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That's a Wrap

EXPLORING LOS ANGELES COUNTY'S ADULT FILM CONDOM REQUIREMENT

INTRODUCTION

Los Angeles County, California has the distinction of being among the nation's leaders in at least two things: the production of adult films,¹ and incidences of HIV/AIDS.² The United States began its battle with the HIV/AIDS epidemic in 1981, when the Centers for Disease Control and Prevention (CDC) published a report about five young, gay men diagnosed with rare infections which indicated that their immune systems had ceased to function.³ With that report, the CDC unknowingly launched the first warning beacon about a pernicious epidemic that would infect 121 Americans that year⁴ and approximately 1.1 million Americans by the end of 2010.⁵ Men who have sex with other men (MSM) are the group most at risk for infection,⁶ representing approximately 4% of the total population, but 63% of new HIV infections between 2007 and 2010.⁷ HIV is most commonly spread through sexual contact, to a lesser extent by intravenous drug use, and occasionally from mother to child at

¹ Josh Sanburn, *Sexodus: Porn Industry Mulls a Future Outside L.A.*, TIME MAG. (Sept. 13, 2013), <http://nation.time.com/2013/09/13/sexodus-porn-industry-mulls-a-future-outside-l-a/>.

² Los Angeles County is ranked second in the United States among epicenters for HIV/AIDS. CLAIRE HUSTED, L.A. CNTY. COMM'N ON HIV, CNTY. OF L.A. DEP'T OF PUB. HEALTH, LOS ANGELES COUNTY FIVE-YEAR COMPREHENSIVE HIV PLAN (2013-2017), at 1 (Mar. 2013), available at http://publichealth.lacounty.gov/aids/docs/LAC_FiveYear_ComprehensiveHIVPlan2013-2017.pdf.

³ *A Timeline of AIDS: 1981*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/> (last visited Feb. 21, 2015).

⁴ *Id.*

⁵ *HIV in the United States at a Glance*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/statistics/basics/atagance.html> (last visited Feb. 21, 2015).

⁶ *HIV Among Gay, Bisexual, and Other Men Who Have Sex With Men*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/risk/gender/msm/facts/index.html> (last visited Feb. 21, 2015).

⁷ *Id.*

birth.⁸ Few regions have battled as much with HIV/AIDS as Los Angeles County, which is the “second largest epicenter of HIV/AIDS in the United States.”⁹

Los Angeles County is also distinguished from the rest of the country as the home of the adult entertainment industry,¹⁰ generating an estimated 90% of all pornography production in America.¹¹ Few forms of free expression have incited more controversy or drawn more criticism than pornography.¹² Far from decades past, where adult films operated like a furtive underground business, today’s popular porn industry brings in an estimated 10 to 14 billion dollars each year in the United States.¹³ Pornography, like other forms of expressive activity, has undoubtedly become more popular thanks to the internet’s facilitation of user-generated content. The internet transformed an already popular industry into a colossus¹⁴ thanks to video clip sites and live adult webcam sites,¹⁵ which allow both amateurs and professionals to raise revenue from adult expression.

Unfortunately, as the adult entertainment industry has expanded, so have cases of HIV infection among adult performers.¹⁶ In the last few decades, several HIV scares have disrupted production and ended performers’ careers and lives.¹⁷ John Holmes, one of the most famous pornographic stars of all time, passed away in 1983 at the age of 43 due to complications from

⁸ *HIV/AIDS 101: How Do You Get HIV or AIDS?*, AIDS.GOV, <http://aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/> (last visited Feb. 21, 2015).

⁹ See L.A. CNTY. COMM’N ON HIV, *supra* note 2.

¹⁰ See Sanburn, *supra* note 1.

¹¹ *Id.*

¹² See, e.g., Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL’Y REV. 321, 322-24 (1984); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986).

¹³ David Rosen, *Is the Internet Killing the Porn Industry?*, SALON.COM (May 30, 2013), http://www.salon.com/2013/05/30/is_success_killing_the_porn_industry_partner/.

¹⁴ According to scholars, pornography accounts for four percent of the million most popular websites and 13 percent of all web searches. OGI OGAS & SAI GADDAM, A BILLION WICKED THOUGHTS 20 (2011); Julie Ruvolo, *How Much of the Internet is Actually for Porn*, FORBES (Sept. 7, 2011, 6:00AM), <http://www.forbes.com/sites/julieruvolo/2011/09/07/how-much-of-the-internet-is-actually-for-porn/>.

¹⁵ Adult webcam sites are a \$1 billion industry, and some estimate that each day, they receive page visits from approximately 5% of all internet users. And while few webcam models make enough money to call it a full-time career, many models make enough to comfortably supplement their incomes. Chris Morris, *CamGirls: The New Porn Superstars*, CNBC, Jan. 17, 2013, <http://www.cnbc.com/id/100385730>; see also Ruvolo, *supra* note 14.

¹⁶ Donald G. McNeil Jr., *Pornography and AIDS: A History*, N.Y. TIMES (Nov. 2, 2012), <http://www.nytimes.com/2012/11/06/health/porn-and-aids-a-history.html>.

¹⁷ *Id.*

AIDS.¹⁸ In 2004, four performers tested positive for HIV, causing all productions to shut down for one month.¹⁹ In 2009, Los Angeles County health officials reported that 22 adult performers were diagnosed with HIV since 2004.²⁰ In 2013, five performers announced they contracted HIV, causing the industry to issue three moratoriums on filming.²¹ Several advocacy groups were founded to lobby lawmakers and the pornography industry to require performers to use condoms while filming; one such group is the AIDS Healthcare Foundation (AHF).²² In 2009, the AHF unsuccessfully petitioned the Los Angeles County Superior Court, seeking to compel health officials to enforce a condom requirement for adult films; the court rejected the petition, citing the county's "broad discretion" to enforce its public health laws as it sees fit.²³

In 2012, the AHF co-sponsored the "County of Los Angeles Safer Sex in the Adult Film Industry Act" (Measure B), a ballot initiative which proposed to mandate condom use among adult performers while they filmed in Los Angeles County.²⁴ The measure required adult film producers to apply for a public health permit before filming, and authorized the county's health department to suspend productions, revoke permits, and impose fines and penalties if performers did not use condoms for oral,

¹⁸ See McNeil, *supra* note 16 ("John C. Holmes, for example, the most famous male actor of that era . . . was given an AIDS diagnosis in 1985, withered away to 90 pounds and died three years later.")

¹⁹ Patrick Range McDonald, *Rubbers Revolutionary: AIDS Healthcare Foundation's Michael Weinstein*, L.A. WKLY. (Jan 28, 2010), <http://www.laweekly.com/2010-01-28/news/rubbers-revolutionary-aids-healthcare-foundation-s-michael-weinstein>.

