own behalf.
- (7) any person who exclusively promotes amusements or events at establishments or venues meeting certain requirements including,
 - (A) the owner or operators holds a valid Public Place of Amusement license; and
 - (B) the establishment where the event is promoted:
 - (i) has fixed seating only and all patrons are in fixed seats; or
 - (ii) has a fixed seating capacity of 500 or more persons.²⁷

Despite the exclusions contained in Section 4-157-020, the CPO still covers a broad range of individuals. Once an “event promoter” meets the definition, he or she is required to obtain a promoters’ license connected to one of four levels of promotion. Section 4-157-025 identifies the levels: (A) promoters with the ability to promote events with no maximum capacity limits and shall cost \$2,000²⁸; (B) promoters with the ability to promote events with capacities of 2,000 or less and shall cost \$1,500; (C) promoters with the ability to promote events with 500 persons or less and shall cost \$1,000; and (D) promoters with the ability to promote events with capacities of 99 people or less and shall cost \$500.²⁹ Furthermore, Part (D) of Section 4-157-025 further requires that if the venue holds 99 or fewer individuals, the event promoter only is required to have a license if there is an admission fee, minimum purchase agreement, or membership fee.³⁰ Under Part (D), if no admission fee, minimum purchase agreement or membership fee is imposed for entering the establishment, an event promoter’s license is not required, even if the event promoter is directly or indirectly compensated for promoting such an event.³¹

The application process to obtain an event promoter’s license is extensive and is extremely difficult or unavailable for convicted felons. In applying to the Commissioner,³² Section 4-157-040 requires applicants to, *inter alia*, provide a statement as to whether the applicant has ever been convicted, in custody, under parole or under other non-custodial supervision resulting from a conviction in a court for the commission of a felony or of a criminal offense involving theft, fraud, perjury or dishonesty and the details surrounding each such conviction.”³³ Additionally, fingerprints are required in the application.³⁴ The purpose of

²⁷ *Id.*

²⁸ For licensing costs, see Chicago Municipal Code, *Proposed Event Promoters* at Section 4-5-010 (4-157).

²⁹ *Id.* at Section 4-157-025.

³⁰ *Id.*

³¹ *Id.*

³² The individual responsible for issuing CPO licenses.

³³ See Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-040(G).

Section 4-157-040(G) is to prohibit the applicant who falls under that section from obtaining an event promoter's license, unless upon request of the applicant, the Commissioner determines that the applicant has been sufficiently rehabilitated to warrant public trust.³⁵

In addition to the various requirements identified in the previous paragraph, the CPO also requires insurance for event promoters. The CPO requires the "event promoter" to name the City of Chicago as an additional insured under Section 4-157-100(B)(2). Under Section 4-157-110, the CPO requires event promoters agree, in writing, to indemnify, defend and hold harmless the City of Chicago for any loss that results, directly or indirectly, from the insurance or use of such license. Additionally, each promoter, regardless of what license he or she maintains, is required to maintain general-liability insurance, with limits not less than \$300,000 per occurrence for bodily injury and property damage.³⁶

Once an event promoter is licensed, his or her obligations do not end. Section 4-157-130 requires extensive record keeping for a period of three years following a promoted amusement or event, including, *inter alia*, information that the event promoter may not have. For example, an event promoter is required to maintain records of all admission and entrance fees paid by participants or spectators at the promoted amusement or event.³⁷ Event promoters by definition promote events *prior* to the actual event; however, the CPO would require event promoters also to participate in the management of the actual event. Section 4-157-140 requires that (A) the licensee shall maintain an on-site representative who shall be:

- (1) at least 18 years of age, unless liquor is served in which case the event promoter must be 21 years of age;
- (2) follow all CPO restrictions and conditions';
- (3) to carry photographic identification and a cell phone whose number is disclosed in the contract required by Section 4-157-020;
- (4) carry at all times a copy of the insurance required under 4-157-100;
- (5) to comply with any reasonable request made by any authorized city official;
- (6) to allow any authorized city official to inspect or investigate an inquiry necessary appropriate to implement the requirements of the CPO;
- (7) to ensure that the maximum occupancy is not exceeded;
- (8) to notify the police of any illegal activity reported or to be observed; and
- (9) to enter into a log book all incidents of illegal activity reported to or required to be reported to the police department.³⁸

³⁴ *Id.* at Section 4-157-040(K).

³⁵ Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-050(4).

³⁶ Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-100(A).

³⁷ *Id.* at Section 4-157-130(5).

³⁸ *Id.* at Section 4-157-140.

In enforcing line item number 7 above, the CPO requires that the event promoter not exceed the maximum capacity of the venue.³⁹ This is especially difficult given that the venue often employs the door staff and such staff is often outside the direction of the event promoter. Furthermore, despite the inherent disparity of power between the event promoter and the venue, the CPO mandates that both be jointly and severally liable for a violation of the requirements contained in Section 4-157-149.⁴⁰

Additionally, the licensee must notify the local alderman and the local police within 7 days of a promoted event. This notification must include, *inter alia*, a representation that the licensee has complied with the proof of general commercial liability insurance requirement.⁴¹ Furthermore, if the event was not booked within 7 days of the event, the licensee must notify the alderman and the local police immediately upon booking and under no circumstance shall the alderman or local police be notified less than 24 hours before the event.⁴² The CPO authorizes fines of not less than \$500 for each offense under 4-157-465(C) with each day consisting of a separate and new offense.

In addition to the fines mentioned above, the CPO also imposes other strict fines and penalties on violators. The CPO states, “no person whose license under this chapter is revoked for any cause shall be granted another event promoter license, under the same or different name, for a period of five years from the date of revocation.”⁴³ Moreover, “. . . any person violating any of the provisions of this chapter shall be subject to a fine of up to \$10,000 for each offense. Each day that a violation continues shall constitute a separate and distinct offense to which a separate fine shall apply.”⁴⁴

C. The Windows and the CPO

The CPO does not subject Brian to its provisions; however, David falls under its scope. Brian is exempt under the CPO, as are the other members of The Windows because performers who promote their own events do not have to obtain an event promoters license. As stated in section 4-157-020(3): “the following persons are not event promoters, any performer who is paid for his performance at an amusement or event but exercises no other financial or non-performance related operational responsibility.” David, however, despite his relatively modest involvement and small compensation does fall under the scope of the CPO, and, may be subject to substantial fines.

David falls under the scope of the CPO because the VFW is charging an admission fee (no matter what it is).⁴⁵ David would not be subject to the CPO if the VFW did not charge an admission fee. This is troublesome as event promoters very rarely, if ever, have any control over whether the venue charges or does not charge an admission fee. Thus, the CPO subjects event

³⁹ *Id.* at Section 4-157-150.

⁴⁰ *Id.* at Section 4-157-160.

⁴¹ *Id.* at Section 4-157-465(C).

⁴² *Id.*

⁴³ *Id.* at Section 4-157-180.

⁴⁴ *Id.* at Section 4-157-190.

promoters to its jurisdiction if the *venue* chooses to charge an admission fee, not whether the *event promoter* chooses to charge an admission fee.

