

NOTE

TESTING SOLUTIONS FOR ADULT FILM PERFORMERS

*Zachary R. Bergman**

The majority of the nation’s adult films are produced in California, and within California, most production occurs in Los Angeles. In order to regulate that content, the County of Los Angeles passed the Safer Sex in the Adult Film Industry Act (Measure B) by way of referendum in November 2012. Measure B requires that adult film producers wishing to film in Los Angeles County obtain permits from the Los Angeles County Department of Public Health, and it also mandates that adult film performers use condoms while filming and “engaging in anal or vaginal sexual intercourse.” Nevertheless, between August 2013 and January 2014, several adult film performers in California tested positive for HIV, and the threat of infection remains.

Although Measure B is not the best way forward for Los Angeles County, elements of the ordinance should be incorporated into future legislative efforts. Given the economic ramifications of industry flight due to more localized regulations, this Note concludes that California should pass statewide comprehensive reform. Any such new legislation must treat “independent contractors,” the classification generally used for adult film performs, as if they were regular employees. Legislation should also couple mandatory testing mechanisms with provisions granting performers the right to choose whether they use condoms. Finally, legislation must include mechanisms that ensure performers’ preferences are not improperly tainted by outside forces and pressures. While there will always be risks associated with the production of adult content, if undertaken, these reforms could significantly mitigate those hazards.

INTRODUCTION: A SHARED PROBLEM	184
I. THE PROBLEM	186
II. THE GOVERNMENT	187

* B.S., School of Industrial and Labor Relations—Cornell University, 2010; Candidate for J.D., Cornell Law School, 2015; Notes Editor, *Cornell Journal of Law and Public Policy*. I am extremely grateful for the hard work put in by the associates and editors of the *Cornell Journal of Law and Public Policy*. They did an outstanding job, and their insights and suggestions were incredibly appreciated. I would also like to thank all those individuals who placated me and allowed me to speak to them ad nauseam about my Note.

III. THE INDUSTRY	192
IV. SELF-GOVERNANCE AND THE COST OF CHANGE	197
V. THE COST OF FLIGHT	199
VI. MEASURING MEASURE B IN COURT	200
CONCLUSION	205

INTRODUCTION: A SHARED PROBLEM

The debate regarding the effectiveness of government regulation versus the functionality of free-market self-governance is normally not a sexy one. However, recent events put sex at the forefront of that very discussion. Between August 2013 and January 2014, at least four adult film performers based in California tested positive for HIV.¹ Consequently, the adult film industry entered into three separate filming moratoriums.² Unlike previous industry-wide HIV outbreaks, these results occurred in the post-Measure B world.³

The majority of the nation's adult films are produced in California, which is one of only a handful of states where such production is legal.⁴ Within California itself, most adult content production occurs in the greater Los Angeles area.⁵ In order to regulate that content, the County of Los Angeles passed the Safer Sex in the Adult Film Industry Act

¹ See Michelle Castillo, *HIV-Positive Porn Actors Call for Condoms on Sets*, CBS NEWS, Sept. 19, 2013, available at http://www.cbsnews.com/8301-204_162-57603712/hiv-positive-porn-actors-call-for-condoms-on-sets/; Kathleen Miles, *Yet Another HIV-Positive Porn Performer Leads to Third Shutdown*, HUFFINGTON POST (Dec. 6, 2013), http://www.huffingtonpost.com/2013/12/06/fourth-hiv-porn_n_4401064.html. According to the Centers for Disease Control (CDC), "HIV stands for human immunodeficiency virus." *HIV Basics*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/basics/index.html> (last visited Aug. 28, 2014). The CDC reports that HIV "is the virus that can lead to acquired immunodeficiency syndrome, or AIDS." *Id.*

² See Miles, *supra* note 1.

³ Measure B is the County of Los Angeles Safer Sex in the Adult Film Industry Act. See *Vivid Entm't, L.L.C. v. Fielding*, 965 F. Supp. 2d 1113, 1121 (C.D. Cal. 2013). Among other things, the Act requires adult performers to use condoms when filming vaginal or anal sexual intercourse. *Id.*

⁴ See Elizabeth Sbardellati, *Skin Flicks Without the Skin: Why Government Mandated Condom Use in Adult Films Is a Violation of the First Amendment*, 9 NW. J.L. & SOC. POL'Y 138, 138 (2013); see also Hannah Dreier, *Porn Production Moves to Vegas After Condom Law*, ASSOCIATED PRESS (Jan. 17, 2014), <http://bigstory.ap.org/article/porn-production-moves-vegas-after-condom-law>.

⁵ See Chauntelle Anne Tibbals, "[A]nything That Forces Itself into My Vagina Is by Definition Raping Me . . ."—*Adult Film Performers and Occupational Safety and Health*, 23 STAN. L. & POL'Y REV. 231, 232 (2012). This Note does not delve into issues concerning the "gay" sector of the industry, which follows different testing standards and typically films in Northern California. See *id.* at 234.

(Measure B) by way of referendum in November 2012.⁶ Shortly thereafter, on December 14, 2012, Measure B went into effect.⁷

Measure B requires that adult film producers who wish to film in Los Angeles County obtain permits from the Los Angeles County Department of Public Health (LACDPH) and pay fees between \$2,000 and \$2,500 per year.⁸ The ordinance also requires adult film performers, while filming and “engaging in anal or vaginal sexual intercourse,” to use condoms.⁹ Though this measure initially applied only to Los Angeles City, the regulation expanded to cover eighty-five other cities within Los Angeles County.¹⁰

It is well documented that sexually transmitted infections (STIs) “are common among performers in hardcore pornography,” and that “epidemic[s] of sexually transmitted diseases in the hardcore pornography industry [are partly attributable] to a lack of protective equipment for performers, including condoms.”¹¹ Despite the importance of using condoms, “the use of hazardous materials protection [like condoms] . . . is not standard practice in adult content production, especially not for adult content production in the Los Angeles area.”¹² In fact, only 17% of male performers in heterosexual films use condoms.¹³

This Note argues that although Measure B is not the best way forward for Los Angeles County, elements of the ordinance should be incorporated into future legislative efforts. Part I of this Note outlines the STI problem endemic to the adult entertainment industry. Part II discusses the ability and efforts of government entities to regulate the industry. Part III outlines the mechanism the industry uses to protect its performers and details the industry’s blatant disregard of existing health and safety laws. Part IV explains why litigation and workers’ compensation cannot serve as performers’ sole means of recourse and protection. Part V examines the economic ramifications of industry flight. Part VI discusses the outcome of a courtroom challenge to Measure B. Finally, this Note concludes by contending that California should eschew existing laws and pass more robust legislation in their place.

⁶ See *Vivid Entm’t*, 965 F. Supp. 2d at 1121.

⁷ See Dep’t of Pub. Health, Cnty. of L.A., *Adult Film Industry Act Enforcement*, LACOUNTY.GOV, <http://publichealth.lacounty.gov/phi/AFIact.htm> (last visited Aug. 29, 2014).

⁸ See *Vivid Entm’t*, 965 F. Supp. 2d at 1121.

⁹ *Id.*

¹⁰ See Michelle Castillo, *L.A. County Porn Shoots Must Use Condoms*, CBS NEWS (Nov. 7, 2012), http://www.cbsnews.com/8301-204_162-57546388/l.a-county-porn-shoots-must-use-condoms/.

¹¹ *AIDS Healthcare Found. v. L.A. Cnty. Dep’t of Pub. Health*, 128 Cal. Rptr. 3d 292, 295 (Cal. Ct. App. 2011) (internal quotation marks omitted).

¹² Tibbals, *supra* note 5, at 236.

¹³ See Sbardellati, *supra* note 4, at 139.