²⁰ Kimi Yoshino & Rong-Gong Lin II, *More Porn HIV Cases Disclosed*, L.A. TIMES (July 12, 2009), <http://www.latimes.com/news/local/la-me-porn-hiv12-2009jun12,0,3569962.story>.

²¹ Abby Sewel, *Fourth Porn Performer Tests HIV-Positive, AIDS Healthcare Group Says*, L.A. TIMES (Sept. 9, 2013), <http://www.latimes.com/local/lanow/la-me-ln-hiv-fourth-case-20130909,0,6230600.story>; Abby Sewel, *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>. Again in 2014, the industry voluntarily shut down filming on several occasions due to HIV scares among performers. Christine Mai-Duc, *Porn Filming on Hold as Another Performer Tests Positive for HIV*, L.A. TIMES (Aug. 18, 2014), <http://www.latimes.com/local/lanow/la-me-ln-porn-moratorium-actor-hiv-positive-20140828-story.html>.

²² Sewel, *Fourth Porn Performer Tests HIV-Positive, AIDS Healthcare Group Says*, *supra* note 21.

²³ Kimi Yoshino, *Judge Dismisses Petition Requiring the Use of Condoms in Porn Films*, L.A. TIMES (Dec. 23, 2009), <http://articles.latimes.com/2009/dec/23/local/la-me-porn23-2009dec23>.

²⁴ MEASURE B: TEXT OF THE PROPOSED MEASURE: COUNTY OF LOS ANGELES SAFER SEX IN THE ADULT FILM INDUSTRY ACT, *available at* http://rrcc.lacounty.gov/VOTER/PDFS/ELECTION_RELATED/11062012_LACOUNTY_WIDE_MEASURE_B.pdf (last visited Feb. 28, 2015).

anal, or vaginal penetration.²⁵ In January 2013, the adult film industry, represented by plaintiff companies Vivid Entertainment and CalifaEntertainment, filed suit against Los Angeles County officials in United States District Court for the Central District of California, seeking to enjoin Measure B.²⁶ The plaintiffs alleged that Measure B's provisions requiring adult performers to use condoms while filming infringed upon their First Amendment free speech rights.²⁷ The district court partially enjoined Measure B, leaving in effect the condom requirement, and partially dismissed plaintiffs' claims.²⁸ On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, holding that Measure B's condom requirement did not violate the First Amendment "because it has only a de minimis effect on expression, is narrowly tailored to achieve the substantial governmental interest of reducing the rate of sexually transmitted infections, and leaves open adequate alternative means of expression."²⁹

While Measure B's condom requirement is a substantial restriction on protected expression, it is a necessary limitation in light of the government's substantial interest in public health and the practical limitations of HIV testing technologies. Part I introduces a brief history of pornography regulation in the United States, including tests for obscene speech, the difference between content-based and content-neutral laws, and the secondary effects doctrine. It seeks to give the reader context for the legal concepts underlying Los Angeles's Measure B. Part II discusses in detail the provisions of Measure B, including its condom requirement, and discusses the dispute between the adult film industry and the ordinance's proponents in *Vivid Entertainment v. Fielding*. Part III critically analyzes two key points in *Vivid Entertainment*, and argues: (1) that Measure B is not merely a de minimis restriction on a means of expressive conduct, but instead materially limits the protected First Amendment elements of adult films; and (2) that Measure B's condom requirement is an unfortunate, but ultimately necessary restriction on adult filmmakers as it is an

²⁵ *Id.* Importantly, after the district court's partial injunction of Measure B in *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013), oral penetration no longer requires the use of a condom, and Measure B's applicability is presently limited to vaginal or anal intercourse. *See* *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 591 app. A (9th Cir. 2014).

²⁶ Complaint for Declaratory and Injunctive Relief, *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. 13-00190).

²⁷ *Id.*

²⁸ *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1137-38 (C.D. Cal. 2013).

²⁹ *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 578 (9th Cir. 2014).

appropriately tailored means of achieving a compelling government interest in public health.

I. A BRIEF HISTORY OF PORNOGRAPHY REGULATION

A. *Obscenity, Pornography, and the Origins of Adult Business Regulation*

Pornography has not always been so ubiquitous and popular in American society. As publication technology improved, distribution of illicit materials became much simpler and cost-effective,³⁰ and the number of laws regulating pornography increased. The first federal regulation of obscene materials was the Comstock Act,³¹ which criminalized the distribution, manufacturing, exhibition, advertisement, and possession of “any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation” which was obscene and/or immoral.³² The Comstock Act did not define “obscene” works, and courts have tussled with the meaning of “obscenity” ever since.³³

Attempting to define such an abstract term, judges looked to English obscenity standards, such as the *Hicklin* test, which focused the definition of obscenity on a material’s capacity to corrupt the mind of its reader or viewer.³⁴ In 1896, the Court first endorsed application of the *Hicklin* test,³⁵ which remained the standard until 1957, when the Court heard *Roth v. United States*. The *Roth* Court rejected the *Hicklin* test and instead established that the true measure of obscenity is “whether to the average person, applying contemporary community standards,

³⁰ See Jeordan Legon, *Sex Sells, Especially to Web Surfers*, CNN.COM (Dec. 11, 2003), <http://www.cnn.com/2003/TECH/internet/12/10/porn.business/>; see also *How the Porn Business Works, What it Makes, and What Its Future May Be*, PBS FRONTLINE (2002), <http://www.pbs.org/wgbh/pages/frontline/shows/porn/business/howtheme.html>.

³¹ See O. John Rugge, *Obscenity Legislation*, 10 AM. JUR. TRIALS 1, § 3 (updated Feb. 2015) (describing the history of the Comstock Act). The provisions of the Comstock Act were partially the basis of current regulations regarding obscenity in the United States mail, now codified at 18 USC § 1461 (2012).

³² See 19 U.S.C. § 1305(a) (2012) (reflecting original language from the Comstock Act, 17. Stat. 598-99 (1873)).

³³ Perhaps the most notable example of the inherent problems associated with defining “obscenity” is a quote from Justice Stewart’s concurrence in *Jacobellis v. Ohio*, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . But I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

³⁴ See *Roth v. United States*, 354 U.S. 476, 488-90 (1957) (discussing the *Hicklin* test).