Because the VFW is charging admission for the event, David does not qualify for the exemption contained in 4-157-020(12). That section exempts an individual from obtaining an event promoter license at an establishment that does not require a Public Place of Amusement license⁴⁶ (the VFW does not), and *where no admission fee or cover charge is assessed for the privilege of entering the event.*⁴⁷ Although the VFW is only charging \$3 per person, the CPO does not differentiate between those needing licenses and those that do not based on the admission charge or the purpose of the admission charge. In this case, the \$3 charge imposed by the VFW to offset costs is enough to nullify the exemption for David contained in 4-157-020(12). David had no input in the cover charge, and the cover charge is the very reason the VFW is able to host the battle of the bands at all.

Because David does not fall under the exemption of 4-157-020(12), the CPO requires David obtain an events promoter's license. It is irrelevant how much David is being paid, only that he is being "compensated" at all. Event promoters that are compensated for their work promoting an event at a venue with occupancy of 99 or less do not need an event promoter's license *unless* the venue is charging admission.⁴⁸ If, however, the venue holds 100 or more individuals, then David must obtain an event promoters license based on the fact he is receiving compensation for his services.⁴⁹ In that case, it is irrelevant how much David receives and is irrelevant if the venue charges admission.

The CPO also subjects David to substantial fines because the VFW is serving alcohol and David is under 21 years of age. Individuals 18 years of age may serve as event promoters and work as on-site representatives at a promoted event, unless the venue serves liquor.⁵⁰ In this case, even if Brian did abide by all other CPO mandates, he would be unable to obtain a license because the VFW plans to serve alcohol and David is under 21 years old. Again, David had no input on the VFW's decision to serve alcohol, and serving alcohol is one of the reasons the VFW is able to host the battle of the bands at all.

In any event, in this real life scenario, David would come within the scope of the CPO because he is serving as a compensated event promoter for an event that is charging an admission fee. Furthermore, David is subject to greater fines not only for violating the CPO, but also by serving illegally as an underage promoter for an event that is serving alcohol.

III. NON-LEGAL AND PUBLIC POLICY PROBLEMS WITH THE CPO

A. The CPO Legislative Intent Does Not Justify the CPO Means.

⁴⁶ PPA is a license required by the City of Chicago to hold certain events. See Chicago Municipal Code, (Ill.) Title IV, Chapter 4-156, Amusement Tax, April 1, 1999.

⁴⁷ Chicago Municipal Code, *Proposed* Event Promoters at Section 4-157-020(12)(emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.* at Sections 4-157-010(11) and (12).

⁵⁰ *Id.* at Sections 4-157-040(A)(2), (B)(4), and (C)(3).

The legislative justifications for the CPO do not support the effect the CPO will have on event promoters, performers, or the public as a whole. The Chicago City Council in its proposed CPO claims to intend to protect against another tragedy like E2. The substance of the CPO, however, only serves to indemnify the city against liabilities for such an event and places arbitrary restrictions on event promoters and performers. In the preamble to the CPO, the Chicago City Council attempts to justify the CPO by enumerating factors in an attempt to justify the legislation. This section reprints these factors in their entirety and challenges their respective validity.

- “The event promoter industry has been radically transformed within the last decade by the ease with which the Internet and other forms of electronic communication enable event promoters to reach masses of people and to draw ever-larger crowds to promoted events. As crowds have increased at promoted events, so too have complaints from neighborhood residents, from the venue operators presenting these events and from public safety officials.”

Nowhere in the CPO, the Independent Review Panel of Building Safety Enforcement Powers, or anywhere else, is there factual support for the contention that complaints from neighborhood residents, venue operators, or public safety officials has increased at all, let alone, the contention that event promoters are responsible for such an alleged increase.⁵¹ Assuming, *arguendo*, that event promoters were responsible for an alleged increase, this contention does not address any of the issues surrounding the tragedy at E2. The tragedy at the E2 nightclub had absolutely nothing to do with the patronage outside the venue. The phenomenon of larger crowds arriving and hoping to attend an event is unrelated to “[o]ne of the most critical areas to public safety in large assembly units . . . [which] is the occupancy restrictions and the enforcement of maximum occupancy limits.”⁵² Whether the Internet provides a medium through which promoters can reach a greater mass of potential patrons, and those potential patrons arriving at the venue, therefore, is irrelevant to the “enforcement of occupancy regulation laws [which is] pivotal to effective safety enforcement.”⁵³

Additionally, the Chicago City Council’s alleged intent fails to recognize that prior to the tragedy at E2 nightclub in February 2003, numerous complaints⁵⁴ were made to public and private officials and subsequently went ignored. This was *before* the invention of both Facebook and MySpace,⁵⁵ two of the largest Internet mediums of self-promotion today. The Chicago City Council’s feeble attempt to “blame” a greater access to promotional mediums ignores the fact that 1,100 people were in a venue that realistically and legally was only able to hold 300 people. As a result, the Chicago City Council’s placing blame on event promoters for the tragedy at E2 because of a greater access to the Internet is unfounded.

⁵¹ See generally, Chicago Municipal Code, *Proposed Event Promoters*, CIRS.

⁵² Independent Review Panel of Building Safety Enforcement Powers at (E), pg. 17.

⁵³ *Id.*

⁵⁴ “The Chicago Police Department was . . . regularly and routinely active in disputes and issues arising from occupancy [of E2].” Part F, at pg. 19.

⁵⁵ Tech Crunch, *Facebook v. MySpace In the US Market: The Music Factor*, <http://www.techcrunch.com/2008/08/22/facebook-v-myspace-in-the-us-market-the-music-factor/> (November 30, 2009).

- “The Chicago Independent Review Panel, which was appointed by Mayor Richard M. Daley to make public safety recommendations following the E2 nightclub tragedy that claimed 21 lives, explicitly concluded ‘that promoters who produce events with attendance by more than 100 persons should be licensed.’”

On the 25th page of its 31-page report, the Chicago Independent Review Panel devoted one sentence to promotion of events and promoters as a whole.⁵⁶ Three things emerge from the plain language of the Chicago Independent Review Panel’s recommendation that event promoters be licensed. First, although the Chicago Independent Review Panel does recommend that event promoters be licensed, nowhere does the Chicago Independent Review Panel recommend that these same promoters be bonded, insured, or subject to background checks. Nor does it suggest that, an event promoter indemnify the City of Chicago, or suggest any other requirement the CPO arbitrarily requires. Second, the Chicago Independent Review Panel suggests that only venues with attendance by more than 100 persons should be licensed, a recommendation the CPO ignores⁵⁷ while relying on the recommendation as a whole to justify the remaining provisions in the CPO. Third, the recommendation from the Chicago Independent Review Panel does not apply to the same promoters affected by the CPO. The plain language suggests that only individuals who “*produce*” events should be licensed, not individuals who merely “*promote*” events.⁵⁸ Producers typically control management of the venue; mere promoters do not.

The plain language of the recommendation by the Chicago Independent Review Panel suggests that individuals who *produce* events should be licensed. Producers are inherently different from individuals who merely *promote* events, but the CPO does not distinguish the two categories. It is important to understand what “produce” means in the entertainment world. In the entertainment world, produce is defined as “mak[ing] available for public exhibition or dissemination, as to (a) provide funding for; or (b) to oversee the making of.”⁵⁹ As further understood in the entertainment industry, a “producer” is someone who supervises or finances a work for exhibition or dissemination to the public.”⁶⁰ Conversely, “promote” is defined as merely “presenting [an item] for buyer acceptance through advertising, publicity, or discounting.”⁶¹ Finally, a “promoter” is defined simply as one “who promotes.”⁶² Industry practice and definitions make it clear that individuals who *produce* events take part in the financing and oversight of the event. The mere act of promoting has nothing to do with the actual “production” of the event; rather, event promoters only present the event, controlled by others, for buyer acceptance. Recall the hypothetical of Brian and The Windows. David was

⁵⁶ Independent Review Panel of Building Safety Enforcement Powers, pg. 25.