I. THE PROBLEM

Adult content performers are far more likely than others to develop an STI. A 2008 study showed that 20% of adult performers suffered from an infection, whereas only 2.4% of the general public faced a similar affliction.¹⁴ The California Department of Public Health (DPH) reports that more than 2,300 cases of Chlamydia, over 1,300 incidences of gonorrhea, and at least 5 cases of syphilis have affected adult film performers since 2004.¹⁵ The DPH figures also indicate that 25.5% of infected performers suffered a repeat infection.¹⁶ These findings are particularly disturbing because “[a]n average popular male in the industry, through partner-to-partner-to-partner transmission, reaches approximately 198 people in three days.”¹⁷ Given the high partner-to-partner-to-partner transmission rate, it is imperative that precautions are taken to limit the spread of STIs.

Courts and industry actors have taken note of these alarming figures. A federal district court in California, in *Vivid Entertainment*, suggested that “these disease rates and reinfection rates are likely to be significantly underestimated as rectal and oral screening is not done routinely and these anatomic sites are likely to be a reservoir for repeat reinfection.”¹⁸ Similarly, the now defunct Adult Industry Medical Health Care Foundation issued results from a voluntary test of performers, which showed that “approximately 40% [of those tested] had at least one STD.”¹⁹

Los Angeles public health officials acknowledge “condoms are highly effective in preventing HIV and other sexually transmitted diseases.”²⁰ Presently, only about 17% of performers in heterosexual pornographic films use condoms.²¹ In fact, performers wishing to use condoms are “subject to a blacklist and will most likely find it difficult or impossible to find work.”²² A problem clearly exists within the industry.

¹⁴ See *Vivid Entm't*, 965 F. Supp. 2d at 1135.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ Maria de Cesare, Note, *Rxxx: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 683 (2006) (internal quotation marks omitted).

¹⁸ *Vivid Entm't*, 965 F. Supp. 2d at 1135.

¹⁹ de Cesare, *supra* note 17, at 683.

²⁰ AIDS Healthcare Found. v. L.A. Cnty. Dep't. of Pub. Health, 128 Cal. Rptr. 3d 292, 295 (Ct. App. 2011).

²¹ See Sbardellati, *supra* note 4, at 139.

²² Brian Chase, *An Analysis of Potential Liability Within the Adult Film Industry Stemming from Industry Practices Related to Sexually Transmitted Infections*, 23 STAN. L. & POL'Y REV. 213, 216 (2012).

II. THE GOVERNMENT

There are two governmental bodies that predominantly govern California's adult film industry. The California Division of the Occupational Health and Safety Administration (Cal/OSHA) sets workplace standards throughout California.²³ Simultaneously, LACDPH is responsible for setting health and safety standards in Los Angeles County.²⁴ Though these entities take very different approaches to regulating the adult film industry, neither has proven particularly successful to date.

Statewide, Cal/OSHA is tasked with ensuring that employers provide "a safe and healthful workplace for employees" and "cover the costs of implementing health and safety programs."²⁵ If an employee were exposed to a safety hazard, Cal/OSHA may and should "take reasonable measures to enforce the law in order to remove [the] hazard and protect employees."²⁶ Thus, Cal/OSHA is responsible for ensuring the safety of many performers.

Citing the Bloodborne Pathogen standard, Cal/OSHA contended that condom usage was mandatory even before Measure B became law.²⁷ Cal/OSHA maintains that employing appropriate workplace measures necessitates using "work practice controls" during production.²⁸ Appropriate controls require the use of "'personal protective equipment' . . . in the face of exposure to blood or 'other potentially infectious material' . . .

²³ See de Cesare, *supra* note 17, at 689–90.

²⁴ See L.A. COUNTY, CAL., CODE OF ORDINANCES § 11.02.160 (2012).

²⁵ de Cesare, *supra* note 17, at 689–90.

²⁶ *Id.* at 690 (quoting CAL. STATE ASSEMBLY COMM. ON LABOR & EMP'T, POST-HEARING REPORT: WORKER HEALTH AND SAFETY IN THE ADULT FILM INDUSTRY, 2003-2004 Leg., Reg. Sess., at 2 (2004)).

²⁷ Tara M. Allport, Note, *This Is Hardcore: Why the Court Should Have Granted a Writ of Mandamus Compelling Mandatory Condom Use to Decrease Transmission of HIV and STDs in the Adult Film Industry*, 19 VILL. SPORTS & ENT. L.J. 655, 669 (2012). The Bloodborne Pathogen standard applies to "all occupational exposure to blood or other potentially infectious materials." CAL. CODE REGS. tit. 8, § 5193 (2012). Under the regulation, "semen, vaginal secretions . . . and all body fluids in situations where it is difficult or impossible to differentiate between body fluids such as emergency response" constitute potentially infectious materials. *Id.* The act requires employers to institute "Work Practice Controls." *Id.* at § 5193(d). These controls must "reduce the likelihood of exposure by defining the manner in which a task is performed (e.g., prohibiting recapping of needles by a two-handed technique and use of patient-handling techniques)." *Id.* at § 5193(a). The act further requires that employees use personal protective equipment "[w]here occupational exposure remains after [the] institution of engineering and work practice controls." *Id.* at § 5193(d)(4)(A). . The equipment must "not permit blood or [other potentially hazardous materials] to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used." *Id.* Employers are responsible for ensuring that their employees use protective equipment. See *id.*

²⁸ Allport, *supra* note 27, at 669.

which could carry HIV and STDs.”²⁹ Failure to comply with the Blood-borne Pathogen standard could result in citation.³⁰

However, Cal/OSHA’s reach is limited.³¹ The agency only has jurisdiction over individuals considered “employees,” but not over performers classified as “independent contractors.”³² Within the industry, performers are regularly deemed independent contractors,³³ and no bright-line rule exists concerning who constitutes an independent contractor as opposed to an employee.³⁴

Cal/OSHA insists that industry performers are in fact employees and thus fall under the agency’s purview.³⁵ Nevertheless, this dispute is far from settled, and the agency’s “jurisdiction will likely always be challenged because of its difficulty exercising far-reaching jurisdiction over actors.”³⁶ Determinations distinguishing “employee” from “independent contractor” are made on a case-by-case basis.³⁷ Given this difficulty, it

²⁹ *Id.*

³⁰ *See id.*

³¹ *See de Cesare, supra* note 17, at 688.

³² *See id.*

³³ *See* Allport, *supra* note 27, at 668–69. At a Cal/OSHA advisory meeting, an industry actor stated that a lot of performers are independently contracted from one movie to the next. *See id.* at 673. Further, some performers are paid without payroll deductions and with income “reported by an IRS 1099 form rather than a W-2 form” because they are considered independent contractors by production companies. *de Cesare, supra* note 17, at 693. These payment schemas do not necessarily indicate that a worker is an employee.

³⁴ *See de Cesare, supra* note 17, at 692.

³⁵ *See* Allport, *supra* note 27, at 668.

³⁶ *See id.* at 673.