³⁵ *Rosen v. United States*, 161 U.S. 29, 43 (1896).

the dominant theme of the material taken as a whole appeals to prurient interest.”³⁶ Rather than looking at one particular portion of speech or expressive activity, *Roth* dictated that the communications at issue must be considered in their entirety to determine if they are obscene.³⁷ The Court specifically distinguished between obscenity and artistic depictions of sex, stating that the latter undoubtedly addresses “one of the vital problems of human interest and public concern” and should be protected expression.³⁸

Currently, obscene speech is not protected by the Free Speech Clause of the First Amendment.³⁹ But as pornography is not necessarily obscene, it occupies a particularly tricky position on the spectrum of protected expression.⁴⁰ While “pornography” is a catchall term referring to depictions of sexual activity, it is not de facto obscene. The attempt to delineate “between sexually explicit materials, which may be protected by the First Amendment, and obscene materials . . . has been, and continues to be, a hotly contested issue.”⁴¹ Distinguishing between protected pornography and unprotected obscene material can be a daunting, subjective task. As D.H. Lawrence, author of the once-controversial *Lady Chatterley’s Lover*, once observed, “What is pornography to one man is the laughter of genius to another.”⁴² The current standard for obscenity is a three-part test, originating from the Supreme Court’s 1973 ruling in *Miller v. California*, which states that material is obscene if (a) “the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,” (b) if “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,” and (c) if “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁴³

Like any other protected form of speech, pornography is subject to reasonable restrictions on the time, place, and manner

³⁶ *Roth*, 354 U.S. at 489.

³⁷ *Id.* at 490.

³⁸ *Id.* at 487.

³⁹ See *Miller v. California*, 413 U.S. 15, 20, 23 (1973).

⁴⁰ See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002) (“As a general rule, pornography can be banned only if obscene . . .”) (citing *Miller v. California*, 413 U.S. 15 (1973)).

⁴¹ MICHAEL D. SCOTT, *Obscenity Laws*, in SCOTT ON MULTIMEDIA LAW § 25.05 n.102, available at 2013 WL 2960422.

⁴² D.H. LAWRENCE, *PORNOGRAPHY AND OBSCENITY* (1929), available at <http://www.mjpenney.com/wp-content/uploads/2013/04/D.-H.-Lawrence-Pornography-Obscenity.pdf>.

⁴³ *Miller*, 413 U.S. at 24.

of its expression.⁴⁴ Whether or not these regulations pass constitutional muster substantially depends upon the level of scrutiny the court applies. There are fundamentally two types of regulations on speech and expression: “content-based” laws, which make explicit reference to the content of speech, and “content-neutral” laws, which regulate speech without referring to the speech’s content. “Content-neutral” time, place, and manner restrictions, which are “justified without reference to the content of the regulated speech,” are subject to only intermediate scrutiny.⁴⁵ When courts consider expressive conduct combining speech and non-speech elements, like adult films, the Court’s test from *United States v. O’Brien*⁴⁶ is the standard test for intermediate scrutiny. Under *O’Brien*, a law restricting speech is justified if it “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁴⁷

However, content-based laws, regulating speech based upon the actual substance of the message,⁴⁸ typically must pass strict scrutiny.⁴⁹ Many have stated that strict scrutiny is an often-insurmountable bar to hurdle.⁵⁰ Under strict scrutiny, proponents of challenged content-specific laws must demonstrate a compelling government interest and prove that the law is narrowly tailored to further that government interest, ensnaring no more expression than is necessary to achieve its goals.⁵¹ When

⁴⁴ See, e.g., *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986).

⁴⁵ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991).

⁴⁶ *United States v. O’Brien*, 391 U.S. 367 (1968).

⁴⁷ *Id.* at 377.

⁴⁸ Several different frameworks exist for distinguishing content-based regulation from content-neutral regulation. See Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (focusing on “viewpoint regulation” as content-based). But see LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-2 to 12-7, 12-20 (1978) (focusing on whether a law is related to the “communicative impact” of the regulated speech).

⁴⁹ See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (plurality opinion) (“[A] regulation that does not favor either side of a political controversy is nonetheless impermissible because the First Amendment’s hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.”) (internal citations and quotations omitted); *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

⁵⁰ See, e.g., Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

⁵¹ 16B C.J.S. *Constitutional Law* § 1123 (2013) (“Strict scrutiny test; suspect classifications”).

regulations address adult expression, the content-specific versus content-neutral distinction is not as dispositive. The Court has recognized that when the government seeks to curtail the harmful secondary effects⁵² of adult expression, content-specific laws made to that effect are treated as though they are content-neutral and are subject only to intermediate scrutiny.⁵³

B. *Secondary Effects Test and its History*

The secondary effects test is a curious exception to the rule that content-based laws face strict scrutiny. It originated in a footnote from *Young v. American Mini Theaters, Inc.*, where the Court applied intermediate scrutiny to a zoning law prohibiting adult-oriented businesses, such as adult bookstores and cinemas, from operating within 1,000 feet of another similar business or within 500 feet of a residential area.⁵⁴ The Court justified its application of intermediate scrutiny because that law was not designed to censor adult speech, but instead to prevent such establishments from “caus[ing] the area to deteriorate and become a focus of crime.”⁵⁵ After *Young*, the Court upheld a series of adult zoning laws,⁵⁶ reasoning that these regulations were not designed to stifle explicit speech but to prevent neighborhoods from deteriorating.⁵⁷ The Court also applied the secondary effects doctrine to a line of cases concerning regulations on exotic dancing,⁵⁸ holding that bans on full-nude exotic dancing were designed to prevent prostitution and criminal activity in the neighborhoods surrounding strip clubs.⁵⁹

The secondary effects doctrine is controversial, to say the least. Some argue that the secondary effects test was a stark departure from previous holdings, and “a disturbing, incoherent,

⁵² “A regulation that is facially content-specific may be treated as content-neutral if its purpose is to diminish or eliminate a secondary effect of the speech, such as a zoning regulation for adult theaters when it is intended to limit crime.” *Secondary Effects Test*, BLACK’S LAW DICTIONARY 1471 (9th ed. 2009).

⁵³ *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 71 n.34 (1976).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

⁵⁷ “[T]he ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, [the] City Council’s ‘predominate concerns’ were with the secondary effects of adult theaters, and not with the content of adult films themselves.” *Renton*, 475 U.S. at 47 (emphasis added).

⁵⁸ See *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991).