⁵⁷ See discussion of Brian and The Windows, Section II(C), *supra*.

⁵⁸ Independent Review Panel of Building Safety Enforcement Powers, pg. 25

⁵⁹ Merriam-Webster Online Dictionary, “Produce,” <http://www.merriam-webster.com/dictionary/produce> (December 15, 2009).

⁶⁰ Merriam-Webster Online Dictionary, “Producer,” <http://www.merriam-webster.com/dictionary/producer> (December 15, 2009).

⁶¹ Merriam-Webster Online Dictionary, “Promote,” <http://www.merriam-webster.com/dictionary/promote> (December 15, 2009).

⁶² Merriam-Webster Online Dictionary, “Promoter,” <http://www.merriam-webster.com/dictionary/promoter> (December 15, 2009).

only a promoter. He promoted the battle of the bands at the VFW by presenting (through flyers and web advertising) the event at the VFW for buyer acceptance. Nevertheless, David falls within the scope of the CPO.⁶³ In the case of Brian and The Windows, David took no financial interest in the event, he was to be compensated by the band regardless of how the event performed and David had no oversight of the event. Under these circumstances David would not be considered an individual who is *producing* an event and the Chicago Independent Review Panel intended to exempt these individuals from obtaining a license. Instead, The Chicago Independent Review Panel intended only individuals who *produce* events to be licensed. The Chicago City Council ignored this plain language and sought licensing of all event individuals *promoting* events regardless of their actual and intended roles.

- “Promoted events at large, non-fixed seating venues pose unique public safety challenges. By their very nature, non-fixed seating venues lack the evacuation aisles necessary to funnel people out quickly in the event of an emergency, provide no assurance that persons in attendance will remain properly positioned in relationship to exit doors and stairs; are conducive to being ‘packed by people’ in excess of the venue’s maximum occupancy; and to make it very difficult for fire marshals and law enforcement personnel to determine the precise number of people inside the venue. The crowd in a non-fixed seating venue is fluid and, with little warning, can take on a life of its own. If the crowd panics or shoves in one direction, the probability of death by stampede is greatly increased.”

Promoted or un-promoted events at large, non-fixed seating as well as both promoted and un-promoted events at fixed seat venues both create public safety challenges. To distinguish arbitrarily one from the other is not a reason for requiring individuals who promote events to obtain various licensing, insurance, bonding, or any other requirement contained in the CPO. The United Center in Chicago has fixed seating of over 30,000 during Chicago Bulls Basketball games,⁶⁴ however, only has approximately 8 entrance and exit gates.⁶⁵ This results in approximately 3,750 individuals per gate during an emergency. Of course, these exits are wider and more conducive to emergencies; by comparison, however, the tragedy at E2 had 1,100 individuals per exit. Therefore, the Chicago City Council is mistaken when it summarily concludes that large non-fixed venue seating pose emergency challenges that large, fixed seating venues do not.

Furthermore, the Chicago City Council states that the very nature of large, non-fixed seating venues makes them likely “to being packed by people in excess of the venue’s maximum occupancy. . .” This argument puts the cart before the horse. It is the venue’s responsibility for admitting individuals. If a venue exceeds its maximum occupancy, it is the venue’s responsibility, not the promoters whose sole responsibility is to promote the event. As a result, the Chicago City Council overlooks the fact that *any* large venue is susceptible to increased risk in the event of an emergency and individual(s) responsible for admitting patrons should adhere to PPA licensing requirements and abide by maximum occupancy restrictions.

⁶³ See Section II(C), *supra*.

⁶⁴ The Chicago Bulls, www.bulls.com, (November 22, 2009).

⁶⁵ <http://www.unitedcenter.com/assets/dining/clubseatinghandbook.pdf>.

- “Promoted events at large, non-fixed seating venues are frequently accompanied by public disturbances outside the venue. These public disturbances, which threaten the peace and good order of the surrounding community, are the direct result of large crowds of people waiting in line in the hope of gaining admission to the promoted event.”

The tragedy at E2 nightclub did not have anything to do with potential patrons *outside* the venue. To address concerns about patrons outside the venue is subverting attention and probing for reasons to implicate and restrict event promoters and indemnify the City of Chicago. There is no law, regulation, policy, contract, or any other mandate that says patrons *outside* of the venue *must* be admitted to the venue. In addition, this statement singles out “non-fixed” seating venues while it ignores the magnitude of crowds and the threat of peace and good order surrounding large, fixed seating venues. For example, individuals wait for as much as 5 hours before a Chicago Cubs game in order to be let inside the left field bleachers.⁶⁶ Additionally, this statement ignores the congregation and socializing taking place after large fixed seating events. A comparison of the facts of the E2 tragedy coupled with the terms of the proposed ordinance and this language in particular demonstrates that the CPO is not justified by its legislative findings purporting to link it to previous tragedies.

- “Event promoters and venue operators share mutual responsibility for the conduct of the promoted events. Accountability is best assured under circumstances where both the event promoter and venue operator understand that their respective business licenses may be at stake if the common sense steps required by this ordinance are not taken to protect the public health, safety and welfare at such events.”

As discussed in detail above, the power to protect against risks resides with venue owners and producers, not event promoters. It is a venue’s responsibility for admitting individuals. If a venue exceeds its maximum occupancy, it is the venue’s responsibility, not the promoters whose sole responsibility is to promote the event. Venue owners have a strong incentive to ensure that music events are safe and well run – for fear of severe penalties, including loss of license, for noncompliance.⁶⁷

A vast majority of music performed in Chicago is at Public Places of Amusement (“PPA”) or Special Events licensed spaces.⁶⁸ The vast majority of PPA licensees are upstanding, law-abiding business people.⁶⁹ Currently, the PPA/Special events licensing requirements creates strong incentives for licensees to ensure that music events are safe and well run – and mandates severe penalties, including loss of license, for noncompliance.⁷⁰ Thus, the vast majority of PPA venues and Special Event licensees tightly control their licensed spaces for music events and only work with promoters whom they have an established, contractual relationship. However, where a PPA or Special Events licensee does not retain sufficient control over his space, such as

⁶⁶ On August 20, 2008 I waited outside Wrigley Field from 9:00 am until the doors opened at 2:15 for the Chicago Cubs Division Finals. So too did 1,000’s of other fans.

⁶⁷ Chicago Municipal Code, *Proposed* Event Promoters at Section 4-157-020(B)..

⁶⁸ Ltr. From Chicago Music Commission to Honorable Eugene Schuller, Chariman, Chicago City Council Committee on License and Consumer Protection at pg. 4 (March 3, 2009)(copy on file at www.chicago-music.org).

⁶⁹ *Id.*

⁷⁰ *Id.*

the E2 nightclub, the City of Chicago, Chicago Police, and the Chicago Fire Department currently have the power to act. In the case of the E2 nightclub tragedy, the City of Chicago did in fact act by issuing a “Do Not Occupy” order, however, the City of Chicago tragically failed to enforce the same. It is uncertain how increased legislation would have prevented this lapse in administrative oversight. The CPO would not prevent this abdication of responsibility to enforce the law and the City’s own adjudicatory orders.