³⁷ *See de Cesare, supra* note 17, at 692. A further distinction between “employees” and “independent contractors” is that “employees typically can work with state agencies, such as California’s Department of Labor Standards Enforcement (“DLSE”), to seek enforcement of employment laws, whereas independent contractors must initiate litigation on their own to settle employment disputes.” *Id.* at 691. State agencies often “start with a presumption that the worker is an employee,” though that presumption is rebuttable: “[T]he actual determination of whether a worker is an employee or an independent contractor depends on a number of indicia, none of which is dispositive.” *Id.* at 692. California employs an “economic realities” test, as set forth in *Rutherford Food Corp. v. McComb*, which requires courts to examine whether the putative employee is “economically dependent on the alleged employer.” *Id.* at 692–93 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–29 (1947)). Typically, the most important factor to consider when making that determination is whether the employer controls, or can control, how the work in question is performed. *See id.* at 693. However, an employee-employer relationship might still exist even where the employer does not exert control over how an employee completes tasks if the “principal retains pervasive control over the operation as a whole, the worker’s duties are an integral part of the operation, [and] the nature of the work makes detailed control unnecessary.” *Id.* (internal quotation marks omitted). As *de Cesare* argues:

A pornographic performer’s economic success is inextricably linked to conditions over which a film producer has complete control. An adult film actor relies on a producer to organize and supervise all aspects of the film’s content and production, including the sets, script, talent, crew, equipment, and financing, as well as all post-production aspects such as scoring and editing. Furthermore, after the film is completed, an actor is dependent on the producer to package, distribute, and promote it.

is not particularly surprising that prior to Measure B “[o]nly two of the approximately two hundred adult film production companies [in 2004] require[d] their performers to use condoms, and less than twenty percent of adult film actors use[d] condoms regularly while filming.”³⁸

Cal/OSHA has only issued a handful of citations to production companies for violations of the Bloodborne Pathogens standard.³⁹ However, two of the citations were for over \$30,000, and a more recent citation was for \$14,175.⁴⁰ Additionally, Cal/OSHA officials, alongside California legislators, sent written warnings to scores of production companies and advised them to regulate production voluntarily.⁴¹ These admonitions stated that the continued failure to protect workers adequately would result in legislative action.⁴² The mailings also included a list of suggested “‘harm reduction strategies’ designed to ‘strike a balanced approach that both respects freedom of speech and provides a reasonable level [of] protection for workers.’”⁴³ The warnings went largely unheeded and Cal/OSHA’s attempts to regulate the adult film industry seem to be failing.⁴⁴

Absent new legislation, it appears that Cal/OSHA cannot effectively police condom usage within the adult entertainment industry.⁴⁵ Cal/OSHA recently considered “an amendment to its bloodborne pathogen statute that would ‘clarify required protections for workers in the adult film industry.’ That amendment would explicitly require ‘mandatory use of condoms for all penetrative sex acts’ in an effort to limit the transmission of sexually transmitted diseases.”⁴⁶ During the summer of 2013,

...
 ... [A]s to whether the “nature of the work makes detailed control unnecessary,” the nature of the adult film actor’s work itself—engaging in sexual acts on film—makes detailed control not only unnecessary, but also physically and effectively impossible. An adult film producer can, and does, exercise control over every other aspect of a pornographic film’s operations and production, but when it comes to the core of the adult film actor’s work—the work that the actor is actually getting paid to do—its highly personal, physical, and often unpredictable nature renders the producer’s ability to control it unnecessary and, in fact, futile.

Id. at 694, 696. This Note does not strive to weigh in on this debate. Instead, it merely argues that problems surrounding the murky waters of classifying adult performers can be best navigated by circumventing the question entirely.

³⁸ *Id.* at 684.

³⁹ See *id.* at 669; *Hustler Video, Another Porn Producer Fined for Shoots Without Condoms*, CBS L.A. (Mar. 30, 2011), <http://losangeles.cbslocal.com/2011/03/30/hustler-video-another-porn-producer-fined-for-shoots-without-condoms>; Castillo, *supra* note 10.

⁴⁰ See de Cesare, *supra* note 17, at 669; CBS L.A., *supra* note 39.

⁴¹ See de Cesare, *supra* note 17, at 686.

⁴² See *id.*

⁴³ *Id.*

⁴⁴ See *id.* at 687.

⁴⁵ See *id.* at 687–88, 692–96 (discussing relative complacency amongst industry participants and arguing for Cal/OSHA oversight of performers as “employees”).

⁴⁶ Sbardellati, *supra* note 4, at 145.

“the California State Legislature [tried and] failed to pass a bill that would have amended the labor code to specifically include the adult film industry and act as an analog to the Los Angeles County ordinance.”⁴⁷

LACDPH arguably wields greater influence over the adult film industry than Cal/OSHA does. Unlike Cal/OSHA, LACDPH can pass ordinances effecting both employees and independent contractors.⁴⁸ The organization’s website indicates that it “protects health, prevents disease, and promotes health and well-being for all persons in Los Angeles County.”⁴⁹ Dr. Peter Kerndt, acting within his capacity as the director of the STD Program for the Los Angeles County Department of Health Services stated that pre-Measure B attempts to control the spread of HIV were a “complete failure—and a tragic failure—[in so far as] . . . people have become infected needlessly.”⁵⁰

Measure B falls under LACDPH’s purview. The ordinance requires “all adult film producers filming in unincorporated county areas or in any city that has adopted Los Angeles County Health and Safety Code, Title 11, Chapter 11.39, to obtain an Adult Film Production Public Health Permit.”⁵¹ The Act conditions the issuance of permits “on the use of condoms and other safety precautions to minimize the spread of HIV and other sexually transmitted infections, and authorizes the [Los Angeles] Department of Public Health . . . to take appropriate measures to enforce the Act.”⁵² LACDPH tasked the Public Health Investigation (PHI) Administration with implementing and enforcing the Act.⁵³

PHI is the fact-finding and prosecutorial arm of LACDPH.⁵⁴ PHI’s mission is “[t]o safeguard the public’s health through mandated disease interventions and enforcement of public health laws” and it performs the

⁴⁷ *Id.* at 162.

⁴⁸ *See de Cesare, supra* note 17, at 688–89; *see also Sbardellati, supra* note 4, at 144–45. In 2009, a court held that LACDPH officers “had discretion regarding how to control the spread of sexually transmitted diseases and the Department’s refusal to mandate that adult film actors wear condoms was not an abuse of discretion.” *Id.* at 144.

⁴⁹ Dep’t of Pub. Health, Cnty. of L.A., *supra* note 24.

⁵⁰ *de Cesare, supra* note 17, at 686.

⁵¹ Dep’t of Pub. Health, Cnty. of L.A., *supra* note 7.

⁵² *Id.*

⁵³ *See id.* The County indicates that:

Upon issuance of a Conditional Adult Film Production Public Health Permit, producers are advised of the requirement to provide proof of completion of blood borne pathogen training specific to the adult film industry and approved by DPH for the individual owner or all company principals and management level employees, and all film directors; receive DPH approval of an Exposure Control Plan that specifies how employee risk of exposure to blood or other infectious material will be minimized; display the permit in an area visible to performers at all times at the location where an adult film is being filmed; and use condoms for any acts of vaginal or anal sexual intercourse.

Id.

⁵⁴ *See id.*

“mandated functions of the Health Officer primarily related to communicable disease intervention and control.”⁵⁵ Acting in that capacity, if PHI finds:

[A]ny immediate danger to the public health or safety . . . or [if any] is reasonably suspected, the department may immediately suspend the adult film production public health permit, initiate a criminal complaint and/or impose any fine permitted by this chapter, pending a determination of an administrative review, as provided herein.⁵⁶

Under Measure B, an immediate danger includes “any condition, based upon inspection findings or other evidence, that can cause, or is reasonably suspected of causing, infection or disease transmission, or any known or reasonably suspected hazardous condition.”⁵⁷ In order to check for noncompliance, the department may “enter and inspect any location suspected of conducting any activity regulated by [Measure B].”⁵⁸ LACDPH has taken steps to enforce Measure B.⁵⁹

Despite undertaking to enforce Measure B, Los Angeles County has refused to defend it in court.⁶⁰ In its stead, the AIDS Healthcare Foundation (Intervener) was “granted status to defend the law against the porn industry’s lawsuit.”⁶¹ In an April 16, 2013 ruling, the court agreed with the Intervener’s contention that the County would:

[N]ot adequately represent their interests because the County Board of Supervisors voted against adopting Measure B, County Counsel expressed skepticism toward Measure B, and the Defendants desire the same legal outcome as Plaintiffs. Most significantly, Defendants have indicated that they “have declined to defend the constitutionality of Measure B and have taken

⁵⁵ Dep’t of Pub. Health, Cnty. of L.A., *Public Health Investigation*, LACOUNTY.GOV, <http://publichealth.lacounty.gov/phi/aboutus.htm> (last visited Aug. 29, 2014).