⁵⁹ *Barnes*, 501 U.S. at 585-86.

and unsettling precedent.”⁶⁰ In *United States v. O'Brien*, the Court held that in order to justify “incidental limitations on First Amendment freedoms,” a government interest in regulating expressive conduct must be “unrelated to the suppression of free expression.”⁶¹ According to *O'Brien*, in assessing the constitutionality of those adult zoning and exotic dancing regulations, the government’s “ultimate goal” was not relevant; rather, “the case should have turned on whether the regulation was geared to the communicative impact of the speech.”⁶² The *Renton* case was the first time that the Court held it would “treat a law based *explicitly* on content as content-neutral merely because the justifications for the law did not relate to the suppression of speech.”⁶³ Critics warned that the secondary effects rule could “undermine the very foundation of the content-based/content-neutral distinction” and “erode the coherence and predictability of first amendment doctrine.”⁶⁴

Since its adoption in *Renton*, the secondary effects doctrine has justified regulations such as prohibiting the sale of alcoholic beverages in strip clubs,⁶⁵ requiring “buffer zones” between exotic dancers and patrons,⁶⁶ and forbidding any door or curtain to “peep show” viewing booths.⁶⁷ Some argue that we have stretched the secondary effects doctrine beyond its logical limits. Justice Stevens, in his dissenting opinion in *City of Erie v. Pap’s AM*, voiced concern that the Court had stretched the secondary effects doctrine to its sensible breaking point by expanding the doctrine beyond merely zoning adult-oriented businesses to actually restricting protected expression within those businesses.⁶⁸ Perhaps it is time to consider retiring the secondary effects doctrine, or at least limiting its application to

⁶⁰ Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115 (1987); see also 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 9:19 (2014), (“The analysis in *Renton* was a deviation from prior content-neutrality analysis.”).

⁶¹ *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

⁶² 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 9:19 (2013).

⁶³ *Id.*

⁶⁴ Stone, *supra* note 60, at 116-17; see also David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19 (2012) (“The secondary-effects doctrine continues to wreak havoc in First Amendment jurisprudence. Much adult entertainment litigation centers on this doctrine, the principal legal tool that enables government officials to regulate adult-oriented expression with greater ease.”).

⁶⁵ See *Flanigan’s Enters., Inc. v. Fulton Cnty.*, 596 F.3d 1265 (11th Cir. 2010); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736 (4th Cir. 2010).

⁶⁶ See *Fantasy Ranch v. City of Arlington*, 459 F.3d 546, 550 (5th Cir. 2006).

⁶⁷ See *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1000 (9th Cir. 2007).

⁶⁸ *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 317-18 (2000) (J. Stevens, dissenting).

adult zoning laws, thereby subjecting content-specific laws regulating adult speech to the same scrutiny as any other content-specific laws.

But for better or worse, as a matter of law, the secondary effects doctrine extends to circumstances when municipalities do not target adult expression for its content, but seek to control its externalities. While adult businesses may be an easy target for blame, several studies have linked adult businesses to increased criminal activity in their surrounding areas.⁶⁹ Supporters of the secondary effects doctrine further argue that the link between adult speech and secondary effects are not as attenuated as opponents would have us believe.⁷⁰ The Court defended the doctrine in *Barnes*, specifically in reference to a full-nude dancing prohibition, by likening valid secondary effects laws to time, place, and manner restrictions on speech⁷¹ as discussed in *United States v. O'Brien*. Some even argue that the secondary effects doctrine does not provide municipalities with enough authority to regulate adult businesses, and effectively undermines their ability to do so.⁷²

In this case, Measure B's proponents argued that because the condom requirement merely regulates the manner in which adult films can be made in order to combat their secondary effects, it is a permissible restriction on free expression and should only be subjected to intermediate scrutiny.⁷³ The secondary effects that the law purports to regulate are the spread of HIV and similar blood borne STDs from the adult film industry to the larger community.⁷⁴

But how much evidence should Measure B's proponents have to produce to justify Measure B's restrictions? In *Alameda Books*, the Court held that local governments may rely on any evidence "reasonably believed to be relevant" to link the restricted speech with the secondary effects in question.⁷⁵ But the Court also emphasized that municipalities cannot conduct shoddy workmanship; the "evidence must fairly support the municipality's rationale for its ordinance." After proponents provide some

⁶⁹ See Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO ARTS & ENT. L.J. 565, 591 (2011).

⁷⁰ *Id.* at 595.

⁷¹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570-71 (1991).

⁷² See Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447 (2004).

⁷³ Intervenor Defendants-Appellees' Answering Brief at 27-28, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

⁷⁴ MEASURE B, *supra* note 24 ("Argument in Favor").

⁷⁵ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002).

evidence, the burden shifts to the law's challengers to either demonstrate that the evidence does not support the ordinance, or to provide new evidence supporting their claim.⁷⁶ Some argue that this low hurdle for legislators, combined with a total lack of guidance from the Court about what types of studies or evidence will suffice, has produced some nonsensical results.⁷⁷ Since *Alameda Books*, Courts have accepted from municipalities reports that are ill-fitting, outdated, and of dubious relevance to the purported secondary effects and governmental interests at issue.⁷⁸

As this note will discuss in Section II, the Ninth Circuit ultimately concluded, using the secondary effects doctrine to apply intermediate scrutiny to Measure B, that the condom requirement did not violate plaintiffs' First Amendment rights because it "has only a de minimis effect on expression, is narrowly tailored to achieve the substantial governmental interest of reducing the rate of sexually transmitted infections, and leaves open adequate alternative means of expression."⁷⁹

C. *California's Occupational Safety and Health Regulations and the Porn Industry*

At the state level, California's Occupational Safety and Health Act of 1973 (Cal/OSHA) was enacted to "assur[e] safe and healthful working conditions for all California working men and women" through health and safety standards, workplace training, and on-site enforcement of guidelines.⁸⁰ Notably, porn filmmakers must observe "[u]niversal precautions . . . to prevent contact" with bodily fluids⁸¹ in order to protect performers from exposure to HIV as well as Hepatitis B and C. Cal/OSHA regulations require filmmakers to exercise "feasible engineering and work practice controls" to prevent performers' exposure to bodily fluids.⁸² The state suggests that performers wear condoms, avoid ejaculation inside a partner's bodily orifices, and simulate sexual acts rather

⁷⁶ *Id.* at 439.

⁷⁷ Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 322 (2004) ("[L]ower federal courts have accepted a hodgepodge of proof, some of which profoundly tests the limits of the reasonable relevance requirement endorsed in *Alameda Books*.").

⁷⁸ *Id.* at 323-24.

⁷⁹ *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 578 (9th Cir. 2014).

⁸⁰ CAL. LAB. CODE § 6300 (West 1973).

⁸¹ CAL. CODE REGS. tit. 8, § 5193(d)(1) (West 2015).