Furthermore, it is widely known that many PPA and Special Events licensees regularly contract with various performance groups for use of their PPA/Special Events-licensed spaces.⁷¹ For these common and often incident-free events, the PPA/Special Events licensee is assuming substantial business risk;⁷² if the performance creates a public safety incident or in any way violates the terms of the PPA or Special Events license, the licensee alone faces in the very least the risk of losing his or her license.⁷³ Due to this substantial risk and assumed responsibility, PPA/Special Events licensees currently go to great lengths to ensure that their licensed spaces are controlled and managed responsibly at all times for the safety of their customers and Chicago residents (including having their staffs on-site for the duration of the event).⁷⁴ Indeed, the CPO acknowledges this reality by exempting PPA licensees from needing a promoter license to promote their own events.⁷⁵

- “It is not unreasonable to expect persons who make a living out of promoting events in the City of Chicago, and who engage in the business of drawing large crowds to Chicago venues, to take the common sense steps required by this ordinance to ensure that the public safety and neighborhood tranquility are preserved at these events.”

In this paragraph, Chicago City Council’s intent does not correspond to the actual language of the CPO. The Chicago City Council maintains that it is unreasonable to expect persons who *make a living* out of promoting events to be subject to the provisions of the CPO. Again, recall the hypothetical of Brian and The Windows. Brian’s brother David is undoubtedly *not* making a living out of promoting events in the City of Chicago although the scope of the CPO subjects him to its provisions. It is an economic reality that most event promoters do not make a living from promoting activities, in fact, indie musicians and indie personnel rarely cover costs at all.⁷⁶ The CPO ignores this fact and subjects compensated event promoters regardless of whether they are *making a living* or not.

Furthermore, even if event promoters should take certain steps to ensure that the public safety and neighborhood tranquility are preserved at promoted events, those steps do not include being subject to fingerprinting, paying a licensing fee, obtaining insurance, being bonded, indemnifying the City of Chicago, or any number of requirements mandated by the CPO. Despite the contentions of the Chicago City Council, there is no evidence that promoters even promoted the event at E2. In fact, the only reason E2 was open for business that night and the

⁷¹ Ltr. From Chicago Music Commission at pg. 5

⁷² Even potential prison sentences as evidenced by the owners of the E2 nightclub, See Footnotes 12 and 13.

⁷³ Ltr. From Chicago Music Commission at pg. 5

⁷⁴ *Id.* at 5-6.

⁷⁵ *Id.* at 6.

⁷⁶ *Id.* at 4.

only reason E2 unlawfully exceeded its maximum occupancy was the failure of the city to communicate the “Do Not Occupy” order to the proper personnel. As evidenced by the hypothetical featuring David and The Windows, it is undisputed that the intention to license “individuals making a living” from promoting events is not accomplished by the CPO. Furthermore, these “common sense steps” defy common sense and the facts, and are irrelevant and unnecessary if the very people paid “to serve and protect” are unable to or do not do their job.

- “The music and entertainment industry in Chicago will flourish if event promoters are licensed. Today, many venue operators are reluctant to host promoted events at their establishments because irresponsible event promoters, those whose promoted events have resulted in death, personal injury, property damage or public disturbances, have given the event promoter industry a bad name. Venue operators presently have no way of knowing, other than by word of mouth, whether an event promoter who approaches them with an offer to host a promoted event at their venue has a good record as an event promoter or not. Licensing of event promoters will work to allay such unfounded fears about event promoters and to encourage more Chicago venue operators to open their doors to promoted events.”

This assertion is unfounded and contrary to the facts. Indeed, statistics lead to the opposite conclusion, to wit, that the music and entertainment industry in Chicago would be greatly hindered and even suffocated if event promoters are required to be licensed. A detailed discussion of this plausible outcome is contained in the subsequent section III(B), *infra*.

B. The Music and Entertainment Industry Will Suffer if the CPO is Passed.

As it is today, the Chicago music industry is a vital component to the overall economy of Chicago, in terms of the jobs it provides, the business it includes, the payroll it generates, and the job growth it spurs.⁷⁷ An economic look at the Chicago music industry, however, does not fully reveal the role music and other entertainment plays in enticing individuals to visit and even to relocate to a city with a vibrant entertainment scene.⁷⁸ With competition for tourist dollars fierce, and with urban developers and planners increasingly aware of the need to woo the “creative class,” by investing in amenities that improve the quality of life, what goes on in local music clubs, ballrooms, auditoriums, festivals, and even basements and garages is so vital to the future of Chicago.⁷⁹

As the music industry is today, without the CPO, Chicago ranks fifth in the nation in the number of musical groups and artists employed.⁸⁰ Nearly 2,000 individuals are on the payroll of musical entertainment businesses, out of a total estimated at almost 50,000 nationwide.⁸¹

⁷⁷ Cultural Policy Center at The University of Chicago, *A Report On The Music Industry in Chicago*, 2 (University of Chicago, 2007).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

Chicago is home to twice as many musicians as Seattle, and ten times as many as Austin.⁸² Additionally, Chicago’s music industry employs nearly 13,000 people in 831 businesses.⁸³ Chicago has the third-largest music workforce, third largest number of music businesses, and the third-largest payroll in the country, roughly \$280 million in 2004.⁸⁴ Receipts generated by the core component of the music industry total \$84 million.⁸⁵ In 2004, 1,093 shows were performed in Chicago by touring performers alone, generating nearly \$80 million in revenue.⁸⁶ To a much greater degree than anywhere in the country besides Atlanta, Chicago’s small club music scene is devoted to specific genres of music, and Chicago offers more kinds of music regularly than anywhere except New York City and Los Angeles.⁸⁷ The average club in Chicago is about the same size as the average club in Austin, who has no regulation similar to the CPO. Catching a show in Chicago is less expensive than in New York or Los Angeles, and comparable to the cost in Nashville, Seattle, or Austin.⁸⁸ In 2004, roughly 9.3 million people attended festivals in Chicago – including small neighborhood gatherings as well as world-renowned festivals for blues, gospel, jazz, and Latin music.⁸⁹ In 2004, only six percent of the performances in Chicago featured *Billboard* Top 100 musicians, this shows a feature of particular economic importance because research has shown that educational attainment and economic status is associated with what sociologists dub “cultural omnivorousness,” a taste for cultural variety.⁹⁰

Despite Chicago’s music industry successes without any form of legislation similar to the CPO, the Chicago City Council states, “the music and entertainment industry will flourish if event promoters are licensed.”⁹¹ This contention is without merit and patently false. The CPO requires licensees to obtain promoter insurance for any promoted event, even if it takes place at a licensed and already-insured place.⁹² If the Chicago City Council passes the CPO, most promoters would be required to purchase single-event insurance, which is extremely expensive.⁹³ The Chicago City Council maintains that promoters can obtain “multi-event” insurance, which is intended to reduce the costs to promoters.⁹⁴ What the CPO does not address, however, is that this form of insurance is largely unavailable to promoters. In fact, only one broker is currently adopting this insurance and only on an experimental basis.⁹⁵ The inevitable conclusion therefore is not that the music and entertainment scene will “flourish,” but rather, that too many small and new promoters affected by the CPO – those that are least able to afford either the expensive

⁸² *Id.*

⁸³ *Id.*; This figure does not take into account the millions of dollars generated by the independent music industry.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.

⁸⁸ *Id.*

⁸⁹ *Id.* at 6.