⁵⁶ L.A. COUNTY, CAL., CODE OF ORDINANCES § 11.39.110E (2012).

⁵⁷ *Id.*

⁵⁸ L.A. COUNTY, CAL., CODE ORDINANCES § 11.39.130 (2012).

⁵⁹ *Vivid Entm’t, L.L.C. v. Fielding*, No. CV 13–00190 DDP (AGRx), 2013 WL 3989558, at *1 (C.D. Cal. Aug. 2, 2013).

⁶⁰ *See id.*

⁶¹ Rubin Vives, *Porn Industry Suffers Setback with Judge’s Ruling on Condom Law*, L.A. TIMES, Aug. 17, 2013, <http://articles.latimes.com/2013/aug/17/local/la-me-ln-porn-industry-condom-20130817>. The Intervener was an “official proponent[] of Measure B . . . [and] drafted the language that would become Measure B, collected signatures to qualify the Measure for the November 2012 ballot, submitted the signatures for verification, raised funds, and drafted an argument for the appearance of the Measure on the ballot.” *Vivid Entm’t*, 2013 WL 3989558, at *1.

a position of neutrality regarding whether Measure B is constitutional and/or preempted by California law.”⁶²

However, the court noted that the County wished to “reserve the right to have proponents of Measure B intervene and defend the constitutionality of Measure B.”⁶³ On appeal, the County of Los Angeles again declined to defend Measure B in court.⁶⁴

Previously proposed legislation offered a different tack to deal with the aforementioned problems. After a 2004 outbreak, California legislatures introduced a bill in the state assembly that would have set compulsory STI testing standards throughout the industry.⁶⁵ The legislation also had mechanisms granting performers recourse against production companies should safety standards fall short.⁶⁶ Specifically, the bill would have allowed performers who contracted STIs on set to bring civil suit against their employers.⁶⁷ Unfortunately, once public outrage regarding positive test results died down, these efforts fell by the wayside.⁶⁸

III. THE INDUSTRY

The adult entertainment industry believes that it can and should regulate itself. The industry established regular testing protocols for performers, and industry actors blatantly disregard Cal/OSHA and LACDPH’s attempts to regulate production. Instead, performers and producers claim that their own testing protocols are sufficient. They further contend that regulation is not necessary and that condom requirements would cause significant harms.

⁶² *Vivid Entm’t, L.L.C. v. Fielding*, No. CV 13–00190 DDP (AGRx), 2013 WL 1628704, at *5 (C.D. Cal. Apr. 16, 2013), *reconsideration denied*, 2013 WL 3989558 (C.D. Cal. Aug. 2, 2013) (citations omitted).

⁶³ *Id.* at *5 n.1.

⁶⁴ Letter from Joel N. Klevens, Attorney for Defendant-Appellees Jonathan Fielding, Jackie Lacey, and the County of Los Angeles, to Molly C. Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Oct. 7, 2013), *available at* <http://www.aidshealth.org/wp-content/uploads/2013/06/Vivid-Entertainment-LLC-Letter-to-Ms.-Molly-C.-Dwyer.pdf>. However, the ability of the interveners to continue defending Measure B in court, in light of *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), is tenuous. *Vivid Entm’t*, 2013 WL 3989558, at *1–2. Nevertheless, the government’s reluctance to defend Measure B and the questionable validity of the law itself further emphasize the need for reform.

⁶⁵ *See de Cesare, supra* note 17, at 669. Assembly Bill 2798 would have required adult film producers, pre-production, to “provide and pay for confidential testing of performers to determine whether they have any STDs. The bill would also have prohibited an adult film production company from allowing STD-positive performers to participate in any production, unless the actors had documentation from a physician proving that they were disease-free.” *Id.* at 687–88.

⁶⁶ *See id.* at 669.

⁶⁷ *See id.* at 687–88.

⁶⁸ *See id.* at 669.

Within the industry, “most adult productions shot in California do not comply with existing occupational safety and health regulations.”⁶⁹ In fact, “of all major producers of heterosexual adult films, only Wicked Pictures requires universal condom use during intercourse.”⁷⁰ The industry presently relies on performer testing to ensure worker safety.

From the late 1990s until 2011, the Adult Industry Medical Health Care Foundation (AIM) ran a database detailing the results of performers’ STI exams.⁷¹ AIM also tracked STI exposures, thereby helping slow the spread of HIV in the industry.⁷² Performers were “encouraged/informally required to test with AIM at least once per month.”⁷³ Producers, in turn, were granted access to performers’ test results “in order to verify [that performers] were free of STIs before working.”⁷⁴

In December 2010, LACDPH determined that AIM was “operating without a community clinic license, in violation of California Health and Safety Code section 1204 *et seq.*”⁷⁵ Subsequently, AIM closed its doors in the spring of 2011.⁷⁶ The Free Speech Coalition (FSC) then took up the reins and founded Adult Production Health and Safety Services (APHSS) to operate a database similar to the one formerly employed by AIM.⁷⁷

APHSS is made up of industry actors, and its “Advisory Council” consists of “representatives from adult film producers, adult film performers, performers’ agents, a Medical Consultant, and a workplace safety attorney.”⁷⁸ However, as of 2012, the effectiveness of APHSS had yet to be determined because a “critical mass of performers and producers” were not subscribing to the program.⁷⁹

Industry actors contend that APHSS keeps records of centers that “follow basic testing and notification protocols for HIV and STD safety in adult films . . . result[ing] in a nationwide network of clinics that can be relied upon by those who perform or intend to perform in adult films.”⁸⁰ These clinics also screen for Chlamydia and gonorrhea.⁸¹ Industry actors also allege that “Adult film producers and performers can

⁶⁹ Tibbals, *supra* note 5, at 236.

⁷⁰ Chase, *supra* note 22, at 216.

⁷¹ See Tibbals, *supra* note 5, at 234–35.

⁷² See *id.*

⁷³ *Id.* at 234.

⁷⁴ *Id.*

⁷⁵ Chase, *supra* note 22, at 216.

⁷⁶ See *id.*

⁷⁷ See *id.* at 217.

⁷⁸ Complaint for Declaratory and Injunctive Relief at ¶ 24, *Vivid Entm’t, L.L.C. v. Fielding*, No. CV 13-00190-DDP (AGRx) (C.D. Cal. Jan. 10, 2013), 2013 WL 136043.

⁷⁹ See Chase, *supra* note 22, at 217.

⁸⁰ Complaint for Declaratory and Injunctive Relief, *supra* note 78, ¶ 26.

⁸¹ See *id.*

access APHSS's database of available performers to confirm the negative-test status of any performer on any given date of production" and "all performers and models must present a driver's license and test results from the prior period showing a negative test for HIV and other STDs."⁸² Finally, insiders claim that conformity with these requirements is universal.⁸³

FSC self-identifies as the "trade association of the adult entertainment industry,"⁸⁴ and FSC serves as the "adult film industry's main defense against jurisprudential and legislative attacks from the mainstream regulators."⁸⁵ As of 2006, FSC was comprised of over 900 members, and its lobbying budget alone was approximately \$750,000.⁸⁶ FSC's lobbying efforts are augmented by the substantial tax returns the industry derives for the State of California.⁸⁷ Working within this capacity, the collation purports to:

[One,] be the watchdog for the adult entertainment industry guarding against unconstitutional and oppressive government intervention; Two, to be a voice for the industry telling the truth about the adult entertainment industry not only in the vital role it plays as an economic contributor, but also in its contribution to quality of life in a healthy society; and finally to provide business resources for our members to facilitate successful businesses in this ever-changing and challenging business environment.⁸⁸

In August 2013, after a string of actors tested positive for HIV, FSC announced that it would require performers to undergo more frequent testing.⁸⁹ The industry now requires performers to submit test results every fourteen days,⁹⁰ whereas the previous standard required testing every twenty-eight days.⁹¹

⁸² *Id.* ¶ 29.