⁸² STATE OF CAL. DEP'T OF INDUS. REGULATIONS, *Vital Information for Workers and Employers in the Adult Film Industry*, CA.GOV (Dec. 2014), <http://www.dir.ca.gov/dosh/adultfilmindustry.html>.

than actually perform them.⁸³ Filmmakers must provide performers with the Hepatitis B vaccine, maintain accurate medical records about actors and actresses, and provide training to performers about how to avoid exposure to blood borne pathogens.⁸⁴

It is worth noting that the Cal/OSHA regulations mentioned above do not explicitly mention condoms or adult films. Last year, the California legislature attempted to amend Cal/OSHA rules to include specific provisions requiring adult performers to use condoms while filming, but the bill, AB 640, stalled in the state Senate.⁸⁵ A recent draft of AB 640 would not only require performers to use condoms, but also to wear protective eyewear during scenes.⁸⁶

As these proposed safety laws become more restrictive of adult films—perhaps requiring performers to wear gloves, goggles, condoms and face shields—the pattern of regulation starts to look more like a furtive ban on pornography rather than an attempt to reasonably regulate it. But the fact that existing Cal/OSHA regulations have been largely unenforced in the adult film industry for some time, while previous reform attempts were not fruitful, helps one understand why Measure B's proponents felt like additional regulation was necessary.

II. CALIFORNIA'S CONDOM LAW: MEASURE B & *VIVID ENTERTAINMENT V. FIELDING*

A. *Measure B*

Because adult film performers are a high-risk group for HIV/AIDS and other diseases transmitted via bodily fluids,⁸⁷ the AHF and other advocates proposed Measure B as a ballot

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Dennis Romero, *Porn's Statewide Condom Law Dies in California Legislature*, L.A. WKLY. (Sept. 16, 2013), <http://www.laweekly.com/news/porns-statewide-condom-law-dies-in-california-legislature-4171483>.

⁸⁶ Jessica Roy, *California Lawmakers Want to Make Porn Stars Wear Super Sexy Goggles*, TIME.COM (Nov. 11, 2013), <http://newsfeed.time.com/2013/11/11/california-lawmakers-want-to-make-porn-stars-wear-super-sexy-goggles/>.

⁸⁷ Memorandum from Jonathan E. Fielding, Dir. & Health Officer, to Supervisors on Adult Film Industry, Cnty. of L.A. Dep't of Public Health (Sept. 17, 2009), available at http://file.lacounty.gov/bc/q3_2009/cms1_137588.pdf.

initiative for the 2012 election.⁸⁸ Voters in the November 6, 2012, general election approved the ballot measure 56.96% to 43.04%.⁸⁹

Measure B requires adult film producers to obtain a public health permit from the county Department of Health by filing an application and paying a required fee.⁹⁰ To maintain the permit, those producers must complete a blood borne pathogen training course⁹¹ and comply with the rest of the Act's health and safety requirements.⁹² The county has the authority to revoke a permit if the adult film producer violates "applicable provisions of the Los Angeles County Code, the California Health and Safety Code, the blood borne pathogen standard, California Code of Regulations Title 8, section 5193 or the exposure control plan of the producer of adult films, or any combination of such violations."⁹³ Namely, if producers fail to "require performers to use condoms during any acts of vaginal or anal sexual intercourse," they will be subject to fines and the potential revocation of their permits.⁹⁴ Producers must also post notice to performers stating that condoms are required by county law and provide contact information for performers to file complaints and questions.⁹⁵

The law immediately sparked controversy. Before the election, some chose not to endorse the law because while it was "well intentioned," it would not markedly benefit adult film performers.⁹⁶ Others saw enforcement difficulties, refusing to endorse Measure B as it was "likely to stymie county government" because some producers would skirt the condom requirement by operating "off-the-books".⁹⁷ Some criticized that the risk of contracting blood borne pathogens from the adult film industry simply was not a serious enough concern to merit legislation.⁹⁸

⁸⁸ MEASURE B: TEXT OF THE PROPOSED MEASURE: COUNTY OF LOS ANGELES SAFER SEX IN THE ADULT FILM INDUSTRY ACT, *available at* http://rrcc.lacounty.gov/VOTER/PDFS/ELECTION_RELATED/11062012_LACOUNTY_WIDE_MEASURE_B.pdf (last visited Feb. 28, 2015).

⁸⁹ *County Measure—B*, CNTY. OF L.A. REGISTRAR-RECORDER/CNTY. CLERK ELECTION RESULTS, http://rrccmain.co.la.ca.us/old_graphical/0012_CountyMeasure_Frame.htm (last updated Dec. 2, 2012, 2:20PM).

⁹⁰ L.A. CNTY, CAL. CODE OF ORDINANCES § 11.39.080(A).

⁹¹ *Id.*

⁹² *Id.* § 11.39.110.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* § 11.39.090.

⁹⁶ *Endorsement: No on Measure B*, L.A. TIMES (Oct. 18, 2012), <http://articles.latimes.com/2012/oct/18/opinion/la-ed-end-measure-b-20121018>.

⁹⁷ *Id.*

⁹⁸ *Endorsement: No on B—Measure to Force Condoms in Porn Films is Redundant and Could Harm an Important Local Industry*, L.A. DAILY NEWS (Oct. 16,

The official argument against Measure B on the ballot provided to voters raised concerns that Measure B would exile the porn industry from Los Angeles County, frivolously consume tax dollars, and would continue a disturbing trend of “nanny state” regulations, like the super-size soft drink ban once proposed in New York by former Mayor Bloomberg.⁹⁹ Finally, Measure B’s opponents charged that the threat of contracting HIV spread by porn stars is simply an “imaginary threat” which is mitigated by regular industry blood testing.¹⁰⁰

Proponents countered that infections contracted among adult film performers are passed onto people outside the industry, and condoms are the best means to prevent those infections from spreading.¹⁰¹ The official language provided to voters in favor of Measure B also assures everyone the costs of permits and enforcement are not paid with taxpayer dollars, but are totally subsidized by the adult film producers.¹⁰² AHF President Michael Weinstein has said that the industry’s 28 day testing window is insufficient protection because “the reality is you can get tested today and get infected tomorrow.”¹⁰³ Several performers infected with HIV have echoed those concerns that industry testing protocols are not adequate to prevent the spread of sexually transmitted diseases.¹⁰⁴

B. Vivid Entertainment v. Fielding

On January 10, 2013, Vivid Entertainment and Califa Productions, two major porn production companies, as well as Kayden Kross and Logan Pierce, two adult film performers, fired the first retaliatory shots against Measure B. The industry representatives filed a § 1983 action in the Central District of California against Los Angeles County, the Director of the Los Angeles Department of Public Health, and the Los Angeles District Attorney, requesting declaratory and injunctive relief.¹⁰⁵

2012), <http://www.dailynews.com/opinion/20121017/endorsement-no-on-b-measure-to-force-condoms-in-porn-films-is-redundant-and-could-harm-an-important-local-industry>.

⁹⁹ MEASURE B, *supra* note 24 (“Argument Against”).