⁹⁰ *Id.*

⁹¹ Chicago Municipal Code, *Proposed Event Promoters* at Preamble.

⁹² See Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-100; Ltr. From Chicago Music Commission at pg. 5

⁹³ Ltr. From Chicago Music Commission at pg. 5

⁹⁴ Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-100; CMC at 5.

⁹⁵ Ltr. From Chicago Music Commission at pg. 5.

single event insurance or the potentially unavailable and untested multi event insurance – will be unable to obtain *any* required insurance and be shut out of the promoter market all together.⁹⁶

C. Chicago should be Promoting its Indie Musicians not Hindering their Artistic and Economic Advancement.

Chicago’s small music promoter businesses, and individuals such as David, despite their unique economic and cultural contributions to Chicago, are extremely fragile enterprises that operate on very thin profit margins and in a regulatory climate that is treating them not as treasures of Chicago, with specialized business needs and practices, but as safety risks and mere tax generators.⁹⁷ Additionally, much of Chicago’s music emerged into public prominence slowly, from small venues, and with the support of small promoters.⁹⁸ Their work in particular should be supported, not discouraged.

The City of Chicago should embrace the Chicago music community in the same way as competitor cities such as Seattle, Austin, and San Francisco.⁹⁹ Those cities have implemented laws and policies that actively bolster their music communities rather than creating additional regulatory and financial burdens that burden Chicago’s grassroots movement.¹⁰⁰ Drawing hundreds of millions of dollars in revenue, and more than 50,000 jobs, Chicago music’s vibrant and diverse scene and rich history gives Chicago music’s “creative class” the unique ability to help Chicago emerge from the current economic downturn and beyond.¹⁰¹

The grassroots scene of Chicago consists of underground hipsters, music-star wannabes, musicians in training at conservatories or music schools, and semi-professional performers of all kinds of music. Grassroots performers often perform in *ad hoc* settings such as raves, clubs, house parties, college classrooms, dorms, church basements, and garages.¹⁰² All of these venues would be subject to the provisions of the CPO if an event promoter is compensated or the venues charge admission.¹⁰³ The cumulative effect of these individuals is enormous and Chicago should follow sister cities by embracing the “creative class.” Any hindrance of the “creative class” movement, such as the CPO, is unwarranted, unnecessary, and as discussed below, unconstitutional.

⁹⁶ *Id.* (emphasis added).

⁹⁷ Ltr. From Chicago Music Commission at pg. 4

⁹⁸ *Id.*

⁹⁹ Ltr. From Chicago Music Commission at pg. 1

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Cultural Policy Center at The University of Chicago, *A Report On The Music Industry in Chicago* at 39.

¹⁰³ See Chicago Municipal Code, *Proposed Event Promoters* at Section 4-157-020; For event promoters promoting events at a venue that holds less than 100 persons, no license is required *only* if no admission is charged. Event promoters promoting events at a venue that holds more than 100 persons are required to obtain a license if the promoter is compensated or if the venue charges admission.

IV. THE CPO IS UNCONSTITUTIONAL AS WRITTEN

The “the First Amendment is often inconvenient, but that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech.”¹⁰⁴ In the case of the CPO, this has never been truer. The CPO as written is unconstitutional as it violates the First Amendment to the United States Constitution.

The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech.”¹⁰⁵ To evaluate the constitutionality of a regulation challenged on First Amendment grounds as a burden of speech, the Supreme Court utilizes a two-tiered system of review.¹⁰⁶ This two-tiered system begins by asking whether the regulation is content based or content neutral and whether the speech at issue is commercial or expressive.¹⁰⁷

The CPO as written is content based, in that it regulates entertainment promotion – based upon content. Furthermore, as commercial speech, the CPO does not pass muster under the *Central Hudson*¹⁰⁸ test.

A. The CPO is an Impermissible Content-Based Ordinance

The first requirement in determining the level of scrutiny in a First Amendment analysis is whether the regulation is content-based or content-neutral.¹⁰⁹ The CPO is an impermissible content-based ordinance and thus subject to the highest level of scrutiny. Because advertising and promoting entertainment events is a protected form of speech, the regulation of such expression must meet the appropriate level of scrutiny to satisfy constitutional limits.¹¹⁰

Content-neutral regulations are unrelated to the content of the speech and apply to all speech, regardless of the message.¹¹¹ In other words, content neutral regulations must be both subject-matter and viewpoint neutral, and those regulations are “justified without reference to the content of the regulated speech.”¹¹² Such content-neutral regulations “are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication.”¹¹³ These regulations are subject to an intermediate level of scrutiny.¹¹⁴ Intermediate scrutiny means that a content-neutral restriction on speech is valid “if it furthers an important or substantial interest; if the government interest is unrelated to the

¹⁰⁴ Anonymous, ThinkExist.com, http://thinkexist.com/quotes/with/keyword/first_amendment/2.html. (November 22, 2009).

¹⁰⁵ U.S. Const. amend. I.

¹⁰⁶ *Kennedy v. Avondale Estates, Georgia* 414 F.Supp. 2d 1184, 1196 (N.D. Georgia 2005).

¹⁰⁷ *Id.* at 1196, 1198.

¹⁰⁸ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.* 447 U.S. 557 (1980).

¹⁰⁹ *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

¹¹⁰ See *Advantage Media, LLC v. City of Hopkins*, 379 F.Supp.2d 1030, 1038 (D. Minnesota 2005); See also *Valley Broadcasting Co. v. U.S.*, 820 F.Supp.519 (D. Nevada 1993).

¹¹¹ *Turner Broadcasting System, Inc., v. Fed. Communications Comm’n.* 512 U.S. 622 (1994)

¹¹² *Consolidated Edison v. Pub. Serv. Comm’n.* 447 U.S. 530 (1980); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Whitton v. City of Gladstone, Missouri*, 54 F.3d 1400, 1403 (8th Cir. 1995).

¹¹³ *City of Renton*, 475 U.S. at 46-47.

¹¹⁴ *Turner*, 512 U.S. at 642.

suppression of free expression; and if incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”¹¹⁵ More simply put, a content-neutral restriction survives if the government can show a reasonable basis for believing its policy will further a “substantial governmental interest and that the policy is the least restriction possible which would further that interest.”¹¹⁶ The court’s “principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys.”¹¹⁷ If a regulation is deemed to be content-neutral, then the court must inquire whether the regulation constitutes reasonable time, place, or manner restriction.¹¹⁸ Courts may approve reasonable time, place, and manner restrictions as long as they are, “justified without reference to the content of the regulated speech . . . they serve a significant governmental interest, and . . . they leave open ample alternative channels for communication.”¹¹⁹ The CPO is not content-neutral and therefore such an analysis is not applicable.

In contrast, content-based regulations are those that suppress, disadvantage, or impose differential burdens upon speech based upon its content.¹²⁰ Such regulations are subject to strict scrutiny and are presumptively invalid.¹²¹ To survive a strict scrutiny review, the State must show that its regulation is, “necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”¹²² In this case, the CPO is an impermissible content-based ordinance that does not possess narrowly tailored means in order to justify the state interest.