⁸³ *See id.* ¶ 31.

⁸⁴ *About*, FREE SPEECH COAL., <http://freespeechcoalition.com/staging/about/> (last visited Aug. 29, 2014). The coalition grew out of a legal defense fund that was formed in 1990 as a means of staying off attacks from the Bush administration. *See* Chauntelle Anne Tibbals, *When Law Moves Quicker than Culture: Key Jurisprudential Regulations Shaping the US Adult Content Production Industry*, 15 SCHOLAR 213, 244 (2013).

⁸⁵ Tibbals, *supra* note 84, at 246.

⁸⁶ *See de Cesare, supra* note 17, at 677–78.

⁸⁷ *See id.* at 678. Maria de Cesare indicated that "[i]ndustry-funded research has estimated that rentals of pornographic videos garner \$31 to \$36 million in state sales tax alone." *Id.*

⁸⁸ Welcome Letter from Diane Duke, Free Speech Coalition, to Website Visitors (on file with author).

⁸⁹ *See* Castillo, *supra* note 1.

⁹⁰ *Id.*

⁹¹ *Id.*

While helpful, the new testing requirement does not adequately protect workers. According to the San Francisco AIDS Foundation, “there’s a period of time *after* a person is infected during which they won’t test positive. This is called the ‘hiv window period.’”⁹² Depending on the test used, and the person’s body, the window period may last anywhere from nine days to several months.⁹³ Additionally, there is “evidence that a person in the window period is more likely to pass the virus on.”⁹⁴ Under FSC’s fourteen-day test requirement, it is possible for an individual to contract HIV before a shoot, test clean, and then transmit the virus.

Diane Duke, FSC’s Chief Executive Officer, explained that the industry could “do more to help our performers learn how to protect themselves, on screen and off.”⁹⁵ Ms. Duke further argued that “While the increased testing will further ensure safer sets, it is important that we remain vigilant. Going forward, we need to constantly look to both performers, producers and health care professionals to find ways to improve our protocols.”⁹⁶ Notably, Ms. Duke did not list government organizations among entities that she said should help improve safety protocols.

Since FSC instituted the fourteen-day testing requirement, at least one performer has tested positive for HIV.⁹⁷ In response to the news regarding the most recent test, Ms. Daily stated, “We cannot control, and should not look to control, people’s private lives. What we can do is make sure that HIV is stopped at the gate by testing protocols.”⁹⁸ Once again, Ms. Duke did not indicate that the government should play any role in ensuring performers’ well-being.

Many producers are opposed to Measure B and blatantly disregard its provisions. Some producers purportedly tell performers that they can use condoms if they would like.⁹⁹ Peter Acworth, the founder of Kink.com,¹⁰⁰ indicated, “All of our models are informed that they [may] request a condom at any time, that they can stop a shoot at any time, and

⁹² *HIV Test Window Periods*, S.F. AIDS FOUND., <http://www.sfaf.org/hiv-info/testing/hiv-test-window-periods.html> (last visited Mar. 23, 2014).

⁹³ *See id.*

⁹⁴ *Id.*

⁹⁵ *FSC Announces Moratorium to Lift on Friday, September 20*, FREE SPEECH COAL., <http://fscblogger.wordpress.com/2013/09/16/fsc-announces-moratorium-to-lift-on-friday-sep-tember-20/> (last visited Aug. 29, 2014).

⁹⁶ *Id.*

⁹⁷ *See Miles, supra* note 1.

⁹⁸ Abby Sewell, *Porn Industry Lifts Moratorium Imposed After Latest HIV Case*, L.A. TIMES, Dec. 13, 2013, <http://www.latimes.com/local/lanow/la-me-ln-porn-hiv-moratorium-20131213,0,5771867.story#ixzz2oSm10huh>.

⁹⁹ *See Castillo, supra* note 1.

¹⁰⁰ *See Peter Acworth, Why Kink Matters*, HUFFINGTON POST (Jan. 14, 2013), http://www.huffingtonpost.com/peter-acworth/why-kink-matters_b_2460100.html/. Kink.com is the largest producer of fetish pornography in the world. *Id.* A documentary about the organization premiered at the Sundance Film Festival in January 2013. *Id.*

that they control the scene . . . We take consent and safety seriously.”¹⁰¹ Mr. Acrworth’s comments imply that producers do not require performers to use protection. Moreover, some producers blacklist performers that request to use condoms.¹⁰²

Adult industry producers typically contend that “market forces dictate that films featuring safe sex practices do not sell as well as those without such practices.”¹⁰³ Films where actors are not wearing condoms tend to make more money.¹⁰⁴ Adult entertainment mogul Larry Flynt claimed that:

Market testing—and conventional wisdom—tells us that films that feature actors wearing condoms don’t sell. That means that forcing condom use on the industry is more likely to have a negative rather than positive effect on HIV protection. It would drive the industry underground or out of state to where there is no testing, let alone a condom requirement. The net result would surely be more HIV infections.¹⁰⁵

Relatedly, producers claim that “state-mandated testing and condom-use will force the industry either out of state, or ‘underground,’ far from the reach of any oversight protection.”¹⁰⁶ Insiders also maintain, “[M]andatory compliance with state regulations would pose an economic disincentive for ‘rogue producers’ to comply with industry health organizations such as AIM, thus reducing the amount of testing performed by such organizations.”¹⁰⁷ Instead, they posit that performers should obtain education about industry related health risks and then take actions that the performers deem appropriate.¹⁰⁸

Generally, performers claim to disfavor Measure B and other prophylactic requirements. Adult film performer Sovereign Syre, for example, expressed that HIV is among the least of her concerns.¹⁰⁹ Similarly, the performer Amber Lynn stated that “[t]he idea of allowing a government employee to come and examine our genitalia while we’re on set is atrocious.”¹¹⁰

¹⁰¹ Castillo, *supra* note 1.

¹⁰² See Chase, *supra* note 22, at 216.

¹⁰³ de Cesare, *supra* note 17, at 704.

¹⁰⁴ See *id.* at 701–07.

¹⁰⁵ *Id.* at 704–05 (quoting Larry Flynt, *Porn World’s Sky Isn’t Falling—It Doesn’t Need a Condom Rule*, L.A. TIMES, Apr. 23 2004, at B13).

¹⁰⁶ *Id.* at 706.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.*

¹⁰⁹ *Sex, Lies and Propaganda*, HUFFINGTON POST LIVE, at 4:30–5:30 (Oct. 1, 2013), <http://live.huffingtonpost.com/r/segment/cameron-bay-condoms-michael-weinstein-/52409495fe34447ec40000f4>.

¹¹⁰ Castillo, *supra* note 10.