¹⁰⁰ *Id.* (“Rebuttal to Argument in Favor of Measure B”).

¹⁰¹ *Id.* (“Rebuttal to Argument Against Measure B”).

¹⁰² *Id.*

¹⁰³ Dennis Romero, *Porn Defends the Money Shot*, L.A. WKLY. (Sept. 29, 2011), <http://www.laweekly.com/news/porn-defends-the-money-shot-2172156/>.

¹⁰⁴ Abby Sewell, *Tearful Porn Actress Speaks out About HIV Risk in Adult Film Industry*, L.A. TIMES (Sept. 18, 2013), <http://www.latimes.com/local/lanow/la-me-ln-porn-hiv-20130918,0,3425220,full.story>.

¹⁰⁵ Complaint for Declaratory and Injunctive Relief, Vivid Entm’t, LLC v. Fielding, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. 13-00190).

In their complaint, the plaintiffs challenged Measure B on several grounds. Among other claims, they argued: (1) that Los Angeles County unconstitutionally put protected free expression to a ballot referendum, (2) that Measure B's permitting scheme was an unlawful prior restraint on protected speech, (3) that Measure B's language was unconstitutionally vague, and (4) that Measure B was inadequately tailored, both over-inclusive and under-inclusive.¹⁰⁶

Interestingly enough, Los Angeles County government officials declined to defend Measure B's constitutionality,¹⁰⁷ and the district court allowed representatives from the AHF to intervene and defend the condom requirement.¹⁰⁸ The interveners filed a Rule 12(b)(6) motion to dismiss plaintiffs' claims, arguing that they lacked standing to challenge Measure B, and failed to state plausible First Amendment claims for relief.¹⁰⁹

The district court partially granted AHF's 12(b)(6) motion and partially enjoined Measure B.¹¹⁰ As the stated goal of the measure was to curb a secondary effect of adult films—the spread of HIV among porn performers and the general public in Los Angeles—the court recognized that Measure B would have to pass intermediate scrutiny.¹¹¹ The court dismissed several of plaintiffs' claims, including the referendum against free expression, vagueness, and due process challenges.¹¹² But the court denied the intervenors' motion to dismiss the First Amendment claim, ruling that in light of the complaint's discussion about the porn industry's internal sexually-transmitted disease testing, plaintiffs alleged sufficient facts “to show that Measure B's condom requirement does not alleviate the spread of STIs in a direct and material way.”¹¹³

However, the court also denied the plaintiffs' motion for a preliminary injunction on the same First Amendment issue, concluding that under intermediate scrutiny, the plaintiffs were

¹⁰⁶ *Id.* at 11-18.

¹⁰⁷ Letter from Joel N. Klevins, Esq., Private Legal Counsel for L.A. Cnty., to Molly C. Dwyer, Clerk of the Court, U. S. Court of Appeals for the 9th Cir. (Oct. 7, 2013), available at <http://www.aidshealth.org/wp-content/uploads/2013/06/Vivid-Entertainment-LLC-Letter-to-Ms.-Molly-C.-Dwyer.pdf>.

¹⁰⁸ Order Granting Motion to Intervene, *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. 13-00190) (Dkt. 44).

¹⁰⁹ Intervenors' Motion to Dismiss Plaintiffs' Complaint Pursuant to Federal Rule of Civil Procedure 12(B)(6), *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. 13-00190).

¹¹⁰ *Vivid Entm't, LLC*, 965 F. Supp. 2d at 1138.

¹¹¹ *Id.* at 1125.

¹¹² *Id.* at 1127, 1132-33.

¹¹³ *Id.* at 1126-27 (internal citation omitted).

unlikely to succeed on the merits.¹¹⁴ The district court did, however, enjoin “the fees provision, the administrative search provision, and the prior restraint provisions” of Measure B, concluding that the plaintiffs were likely to succeed on the merits as the intervenors had made no showing that those provisions were narrowly tailored.¹¹⁵ So after all of that, what remained of Measure B was its condom requirement and the permit scheme; the district court enjoined most of the enforcement mechanisms, but still upheld the portions of the law requiring performers to use protection.¹¹⁶

The plaintiffs appealed to the Ninth Circuit, raising two rather interesting First Amendment questions, which this article will discuss *infra* Section III. First, whether Measure B’s condom requirement is merely a de minimis restriction on the manner in which plaintiffs can convey their desired message, or a ban on the message itself. The crucial distinction lies in how one defines the relevant First Amendment message of adult films. Is condom-less sex itself an expression of some ideas or attitudes, or is it merely a method of communicating “more generally the adult films’ erotic message”?¹¹⁷ This Note argues that the correct answer is the former; that condomless sex is not merely a means of communicating a broader sexual message but is actually an important expression of sexual ideas and relationships.

Second, whether Measure B is narrowly tailored to achieve the government’s health interest when it arguably “duplicates a voluntary testing and monitoring scheme that already is in place in the industry,” the Adult Protection Health & Safety Service.¹¹⁸ The key to this issue seems to be whether the porn industry’s internal testing and prevention procedures are actually a viable, safe alternative to Measure B’s condom requirement; that is, is one preventative method scientifically more effective than the other? This Note concludes that while the adult film industry’s internal testing and preventative measures are seemingly thorough, they do not further the government’s public health interest as effectively as Measure B’s condom requirement.

¹¹⁴ *Id.* at 1134.

¹¹⁵ *Id.* at 1136.

¹¹⁶ *Id.* at 1122-23, 34.

¹¹⁷ *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 579 (9th Cir. 2014) (citing *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 293 (2000); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005)).

¹¹⁸ *Vivid Entm’t, LLC*, 774 F.3d at 581.

After briefs and arguments, the Ninth Circuit affirmed the decision of the district court.¹¹⁹ Addressing both First Amendment claims listed above, the Ninth Circuit held that the plaintiffs were unlikely to succeed on the merits because the mandate “has only a de minimis effect on expression, is narrowly tailored to achieve the substantial governmental interest of reducing the rate of sexually transmitted infections, and leaves open adequate alternative means of expression.”¹²⁰

III. THE CONDOM MANDATE: A SIGNIFICANT LIMIT ON PROTECTED EXPRESSION

One thing is clear: as Vivid’s brief argues¹²¹ and the Ninth Circuit seemingly acknowledges, Measure B’s condom requirement will change the on-screen content of adult films produced in Los Angeles County.¹²² The underlying question is how narrowly or broadly one defines the relevant First Amendment message of these adult films. Is a condom or the absence of a condom merely an incidental piece of a larger sexual message in an adult film, or is it more important to conveying a particular message about the consequences of human sexuality?