If an official must consider the content of a sign (or in this case, advertisement) to determine whether an ordinance applies, then that ordinance is content-based.¹²³ Moreover, an ordinance is content-based where “it makes impermissible distinction based *solely* on the content or message conveyed by the sign.”¹²⁴

In *Whitton v. City of Gladstone, Mo.*,¹²⁵ the court noted that the types of words on regulated signs dictated how long the signs could remain posted. The court held that because the content of the signs dictated the durational limit a sign could be posted per the city ordinance, the ordinance was thus content-based.¹²⁶ Additionally, in *Advantage Media, LLC, v. City of*

¹¹⁵ *U.S. v. O’Brien*, 391 U.S. 367, 377 (1968).

¹¹⁶ *Artistic Entm’t, Inc., v. City of Warner Robbins*, 331 F.3d 1196, 2005 (11th Cir. 2003).

¹¹⁷ *Kennedy*, 414 F.Supp.2d at 1197 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹¹⁸ *Kennedy*, 414 F.Supp.2d at 1197.

¹¹⁹ *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

¹²⁰ *Turner*, 512 U.S. at 642.

¹²¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *U.S. v. Playboy Entm’t Group Inc.*, 529 U.S. 803, 813 (2000).

¹²² *Simon & Schuster, Inc., v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991)(citing *Arkansas Writers’ Project, Inc., v. Ragland*, 481 U.S. 221, 231 (1987)).

¹²³ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992)(striking ordinance in which an official “must necessarily examine the content of the message that is conveyed”); *Clear Channel outdoor, Inc., v. City of St. Paul*, No.: 02-1060 (DWF/AJB), 2003 WL 21857830 at *4 (D. Minn. 2003)(holding unconstitutional a statute where an official “would need to read the sign in order to determine whether it advertised off premises or on-premises services or commodities, and thus to determine whether the ordinance applies, the ordinance imposes a content-based restriction”).

¹²⁴ *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1404 (8th Cir. 1995)(emphasis in original).

¹²⁵ *Id.*

¹²⁶ *Advantage Media LLC*, 379 F.Supp.2d at 1040-1041.

Hopkins,¹²⁷ a city ordinance that placed certain classification and regulation restrictions that depended upon a signs content, the distinctions clearly rendered the ordinance content-based.¹²⁸ Another example that is analogous to the CPO was seen in *City of Cincinnati v. Discovery Network, Inc.*¹²⁹ In that case, the court held that an ordinance regulating use of newspaper racks to distribute commercial handbills but not newspapers was content-based because “whether any particular newspaper rack falls within the ban is determined by the content of the publication resting inside that newspaper rack.”¹³⁰

Application of these principles to the language contained in the CPO yields the same conclusion the court reached in *Whitton* and *Advantage Media, LLC*. First, nowhere in the proffered ordinance is there a definition of what it means “to promote.”¹³¹ Rather the CPO defines in pertinent part an “event promoter” as any person who: (1) is directly or indirectly responsible for the organization of an amusement or event, as evidenced by activities such as contracting with the principles, selecting entertainment, *advertising or otherwise holding out an amusement or event to members of the general public, inviting participants to an amusement or event, or controlling the site of an amusement or event . . .*”¹³² The language of the CPO is offensive-not only to the values protected by the First Amendment, but to the very notion of a free-society that in the context of everyday public discourse, a citizen must first inform the government of his or her desire and apply for a license in order to speak to his or her neighbors.¹³³ The CPO restricts promotional material through all forms of advertising or otherwise holding out an amusement or event to members of the general public or inviting participants to an amusement or event. In this case, whether someone is an event promoter depends on whether he or she advertises or holds out an amusement or event or whether he or she invites participants to an amusement or event. It follows, therefore, that like *Whitton* and *Advantage Media, LLC*, in order to tell if someone is an event promoter under the definitions provided in the CPO, is dependent upon what the individual is tendering or saying to members of the public. For example, an individual in charge of promoting an advertisement for free hot dogs at Portillo’s Hot Dogs is free from any ordinance, regulation, or restriction to hand out flyers or to post on his or her Facebook. That same individual, however, is not free from handing out the same color flyers, at the same place, to the same people if the flyers advertise The Ultra Sonic Edukators live at Schubas.¹³⁴ There might be a riot at the hot-dog stand or at Schubas. The CPO restricts only certain kinds of promotions, and thus, like *Whitton* and *Advantage Media LLC*, the content of the speech may or may not subject an individual to the CPO. The CPO is thus content-based.

¹²⁷ 379 F.Supp.2d at 1041.

¹²⁸ 379 F.Supp.2d at 1041.

¹²⁹ 507 U.S. 410 (1993).

¹³⁰ *Id.* at 429.

¹³¹ See generally, Chicago Municipal Code, *Proposed Event Promoters*.

¹³² *Id.* at Section 4-157-010 (emphasis added).

¹³³ *Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton*, 536 U.S. 150, 165-166

(2002)(holding that ordinance requiring Jehovah’s witnesses who go door-to-door to register with the Village unconstitutional as it contains restrictions against national heritage and constitutional tradition).

¹³⁴ The Ultra Sonic Edukators are an indie band in Chicago. See <http://www.myspace.com/ultrasonicedukators>.

Schubas is a Chicago bar that features some of the best indie musicians in the Chicago area. See <http://www.schubas.com/>.

The application of the law in *Discovery Network* further exemplifies the unconstitutionality of the CPO. In *Discovery Network*, the question of whether a certain newspaper rack fell within the ordinance depended on the content of the publication resting inside the newspaper rack.¹³⁵ Similarly, an event promoter, like a newspaper rack, is only subject to the CPO depending on the content of the publication he or she is making or holding. Again referring to the hot dog example at Portillo's Hot Dogs, only depending on the words of the flyer is the event promoter subject to the CPO. Application of *Discovery Network* further proves that the CPO, like the Cincinnati ordinance is content-based.

B. Strict Scrutiny of Content-Based Regulations

Because the CPO is a content-based ordinance, the CPO “can stand only if it satisfie[s] strict scrutiny.”¹³⁶ To satisfy strict scrutiny, a regulation “must be narrowly tailored to promote a compelling government interest.”¹³⁷ Generally, a content-based regulation is unconstitutional unless the government proves that it is “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹³⁸ “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”¹³⁹ The government bears the burden of proving that any proposed alternatives would not be as effective as the challenged statute.¹⁴⁰

1. Compelling Government Purpose

The first question is whether the CPO promotes a “compelling governmental interest.” The Supreme Court has noted that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”¹⁴¹ Many courts have interpreted *Ward* to “instruct reviewing courts to give controlling weight to what the court determines is the government’s true purpose for enacting it.”¹⁴² Such a “compelling” interest serves as a higher standard than mere “substantial” state interests.¹⁴³ A similar holding is seen in *Advantage Media, LLC*.¹⁴⁴

In *Advantage Media, LLC*, the court held that the city’s purpose in enacting the ordinance that regulated the duration and geographic placement of signs based on the sign’s content, was to ‘protect public health safety, morals, comfort, convenience and general welfare,’ and to “limit congestion in the public right-of-way.”¹⁴⁵ The Court in *Advantage Media, LLC* applied the holding from *Whitton* that said “a municipality’s asserted interests in traffic safety and aesthetics,

¹³⁵ 507 U.S. at 429.

¹³⁶ *Playboy Entm’t Group, Inc.*, 592 U.S. at 813.

¹³⁷ *Id.*

¹³⁸ *U.S. v. Dinwiddie*, 76 F.3d 913, 921 (8th Cir. 1996)(quotation omitted).

¹³⁹ *Playboy Entm’t Group, Inc.*, 592 U.S. at 813.