Chauntelle Anne Tibbals, a sociologist who writes on gender, sexualities, and workplaces, conducted a series of interviews with industry performers regarding their views on condom usage.¹¹¹ Tibbals found, “With two notable exceptions, most respondents felt that condoms made their work unnecessarily difficult and found them prohibitive on those grounds.”¹¹² Male performers typically disfavored condom usage because they felt that condoms complicated their performances.¹¹³ Conversely, female interviewees reported, “the preference to work without condoms had to do with both the ease of work and avoiding injury. Condoms rip, tear, chafe, and burn. Both latex itself and the lubricant on the condom necessary to use the condom properly were described as powerful irritants.”¹¹⁴ Tibbals also noted that some performers are allergic to latex, and many of the female interviewees said that condoms are uncomfortable.¹¹⁵ Each of the participants felt that choices regarding condom usage should be decided by performers and producers, and not by government entities.¹¹⁶

IV. SELF-GOVERNANCE AND THE COST OF CHANGE

Some worry that the current form of self-regulation cannot carry the day, and industry-wide STI rates seem to suggest that this concern holds water. Proponents of this reasoning argue that even if producers “were willing to monitor and enforce health and safety practices, and to implement a workers’ compensation system to address occupational illnesses—as certain adult studios already have—the sustained success of such systems is dubious.”¹¹⁷

Typically, market-based approaches rely on “workers’ compensation and tort liability” to incentivize employers to improve workplace conditions in high-risk industries, but “workers’ compensation programs have generally proven . . . inadequate at ensuring an efficient allocation of health resources.¹¹⁸ Workers’ compensation programs, in particular, are often ineffective because there are not “sufficient incentives for employers to invest in a more healthful workplace.”¹¹⁹ Such incentives are unrealistic “because benefits are often below the actual costs of injury, and because premiums for individual providers do not directly hinge on

¹¹¹ See Tibbals, *supra* note 5, at 213 n.a1, 242.

¹¹² *Id.* at 242.

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 243.

¹¹⁶ See *id.* at 244.

¹¹⁷ de Cesare, *supra* note 17, at 701.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

the level of risk they impose.”¹²⁰ With regards to adult film performers, pinpointing the exact nexus of an infection is hard to do, and the level of potential injury is extremely high.¹²¹ Thus, relying on performers to bring workers’ compensation claims against their employers is an ineffective and dangerous means of regulating the adult film industry.

On its face, litigation appears to be the more promising of the two self-regulatory avenues. Generally, “the threat of litigation under tort liability is considered an effective market incentive for employers to provide a more healthful work environment.”¹²² However, this is surprising “considering the industry’s size . . . [and that producers to] date, [have] avoided significant liability to performers stemming from any questionable workplace practices within the industry.”¹²³

Litigation’s usefulness within the adult film industry is hampered by the “sizeable legal fees associated with prolonged litigation, the difficulty of proving that their employers were negligent in the first place, and the tendency of employers to suppress information about workplace hazards.”¹²⁴ In fact, such lawsuits are “exceedingly rare” and practically “no published decisions involving such suits” exist.¹²⁵ There is only one reported case in which a performer brought suit because of workplace-related STI contractions, and that worker was granted workers’ compensation.¹²⁶ Further, while performers may be “entitled to employee protections such as workers’ compensation and overtime, they see no way [they] could organize effectively, given their fragmentation, high turnover rate, and fungibility.”¹²⁷

Litigation is so rare, in part because the industry suffers from extremely high turnover and performers worry about exposing themselves to public ridicule or harming their ability to find future employment. Chase, a former Assistant General Counsel at AIDs Healthcare Foundation,¹²⁸ contends that “if a performer speaks out against industry practices,” there is a real threat other industry actors “will publish as much damaging or embarrassing information as they can find about them.”¹²⁹ And as aforementioned, performers are sometimes blacklisted.¹³⁰

¹²⁰ *Id.*

¹²¹ See Chase, *supra* note 22, at 229.

¹²² de Cesare, *supra* note 17, at 702.

¹²³ Chase, *supra* note 22, at 214–15.

¹²⁴ de Cesare, *supra* note 17, at 702.

¹²⁵ Chase, *supra* note 22, at 214–15.

¹²⁶ See *id.*

¹²⁷ de Cesare, *supra* note 17, at 703.

¹²⁸ Chase, *supra* note 22, at a1.

¹²⁹ *Id.* at 228.

¹³⁰ *Id.* at 216.

These fears serve as effective litigation deterrents.¹³¹ However, the threat of litigation can serve as an important and effective recourse for performers if measures are taken that mitigate the risk of employer reprisal. Going forward, legislative efforts can make the threat of litigation more effectual.¹³²

V. THE COST OF FLIGHT

Attempts to circumvent Measure B have left producers in a delicate position and dramatic changes to the adult film industry could have dire economic implications for the greater Los Angeles area. Although exact figures are unavailable, pre-Measure B estimates placed California's adult film production rate at somewhere between 4,000 and 11,000 films per year.¹³³ Traditionally, Southern California's adult film industry is a several billion dollars a year industry: some figures indicate that annual domestic revenue ranged from \$4.4 billion to \$15 billion.¹³⁴

However, since Measure B's enactment, many production companies have ceased filming in Los Angeles in an attempt to avoid Measure B's reach.¹³⁵ In other regions of California, like Ventura County, local governments reacted negatively to news that producers might seek to shoot there.¹³⁶ For example, in Camarillo City, located within Ventura County, council members agreed to a forty-five-day filming moratorium in order to "look into the possibility of considering a safer sex ordinance," after receiving several permit requests.¹³⁷

Industry actors claim that ordinances like Measure B might force production companies to leave the state.¹³⁸ As pornography purveyor Jules Jordan put it, "It's not really an option to change the way we make

¹³¹ See Chase, *supra* note 22, at 228–29. In his article, Chase details the ordeal suffered by Monica Foster, a former performer, concerning a recent breach of her confidential information. *Id.* Foster's tormenters publicly posted her address and uploaded a photograph of her home onto the internet. *Id.* They also uploaded "her parents' addresses and photographs of their homes, and orchestrated a campaign to inform the school where the performer's mother works as a teacher about the performer's work in adult films." *Id.* at 228. According to Chase, this incident "underscored just how vulnerable adult film performers are to public disclosures of private facts. The very legitimate fear of exposure, blacklisting, and public attacks by others within the industry seems to be a sufficient incentive against any form of activism by adult film performers, including litigation." *Id.* at 229.

¹³² See *infra* CONCLUSION.

¹³³ See de Cesare, *supra* note 17, at 675–76.

¹³⁴ See *id.* at 676–77.

¹³⁵ *Los Angeles County Condom Law Leads to Steep Drop in Porn Film Permits*, DAILY NEWS, Nov. 16, 2013, <http://www.nydailynews.com/news/national/porn-film-production-county-article-1.1519499>.

¹³⁶ See *Porn Producers Consider Moving Operations from Valley to Camarillo*, CBS L.A. (Mar. 28, 2013), <http://losangeles.cbslocal.com/2013/03/28/porn-producers-consider-moving-operations-from-valley-to-camarillo/>.

¹³⁷ *Id.*

¹³⁸ See *id.*

our movies, and moving production isn't that hard."¹³⁹ Elsewhere, public officials are more receptive to the industry.¹⁴⁰ In Nevada, for example, Clark County commissioner Chris Giunchigliani said, "It's a legalized industry and properly regulated, so I don't see it as a problem . . . I think the city and the county will benefit from any expansion of the film industry. It's economic diversification."¹⁴¹ The owner of LA Direct Models, an adult talent agency, estimates "that 20 percent of the industry will have moved to Las Vegas by the end of the year."¹⁴² Producers are seeking greener pastures,¹⁴³ and performers are following suit.¹⁴⁴

However, this exodus is not without costs. Vivid Entertainment, a billion-dollar entity, indicated that performers are less available to film outside of Los Angeles and fewer performer support services exist outside Los Angeles County.¹⁴⁵ Vivid also contends that there are fewer suitable locations outside of Los Angeles County to shoot.¹⁴⁶ Nevertheless, Vivid submitted evidence to the court indicating that "as a result of Measure B's passage, it has stopped shooting adult films in Los Angeles."¹⁴⁷

Estimates indicate that "the number of permits pulled to make porn films in Los Angeles County has declined . . . from about 480 issued in 2012 to only 24 through the first nine months of this year."¹⁴⁸ The economic impact of this considerable drop-off has resulted in significant losses: "[A] typical porn film permit costs about \$1,000, meaning the county lost about \$456,000."¹⁴⁹ Those figures, of course, only represent the loss represented by a decrease in permits. The true impact of this decrease is likely substantially higher.