The Ninth Circuit was not without guidance in defining the relevant First Amendment message. The Supreme Court’s opinion in *Spence v. State of Washington* requires courts to evaluate “not only whether someone intended to convey a particular message through that conduct, but also whether there is a ‘great’ likelihood ‘that the message would be understood by those who viewed it.’”¹²³ *Spence* was not an adult speech case; it involved the arrest of a college student who, in protest of the Vietnam War, hung an upside-down American flag with an attached peace symbol from the window of his apartment.¹²⁴ The Court held the statute under which the student was arrested unconstitutional, as it criminalized protected expressive conduct likely to be understood by others.¹²⁵

¹¹⁹ *Id.* at 577.

¹²⁰ *Id.* at 578.

¹²¹ Brief of Plaintiffs-Appellants at 41-42, *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal. 2013) (No. 13-00190).

¹²² *Vivid Entm’t, LLC*, 774 F.3d at 579 (holding that “the condom mandate does not ban the *relevant* expression completely. Rather, it imposes a de minimis restriction”) (emphasis in original).

¹²³ *Id.* (citing *Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974)).

¹²⁴ *Spence*, 418 U.S. at 405.

¹²⁵ *Id.* at 414-15.

So in light of *Spence*, the Ninth Circuit evaluated the plaintiffs' argument "that condomless sex differs from sex generally because condoms remind the audience about real-world concerns such as pregnancy and disease. Under this view, films depicting condomless sex convey a particular message about sex in a world without those risks."¹²⁶ If condomless sex is actually a crucial part of the message you are trying to convey, then, the plaintiffs argued, a condom requirement was in fact "a complete ban on their protected expression."¹²⁷ If that were true, then Measure B would have to pass strict scrutiny.¹²⁸ But the Ninth Circuit rejected the idea that the relevant protected expression was the depiction of unprotected sex, stating that "Plaintiffs' argument presupposes that their relevant expression for First Amendment purposes is the depiction of condomless sex. But 'simply to define what is being banned as the "message" is to assume the conclusion."¹²⁹ The court seemingly sensed a danger in narrowly defining a particular brand of adult expression in order to avoid regulation.

Instead, the court cited logic from several cases involving restrictions on full-nude exotic dancing. The first case was *City of Erie v. Pap's A.M.*, a case in which the Supreme Court upheld an ordinance requiring full-nude dancers to wear pasties and G-strings, because while the law limited "the erotic message by muting that portion of the expression that occurs when the last stitch is dropped," the effect on the overall protected expression was *de minimis*.¹³⁰ The second case was *Barnes v. Glen Theatre, Inc.*, in which the Supreme Court held that another pastie and G-string regulation on full-nude exotic dancing "[did] not deprive the dance of whatever erotic message it convey[ed]; it simply ma[de] the message slightly less graphic."¹³¹ The Ninth Circuit also cited its own cases as well as those of several sister circuits, all applying similar analyses to wardrobe and distance restrictions on exotic dancing.¹³² All together, those cases establish that generally, courts see no substantial difference between fully nude

¹²⁶ *Vivid Entm't, LLC*, 774 F.3d at 579 (summarizing the court's understanding of Plaintiffs' argument).

¹²⁷ *Id.* at 578.

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000)).

¹³⁰ *Pap's A.M.*, 529 U.S. at 279.

¹³¹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991).

¹³² See *Vivid Entm't, LLC*, 774 F.3d at 579-80 (citing *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 299 (6th Cir. 2008)); *Fantasy Ranch v. City of Arlington*, 459 F.3d 546, 562 (5th Cir. 2006); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1195-96 (10th Cir. 2003)).

and partially nude exotic dancing; any restrictions on those activities are mostly de minimis. But are the two activities, full-nude dancing and adult films, really so synonymous? AHF adopted that position in their brief, stating that “the only difference between the condoms required here and the pasties and G-strings required in *Barnes* and *Erie* . . . is that condoms can be hidden . . . while pasties and G-strings cannot be ‘edited out.’”¹³³

Establishing its view of how to define the First Amendment expression at issue, the Ninth Circuit found that Measure B was not a complete ban on protected expression, and held that “whatever unique message Plaintiffs might intend to convey by depicting condomless sex, *it is unlikely that viewers of adult films will understand that message*. So condomless sex is not the relevant expression for First Amendment purposes; instead, the relevant expression is more generally the adult films’ erotic message.”¹³⁴

Stop and think about that for a second; the Ninth Circuit’s application of intermediate scrutiny partly rests on the idea that people who watch porn do not and cannot appreciate the artistic differences between scenes depicting condom use and scenes depicting unprotected sex. Such a conclusion is unfounded. Perhaps it is based on an underlying animus or indifference toward pornography. Maybe it is based on a low estimation of the mental faculties of those who watch adult films. Regardless, it seems counterintuitive to conclude that people who watch porn, in part to fantasize about their own participation in the depicted sexual milieu, would not have their suspension of disbelief interrupted by the presence of a condom.

Moreover, in some cases Measure B’s impact will extend well beyond viewers’ enjoyment of adult films showing a world without consequences to sexual conduct. Some argue that the difference between unprotected and protected sex is crucially important to the video’s message and the viewer’s cultural identity. For instance, practicing unprotected sex is particularly important to some portions of gay communities, where “barebacking” represents a special hyper-masculine cultural identity.¹³⁵ By “[f]orcing a gay porn star” to use protection, Los Angeles County is effectively “sheathing his sword, blunting his masculinity, power,

¹³³ Intervenor Defendants-Appellees’ Answering Brief at 23, *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

¹³⁴ *Vivid Entm’t, LLC*, 774 F.3d at 579 (emphasis added).

¹³⁵ Alexander S. Birkhold, *Poking Holes in L.A.’s New Condom Requirement: Pornography, Barebacking, and Speech*, 90 WASH. U.L. REV. 1819 (2013).

and speech.”¹³⁶ In the case of the gay barebacking subculture,¹³⁷ the condom makes a world of difference; its absence or presence is integral to expressing the subculture’s ideas about gender, power, and sexuality. Some people expressly identify as barebackers while others refuse to take the label because of the stigma attached to it.¹³⁸ But it is clear that for some gay men, barebacking is not merely an act or preference, but an attribute of their sexual identity.¹³⁹ As important as barebacking may be to some, the practice remains troubling because MSM who engage in unprotected sex are most at risk for contracting HIV/AIDS; in 2010, MSM were only 2% of the U.S. population but accounted for 63% of all new cases of HIV.¹⁴⁰ Measure B illustrates that, as a matter of policy, drawing the proper balance between the protected expression of one subculture and the broader public health and wellness can be a difficult analysis.