¹⁴⁰ *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

¹⁴¹ *Ward*, 491 U.S. at 791.

¹⁴² *Whitton*, 54 F.3d at 1406; *Advantage Media LLC*, 379 F.Supp.2d at 1042.

¹⁴³ *Whitton*, 54 F.3d at 1409 (holding that traffic safety and aesthetic beauty are substantial, but not compelling, governmental interests).

¹⁴⁴ 379 F. Supp.2d 1030.

¹⁴⁵ *Advantage Media LLC*, 379 F.Supp.2d at 1042.

while significant, *have never been held to be compelling*.¹⁴⁶ Moreover, circuits such as the Eighth Circuit have held that “a city’s interests in aesthetics, safety, and property values are substantial, but they are not sufficiently ‘compelling’ to support a content-based restriction that is not the least restrictive alternative.”¹⁴⁷

Application of the law requires an understanding of the City of Chicago’s purpose in proposing the CPO.¹⁴⁸ The Chicago City Council explicitly states its purposes for the CPO. The Chicago City Council lists the following objectives: (1) to promote public safety at promoted events; (2) to promote neighborhood tranquility at promoted events; (3) to promoted shared responsibility at promoted events; (4) to promoted accountability at promoted events; (5) to require common sense regulation of event promoters; and (6) to promote a thriving music and entertainment industry.¹⁴⁹ It is arguable that the Chicago City Council listed these purposes for the CPO in descending order of importance; however, even if it did not, the Chicago City Council has not listed any *compelling* reasons to usurp the *prima facie* unconstitutionality of a content-based ordinance. Courts held in *Whitton* and *Advantage Media, LLC*, that safety (the first purpose offered by the CPO) is a *substantial* state interest, but not a *compelling* state interest.¹⁵⁰ Moreover, public health, morals, comfort, convenience, and general welfare which also have been held to be *substantial* (but not compelling) state interests are all analogous in one way or another to tranquility, responsibility, and accountability that are objectives in passing the CPO.¹⁵¹ Finally, a “common sense” regulation and an arbitrary purpose by the Chicago City Council to promote the music and entertainment industry also fails to meet the *compelling* standard. Therefore, the Chicago City Council’s proffered intent, purpose, and interests, although they may be significant, are not compelling under the strict scrutiny standard.

2. Narrowly Tailored; Least Restrictive Means.

To survive strict scrutiny, the government bears the burden of showing that the CPO is “narrowly tailored” to promote its compelling interest.¹⁵² Although the CPO does not meet the compelling standard as discussed above, discussion of the narrowly tailored and least restrictive means requirement is warranted. The Supreme Court has held that a regulation must be set forth and follow “definite and objective standards” if government officials are “empowered to limit citizens’ ability to express themselves.”¹⁵³ To satisfy the “narrowly tailored” aspect of the test, the restriction “need not be the least restrictive or least intrusive means of [serving the governments’ interest],” but it also may not “burden substantially more speech than is necessary

¹⁴⁶ *Id.* See also, *Whitton*, 54 F.3d at 1409 (emphasis in original).

¹⁴⁷ *Advantage Media, LLC*, 379 F.Supp.2d at 1042-1043; *Gileo v. City of Laude*, 986 F.2d 1180, 1181-1182 (8th Cir. 1993) *aff’d* 512 U.S. 43 (1994).

¹⁴⁸ Although one purpose of this paper is to offer a “real” reason for the CPO, this section presupposes the City of Chicago’s proffered reasons as true.

¹⁴⁹ Chicago Municipal Code, *Proposed Event Promoters*. “*Close Collaboration with the Industry and other Affected Parties*.”

¹⁵⁰ See Footnotes 124 and 126.

¹⁵¹ *Whitton*, 54 F.3d at 1406; See also Footnote 130.

¹⁵² *Playboy Entm’t Group, Inc.*, 529 U.S. at 813.

¹⁵³ *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215 (1990); *Young v. City of Roseville*, 78 F.Supp.2d 970, 975 (D. Minn. 1999).

to further” that interest.”¹⁵⁴ The existence of “numerous and obvious less-burdensome alternatives” is relevant to assessing whether the restriction on speech reasonably fits the interest asserted.¹⁵⁵ “Merely invoking interests . . . is insufficient. The government must also show that the proposed communicative activity endangers those interests.”¹⁵⁶ Finally, “[the government] is not free to foreclose expressive activity in public areas on mere speculation about danger.”¹⁵⁷

In *Advantage Media, LLC*, the court held that despite the defendant’s stated interests in safety and aesthetics, including sign size, the distinctions provided by the ordinance were not narrowly tailored to promote the Defendant’s interest.¹⁵⁸ In coming to this conclusion, the court found that if the content-based distinctions (the regulation of size of a given sign based on the signs content) were removed from the ordinance or by keeping a globally applicable size-limitation provision or size limitation by zoning district, would possibly demonstrate a less-restrictive means of achieving the City’s interests in safety and aesthetics.¹⁵⁹ The court held that the ordinance was not narrowly tailored to further the City’s interests, nor was it the least restrictive means of regulating those interests.¹⁶⁰

In *Klein v. City of San Clemente*,¹⁶¹ the Ninth Circuit Court of Appeals held that the city’s anti-littering ordinance, prohibiting the leafleting of unoccupied vehicles parked on city streets violated the First Amendment as it was likely that the ordinance was not narrowly tailored to serve the city’s legitimate interests.¹⁶² The first interest that the city asserted was in “prohibiting litter and visual blight thereby preserving the aesthetics of the community.”¹⁶³ The city contended that the ordinance was narrowly tailored because it “only prohibits the placing of materials on unoccupied vehicles where it results in litter” and thus “target[s] the precise problem that it wished to correct.”¹⁶⁴ The court rejected this argument because the city failed to show some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets. Because the city failed to do this, court concluded that the City’s asserted interest in preventing littering on the streets did not justify a prohibition on placing leaflets on windshields.¹⁶⁵

Applying the rules from *Playboy Entm’t Group, Inc.*, and *Klein v. City of San Clemente* shows that the CPO, like the ordinance in *Advantage Media, LLC*, is not narrowly tailored to further Chicago’s interests nor is it the least restrictive means of regulating those interests. Like

¹⁵⁴ *Ward*, 491 U.S. at 798-799.

¹⁵⁵ *Discovery Network, Inc.*, 507 U.S. at 417 n.3.

¹⁵⁶ *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 73 (1981)(rejecting city’s asserted zoning interests because it “presented no evidence.”).

¹⁵⁷ *S.O.C. v. County of Clark*, 152 F.3d 1136, 1146 (9th Cir. 1998)(holding that there was no evidence in the record to support an assumption that commercial handbillers are the inherent cause of pedestrian flow problems in Clark County.).

¹⁵⁸ *Advantage Media LLC*, 379 F.Supp.2d at 1043.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 584 F.3d 1196 (9th Cir. 2008).

¹⁶² *Id.*

¹⁶³ *Id.* at 1198.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Klein, the Chicago City Council has failed to show any evidence that event promoters were at fault for the tragedy at E2 nightclub, the motivation for the CPO. In fact, the Chicago City Council fails to show how event promoters allowed approximately 800 patrons over the maximum occupancy at E2, how event promoters sprayed anyone with mace, how event promoters did not enforce a court ordered “Do Not Occupy,” whether event promoters even promoted E2, and most importantly, how the CPO will serve to reduce any of these risks. Moreover, the CPO is also not narrowly tailored in that it directly affects individuals like David, Brian’s brother from the hypothetical in I(A), *infra*.