VI. MEASURING MEASURE B IN COURT

Industry actors challenged Measure B in court and won important concessions that weaken LACDPH's ability to enforce Measure B.¹⁵⁰

¹³⁹ Dreier, *supra* note 4.

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *Id.* In addition to not requiring that performers use condoms, Clark County "gives out location permits for a nominal fee and does not require health permits." *Id.*

¹⁴³ *See* CBS L.A., *supra* note 136.

¹⁴⁴ *See* Dreier, *supra* note 4.

¹⁴⁵ *See* Vivid Entm't, L.L.C. v. Fielding, 965 F. Supp. 2d 1113, 1124 (C.D. Cal. 2013); Chase, *supra* note 22, at 214.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ DAILY NEWS, *supra* note 135.

¹⁴⁹ *Id.* Under Measure B, however, LACDPH currently charges anywhere from \$2,000 to \$2,500 per permit. *Vivid Entm't*, 965 F. Supp. 2d at 1121. The source of this discrepancy is unclear.

¹⁵⁰ *See* Vivid Entm't, 965 F. Supp. 2d 1113.

Nevertheless, Measure B was found constitutional and its condom requirement remains intact.¹⁵¹ On January 10, 2013, Vivid Entertainment, Califa Productions, Inc., Kayden Kross, and others filed a complaint for declaratory and injunctive relief.¹⁵² They sought to have the court “enjoin the enforcement of a new Los Angeles County ordinance that imposes an intolerable burden on the exercise of rights under the First Amendment to the United States Constitution.”¹⁵³ On August 16, 2013, the court ruled on the Intervener’s “Motion to Dismiss and Plaintiffs’ Motion for a Preliminary Injunction.”¹⁵⁴

The court dismissed the plaintiffs’ claim that “ballot initiatives cannot, as a matter of law, implicate First Amendment rights, that state law preempts Measure B, and that Measure B violates Plaintiffs’ due process rights (with the exception of Plaintiffs’ Fourth Amendment claim).”¹⁵⁵ However, several key provisions of Measure B were deemed unconstitutional.

The court concluded that because Measure B’s “stated purpose ‘is to minimize the spread of sexually transmitted infections resulting from the production of adult films in Los Angeles,’” the measure focuses on the “secondary effects of unprotected speech, rather than the message the speech conveys.”¹⁵⁶ The Intervener, therefore, had the burden of showing that a substantial governmental interest is “not merely conjectural, and that the regulation will in fact alleviate . . . harms in a direct and material way.”¹⁵⁷ The court found that the Intervener failed to demonstrate that Measure B does not “burden substantially more speech than is necessary to further the government’s legitimate interests.”¹⁵⁸ The court also found that “[i]n light of the alleged effective, frequent, and universal testing in the adult film industry, [the] Plaintiffs allege sufficient facts . . . to show that Measure B’s condom requirement does not alleviate the spread of STIs in a ‘direct and material way.’”¹⁵⁹ Thus, the court denied the Intervener’s motion to dismiss Plaintiffs’ First Amendment Claim.¹⁶⁰

The court also determined Measure B’s permit requirement to be an invalid “prior restraint” on communication¹⁶¹ because the measure for-

¹⁵¹ *See id.*

¹⁵² Complaint for Declaratory and Injunctive Relief, *Vivid Entm’t, L.L.C. v. Fielding*, No. CV 13-00190-DDP (AGRx), 2013 WL 136043 (C.D. Cal. Jan. 10, 2013).

¹⁵³ *Id.* ¶ 2.

¹⁵⁴ *Vivid Entm’t*, 965 F. Supp. 2d at 1122.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *4.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.* at *5.

bade certain communications in advance of the time that such communications were to occur.¹⁶² As such, the measure is “presumptively invalid” because prior restraints “chill speech from occurring.”¹⁶³ Similarly, the court noted that other courts “have found that a prior restraint exists when an individual must obtain a permit to engage in nude dancing.”¹⁶⁴ The judge indicated that this presumption “is heavier-and the degree of protection broader-than that against limits on expression imposed by criminal penalties . . . [because] a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”¹⁶⁵ Ultimately, Measure B’s permit requirement was unable to overcome this presumption.

Measure B failed to overcome this presumption for several reasons. Measure B was declared an impermissible prior restraint, in part because the government failed to provide procedural safeguards that allowed “the licensor [to] make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied”.¹⁶⁶ The court determined that “Measure B allows for the Department to revoke and suspend a permit, and once revocation or suspension has occurred, a permit holder must ‘cease filming any adult film.’ These provisions of Measure B are, thus, unconstitutional because they provide for suspensions and revocations before a judicial determination.”¹⁶⁷ It would appear that legislators will have to tread cautiously if and when they propose future permit requirements.

Further, several portions of Measure B are impermissible prior restraints because they grant the government unbridled discretion to regulate First Amendment activity.¹⁶⁸ After administrative review, Measure B allows the department to

modify, suspend, revoke or continue all such action previously imposed upon a permittee pursuant to this chapter or impose any fine imposed by law for violations of this chapter or any other law *or standards affecting public health and safety*, including *but not limited to* [certain laws and regulations].¹⁶⁹

¹⁶² See *id.* at *5–7.

¹⁶³ *Id.* at *5.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *6 (citation omitted).

¹⁶⁷ *Id.* (citations omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* citation omitted).

In so doing, Measure B impermissibly allows the government to deny permits when production violates “unnamed, undescribed ‘standards affecting public health.’”¹⁷⁰ Similarly, Measure B allows that “[i]f there is ‘any immediate danger to the public health or safety is found or is reasonably suspected,’ . . . the department [may] ‘immediately suspend . . . [a] permit, initiate a criminal complaint and/or impose any fine permitted by [Measure B].’”¹⁷¹ Because the provision maintains that an “[i]mmediate danger to the public health and/or safety” includes “any condition, based upon inspection findings or other evidence, that can cause, or is reasonably suspected of causing, infection or disease transmission, or any known or reasonably suspected hazardous condition,” the court deemed it too broad.¹⁷² The law’s failure to give guidance as to the specific meaning of “diseases” and “transmission methods” makes it unconstitutional.¹⁷³ This shortcoming largely turns on definitional deficiencies and could be remedied in subsequent legislation modeled after Measure B.

The court also found that Measure B was not narrowly tailored enough to achieve its purported goal.¹⁷⁴ The plaintiffs demonstrated that Measure B “is not narrowly tailored because, although the condom requirement applies only to vaginal and anal sex, a Measure B permit is required to film much more.”¹⁷⁵ Instead, under Measure B, permits are required for any “adult film[],” which includes:

[A]ny film, video, multimedia or other representation of sexual intercourse in which performers actually engage in oral, vaginal, or anal penetration, including, but not limited to, penetration by a penis, finger, or inanimate object; oral contact with the anus or genitals of another performer; and/or any other sexual activity that may result in the transmission of blood and/or any other potentially infectious materials.¹⁷⁶

Accordingly, the permit requirement far exceeds the scope of Measure B’s purpose because its permit requirement applies to films that do not employ vaginal or anal intercourse.¹⁷⁷ Limiting the scope of when permits are required could remedy this ill.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *7.

¹⁷² *Id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.* at *7–8.

¹⁷⁵ *Id.* at *7.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at *7–8.

The court also declared that the permit fees are improper because “[p]rior restraints may only impose permit fees if they are revenue neutral, because the Government may not charge for the privilege of exercising a constitutional right.”¹⁷⁸ Thus, “the government [must] prove that revenues merely cover ‘the costs of administering [the] licensing program.’”¹⁷⁹ As a result, “[e]ven though the permit fee in this case, \$2,000–\$2,500, is relatively minimal, the Court will not assume that it is constitutionally permissible.”¹⁸⁰ Any future legislation replacing Measure B, and which imposes a similar prior restraint, should account for its proscribed fees and cannot serve as a profit-generation tool.

The court further indicated that the due process section of the Complaint warrants further consideration because the measure “authorizes an unconstitutional system of warrantless searches and seizures.”¹⁸¹ The court noted that administrative warrantless searches are permitted in closely regulated industries if:

- (1) “[T]here is [a] ‘substantial’ government interest that informs the regulatory scheme pursuant to which inspection is made,”
- (2) “warrantless inspection is necessary to further the regulatory scheme,” and
- (3) the “inspection program, in terms of certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant” (i.e. “it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers”).¹⁸²

The court indicated that the authority of inspectors needs to be “carefully limited in time, place, and scope.”¹⁸³ Yet, Measure B specifically states that inspectors may “enter and inspect any location suspected of conducting any activity regulated by this chapter,” and that “[s]uch inspections may be conducted as often as necessary to ensure compliance with the provisions of this chapter.”¹⁸⁴ The court determined that the “any location” language of Measure B violates the Fourth Amendment because “adult filming could occur almost anywhere,” and Measure B seemingly authorizes health officers “to enter and search any part of a private home in the middle of the night, because he suspects violations

¹⁷⁸ *Id.* at *8.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *9–10.

¹⁸² *Id.* at *9 (citations omitted) (quoting *New York v. Burger*, 482 U.S. 691, 703 (1987)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *10.

are occurring.”¹⁸⁵ Consequently, the court denied the dismissal of the plaintiffs’ Fourth Amendment claim.¹⁸⁶

Despite the aforementioned findings, Measure B continues to limp on. Adult film actors must still use condoms, and permits are still required, though the permit cannot be “modified, suspended, or revoked, [and] fines and criminal charges may still be brought against offenders.”¹⁸⁷ Though administrative searches as outlined in Measure B cannot occur, officials can still obtain warrants to enforce Measure B’s search provision.¹⁸⁸ Finally, until LACPHD provides evidence showing that Measure B is fiscally neutral, or changes the fee system to make it neutral, permits can be granted without enforcing the ordinance’s monetary requirement.¹⁸⁹ As discussed in Part II, the plaintiffs are appealing to the Ninth Circuit.¹⁹⁰

CONCLUSION

So far, Measure B has failed to serve as a viable means of protecting against the spread of STIs. Many performers dislike using condoms, and Los Angeles, and California as a whole, are losing money as producers flee to other counties and states. The enforcement mechanisms set forth by Measure B are largely untenable and legally suspect. Nevertheless, the risk of infection remains high and performers should have the opportunity to use condoms if they so desire. California should pass comprehensive legislation to help ensure the safety of industry performers. The following reforms could help achieve that end.

Statewide reform is preferable to a piecemeal county-by-county approach. Producers respond to county centered ordinances, like Measure B, by circumventing laws they deem unfavorable. Production simply picks up and moves. However, producers are less likely to flee California than they are to county hop, given that so few states allow the production of pornography. Accordingly, statewide legislation would stop production companies from venue shopping and ensure conformity throughout California. Statewide reform would also ease the industry’s concerns regarding the availability of performers and performer support services. With no incentive to disperse throughout California, the industry would likely re-center in the greater Los Angeles area, where many of those services are already in place. Re-centering in Los Angeles would

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *13.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ Brief of Plaintiffs-Appellants, *Vivid Entm’t*, No. CV 13–00190 DDP (AGRx) (9th Cir. Apr. 16, 2013); *see also* Rhett Pardon, *Vivid Appeals Denial of TRO with 9th Circuit*, XBIZ NEWSWIRE (Sept. 17, 2013), <http://newswire.xbiz.com/view.php?id=169021>.

bring stability to the industry and help spur industry-wide growth. Ultimately, statewide action would better enable California to protect performers, create jobs, and collect tax revenues.

Any statewide legislative effort must ensure that independent contractors and employees are treated similarly under the law. Otherwise, production companies would structure their business models in ways that evade regulation. As it stands, producers avoid Cal/OSHA's jurisdiction by incorporating the use of more independent contractors and misclassifying employees as independent contractors. Solving this debacle is no easy task.

One way that California's legislators might address this problem is by putting a new agency in charge of monitoring production instead of trying to retrofit Cal/OSHA's Bloodborne Pathogen standard. In doing so, the state could follow Los Angeles County's lead and pass reform that applies to both employees and contractors. However, for the aforementioned reasons, if legislators want Cal/OSHA to regulate the industry, they must take steps to close jurisdictional loopholes.

Any new legislation should mandate that performers undergo regular testing. Given the industry's current stance on testing, passing mandatory testing provisions should prove relatively easy. And despite the recent outbreaks, there is an argument to be made that testing has reduced the number of STIs that would otherwise plague the industry. But, because testing alone has proven insufficient, and industry wide HIV outbreaks arise far too frequently, legislators must err on the side of caution and grant workers the right to use condoms. Acting in concert, mandatory testing requirements and provisions protecting performers' right to condom use could significantly decrease industrywide STI rates.

Workers should have the right to use condoms, but they should not be required to do so. Condoms are effective at limiting the spread of STIs. However, condoms are not foolproof and they occasionally fail. Additionally, many workers report not liking to use them. Condoms rip and tear, and some workers have latex allergies. Condom usage can prove harmful in certain circumstances and it might prove improper and counterproductive to require all workers to use them. Therefore, workers should be given a choice as to whether or not they want to use condoms.

The legislative challenge is ensuring that workers get a real choice and are not simply subjected to the whims of their supervisors. Hence, legislation must enact a barrier between performer's condom-usage choices and producers' hiring decisions. Workers need assurance that electing to use condoms will not cost them employment opportunities.

The fear of losing future employment opportunities likely leads performers to falsely claim that they do not want to use protection. Decreasing producers' incentives for pressuring performers could lead to more

performers voluntarily employing condoms. Accordingly, any proposed legislation should create pro-performer whistleblowing mechanisms. Workers must be able to report producers and directors who prohibit them from using protection. In turn, producers and directors who stop performers from using protection must face severe ramifications for doing so.

The legislature should include some mechanisms that were included in the 2004 reform attempt. In particular, legislators should grant workers the right to litigate against their employers. By mitigating producers' ability to blacklist employees, and by creating more stable employment environments, many of the issues hampering the use of litigation would fall by the wayside.

Another way to ensure that producers respect performers' preferences is to require performers to file documentation dually with the government and with producers/directors indicating the performers' preference before shooting. Consequently, inspectors could more easily determine whether performers' preferences are being honored. Steps should also be taken to ensure that government inspectors have access to filming locations. Measure B's enforcement mechanism was deemed unconstitutional, in part, because inspectors' authority was not properly limited in time, place, or scope. However, by requiring producers to inform the government when and where they shoot, inspectors can do site visits at appropriate times and avoid violating the Fourth Amendment. The perceived arbitrariness associated with their visits would decrease.

Pornography is big business. The industry creates billions of dollars in revenue and thousands of jobs. It is imperative that legislators walk the line between allowing performers and production companies to express themselves freely and ensuring that performers are safe and secure. While Measure B was a good attempt, and some of its provisions should be applied going forward, change is clearly needed.

In conclusion, California should pass statewide comprehensive reform. Any new legislation must treat "independent contractors" as if they were regular employees. Legislation should also couple mandatory testing mechanisms with provisions granting performers the right to choose whether they use condoms. Legislation must also include mechanisms that ensure performers' preferences are not improperly tainted by outside forces and pressures. Allowing workers to sue their employers would help decrease those pressures. Additionally, increased monitoring of worksites would further reduce producers' ability to pressure their employees improperly. While there will always be risks associated with the production of adult content, if undertaken, these reforms could significantly mitigate those hazards.