In addition to not being narrowly tailored, the CPO is not the least restrictive means of accomplishing the City’s proffered objectives. Not only does the CPO substantially burden more speech than necessary to further any interest or objective, but also, other less restrictive means are available to accomplish these objectives. First, the CPO substantially burdens more speech than necessary. Even if the Chicago City Council’s goals were *compelling*, which they are not, the CPO inherently restricts speech that is not likely to cure any proffered objective. For example, David, Brian’s brother from the hypothetical in I(A), *infra*, falls within the scope of the CPO even though it is highly unlikely that the VFW will face overcrowding or any other “safety” interest the CPO allegedly aims to correct. Second, there are numerous less restrictive means available to accomplish the Chicago City Council’s goals. Many of these means are in the language of the ordinance itself or in the Chicago Independent Review Panel’s report. The most obvious means would be for the city to enforce its maximum occupancy laws. If the city enforces these laws, it is irrelevant how many individuals show up for a given event and thus irrelevant what or how an event promoter “promotes.” The CPO intends to prevent the tragedy like the one at E2 nightclub. That tragedy was directly related to an overcrowding and lack of exits – not related to an abundance of patrons outside the venue waiting for permission to enter. It is undisputed that the Chicago Independent Review Panel found that “one of the most critical areas to public safety . . . is occupancy restrictions and the enforcement of occupancy limits.”¹⁶⁶ Because of the City’s failure to enforce occupancy restrictions, a less restrictive means than subjecting event promoters to the CPO, 21 people were killed at E2.

Another less restrictive means than requiring event promoters be licensed, bonded, insured, and subject to fingerprints is for the City of Chicago to enforce its existing laws and court orders. In July 2002, more than six months before the tragedy at E2, the City, acting through its Corporation Counsel obtained a “mandatory Do Not Occupy” order from the Circuit Court of Cook County prohibiting anyone from occupying the second floor at E2.¹⁶⁷ Additionally, the owners of E2 nightclub had a significant history of license violation cases with approximately 32 separate reports in the five-year period from June 1996 to March 2001.¹⁶⁸ The Chicago Independent Review Panel specifically found that this “lack of communication led to [the tragedy at] E2 nightclub,” where two city agencies had obtained an order preventing occupancy of the second floor of that building, while another City agency, the Chicago Police Department, was unaware of the Order and was, ironically, “regularly and routinely active in disputes and issues arising from occupancy at [E2].”¹⁶⁹ This lack of communication is no excuse

¹⁶⁶ Independent Review Panel of Building Safety Enforcement Powers at (E), at pg. 17.

¹⁶⁷ *Id.* at 2.

¹⁶⁸ *Id.* at 16.

¹⁶⁹ *Id.* at 19.

for the Chicago City Council to pass the CPO when it is evident that the City has failed to demonstrate the reality of the harm or the efficacy of the restriction. It is more restrictive than necessary to require event promoters be subject to the CPO when there is no evidence that such an ordinance will have any effect on the Chicago City Council's objectives and that if the CPO had been passed it would not have prevented the tragedy at E2, the Chicago City Council's motivation in drafting the CPO.

C. *Central Hudson*¹⁷⁰ Analysis

Where content-based restrictions apply to commercial speech, courts use the test set forth in *Central Hudson Gas & Elec. Corp., v. Pub. Serv. Comm'n.*¹⁷¹ A content-based restriction on commercial speech also violates the First Amendment unless that restriction (1) is unlawful, false, or misleading; (2) seeks to implement a substantial governmental interest; (3) directly advances that interest; and (4) reaches no further than necessary to accomplish that interest.¹⁷² Under this test, it is evident that commercial speech is not entitled to as much protection as non-commercial speech, however, commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."¹⁷³ In applying this analysis, the defendant bears the burden of demonstrating a substantial state interest, as well as justifying the scope of any restrictions advancing that interest.¹⁷⁴

It is obvious that the CPO meets the first element. There is nothing illegal about advertising an entertainment event, whether it be music or any other sort of entertainment requiring a license by the CPO. As such, the first prong is satisfied.

The Chicago City Council also can satisfy the second prong of the *Central Hudson* test, at least with respect to the Chicago City Council's objective in promoting more safety. Several courts, including the Supreme Court have recognized that within its borders, a state has substantial interest in regulating the health, safety, and welfare of its citizens.¹⁷⁵ As such, it is likely that the Chicago City Council can satisfy its *substantial*, (not compelling as discussed above) interest in promoting safety.

The Chicago City Council, however, cannot satisfy the third and fourth prongs. The third prong requires that the CPO directly advance the Chicago City Council's objective in promoting safety at promoted events. The Chicago City Council "cannot regulate speech that poses no danger to the asserted state interest."¹⁷⁶ Furthermore, governmental prohibitions that are speculative and that only remotely advance that state interest involved cannot justify silencing promotional advertising.¹⁷⁷ As discussed above, there is no evidence that the CPO promotes safety inside venues. In fact, apart from enforcing maximum occupancy laws, the CPO will do

¹⁷⁰ *Central Hudson Gas & Elec. Corp., v. Pub. Serv. Comm'n.*, 447 U.S. 557 (1980).

¹⁷¹ *Id.*

¹⁷² *Id.* at 566.

¹⁷³ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

¹⁷⁴ *Zaunder v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

¹⁷⁵ See *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341 (1986); *U.S. v. Steubben*, 799 F.2d 225, 228-229 (5th Cir. 1986).

¹⁷⁶ *Central Hudson*, 447 U.S. at 565.

¹⁷⁷ *Id.* at 569.

nothing more than insure event promoters and ultimately indemnify the City of Chicago from liability (arguably the real reason for the CPO). At best, the CPO is speculative as to what safety or general welfare interests it will further, and moreover, even if the CPO does in fact foster more safety at a given venue, said safety is of a mere remote advancement from the *status quo*. There would be no advancement if the City of Chicago properly enforced its maximum occupancy laws. As such, the Chicago City Council is unable to satisfy the third prong in *Central Hudson*.

Although the Chicago City Council fails the third prong of *Central Hudson*, a discussion of the fourth prong also is warranted. Under the fourth prong of *Central Hudson*, a restriction on commercial speech must be no more extensive than necessary to further the asserted state interest.¹⁷⁸ In *Central Hudson*, the United States Supreme Court held that a regulation that completely banned promotional advertising, without a state interest sufficiently linked to the advertising ban, impermissibly restrains the First Amendment right of free speech.¹⁷⁹ Applying *Central Hudson*, the court in *HX Magazine* determined that the City of New York failed the fourth prong of *Central Hudson* as the administrative code provisions barring solicitation of passerby violated the First Amendment.¹⁸⁰ In its holding, analogous to the CPO, the court said ordinance prohibiting the solicitation of passerby bans commercial speech which concerns lawful activity that is not misleading.¹⁸¹ As the court in *HX Magazine* held, the CPO is more extensive than necessary to serve the asserted governmental interest. As such, the CPO also fails the *Central Hudson* test and is therefore unconstitutional under the same.

¹⁷⁸ *Id.* at 568-570.

¹⁷⁹ *Id.*

¹⁸⁰ 2002 WL 31040650 (S.D. N.Y. 2002).

¹⁸¹ *Id.* at *2.