Performers in gay adult films and scenes use condoms far more frequently than performers in heterosexual films and scenes.¹⁴¹ One study found that heterosexual adult films only use condoms in 7% of scenes depicting “penile sexual acts,” while gay adult films use condoms in 64% of scenes depicting penile sexual acts.¹⁴² Despite this large disparity in condom use between heterosexual and gay adult films, heterosexuals have no

¹³⁶ *Id.*

¹³⁷ For more information about identifying those who practice gay barebacking as a distinct subculture within the gay community at large, see generally TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009). But see Marc Spindelman, *Unlimited Intimacy: Reflections on the Subculture of Barebacking*, 23 YALE J.L. & FEMINISM 179, 253 (2011) (offering a summary and critical legal review of Dean’s arguments).

¹³⁸ A. Carballo-Diéguez et al., *Is ‘Bareback’ a Useful Construct in Primary HIV-Prevention? Definitions, Identity, and Research*, NATIONAL INSTITUTES OF HEALTH 7 (Jan. 2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2669431/pdf/nihms101240.pdf>.

¹³⁹ See Tim Dean, *Breeding Culture: Barebacking, Bugchasing, Giftgiving*, 49 MASS. REV. 80, 81 (2008), available at <http://www.acsu.buffalo.edu/~tjdean/documents/BreedingCulture.pdf> (“Barebacker has become a new sexual identity because the practice of unprotected sex contravenes gay community norms that were established and held sway throughout the first decade of the epidemic.”); see also Perry N. Halkitis et al., *Barebacking Identity Among HIV-positive Gay and Bisexual Men: Demographic, Psychological, and Behavioral Correlates*, 19 AIDS S27 supp. 1 (2005), available at http://www.researchgate.net/profile/Richard_Wolitski/publication/7899437_Barebacking_identity_among_HIV-positive_gay_and_bisexual_men_demographic_psychological_and_behavioral_correlates/links/00b7d51b08deea71fe000000.pdf.

¹⁴⁰ *HIV Among Gay, Bisexual, and Other Men Who Have Sex With Men*, *supra* note 6.

¹⁴¹ Corita R. Grudzen et al., *Condom Use and High-Risk Sexual Acts in Adult Films: A Comparison of Heterosexual and Homosexual Films*, 99 Supp. 1 AM. J. OF PUB. HEALTH 1 (2009), available at http://publichealth.lacounty.gov/std/docs/afi/Grudzen_AJPH_Condoms_07.pdf.

¹⁴² *Id.* at 3.

identifiable analogue subculture to the barebacking portion of the LGBTQ community.¹⁴³ Yet, the difference between unprotected sex and protected sex is still important to many heterosexual viewers. In general, some heterosexual adults harbor a variety of negative feelings about using condoms, including the beliefs that condoms could break or fail during intercourse, reduce physical sensations of pleasure, are embarrassing to purchase, and are uncomfortable to wear.¹⁴⁴

While Measure B was approved in the 2012 Los Angeles County elections, one should not interpret that success at the ballot box as a prevailing opinion among porn viewers that condoms don't matter to them. The presence of a condom on camera can be contrary to the message adult filmmakers wish to send. People view pornography for many reasons, one of which is to escape their reality and enjoy a virtual one, uninhibited by practical concerns about responsibility and consequences.¹⁴⁵ Adult films may not be popular for their rich screenplays and complex characters, but essential plot characteristics like character identity and inter-character relationships can be vitally important to those films. If producers want to film a scene calling for sexual acts between a monogamous married couple, one could imagine how a performer using a condom might break the viewer's suspension of disbelief and detract from the credibility of the film as a whole. If one considers a more extreme but not implausible scenario, Measure B might also prohibit a monogamous, married couple from filming their unprotected sexual exploits for commercial gain; while those two people likely do not pose the HIV risks to one another that Measure B is designed to prevent, the law arguably prohibits

¹⁴³ Birkhold, *supra* note 135, at 1824 (“The expression, and the social and political meaning behind [barebacking], does not exist in straight pornography in the same manner.”). Birkhold argues that Measure B is content-neutral but fails intermediate scrutiny because it fails to leave open ample alternative methods of communication. *Id.* at 1823. Birkhold also argues, as this Note does, that adding a condom to the bareback video changes the meaning of the speech itself. *Id.*

¹⁴⁴ Kyung-Hee Choi et al., *What Heterosexual Adults Believe About Condoms*, 331 NEW ENG. J. MED. 6, 6-7 (Aug. 11, 1994). (noting that of 5331 heterosexual survey respondents ages 18-49, 54% believed condoms could fail, 41% believed they reduced pleasure, 35% expressed embarrassment when purchasing them, and 21% reported discomfort when wearing them).

¹⁴⁵ 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, 150 (2013). (“According to consumers of adult films . . . the content of adult films is a fantasy created by the sexual encounters on-screen, and the manner in which those sexual encounters occur is inextricably tied to that fantasy.”).

their expressive conduct.¹⁴⁶ For all these reasons, Measure B's impact on the actual content of adult films might not be as minimal as the Ninth Circuit describes it.

Another factor for evaluating whether Measure B's impact is *de minimis* is whether adult filmmakers are actually required to show the use of condoms on camera. The law's supporters argued that Measure B contains no language requiring producers to actually show performers using condoms on camera.¹⁴⁷ Therefore, any impact on the actual content of the adult films is *de minimis*, especially in light of the fact that "filmmakers can create the illusion of condomless sexual intercourse through special effects, camera angles, and editing."¹⁴⁸ This position must have resonated with the Ninth Circuit, which stated in a footnote that even if unprotected sex were the relevant First Amendment expression, Measure B would not "prohibit the depiction of condomless sex," but would restrict "only the way the film is produced," particularly if the district court determines on remand "that special effects could be used to edit condoms out of adult films."¹⁴⁹

This view demonstrates both a lack of understanding about how special effects work and an unrealistic expectation of how effective they would be at removing condoms from footage. Editing out condoms in post-production would impose high costs on producers, and would effectively prevent smaller-budget adult filmmakers from competing in the same arenas as large production companies. Adult films aren't budgeted like traditional feature films.¹⁵⁰ In an industry like adult films, where the average budget for a feature-length film is only approximately \$25,000,¹⁵¹ finances must be tightly controlled. Larger budget adult films have gained some popularity in the last few years,¹⁵² but they are exceptions to the industry norm.

¹⁴⁶ See Christopher A. Ramos, Note, *Wrapped in Ambiguity: Assessing the Expressiveness of Bareback Pornography*, 88 N.Y.U. L. REV. 1839, 1871-72 (2013).

¹⁴⁷ Intervenor Defendants-Appellees' Answering Brief at 2, 13, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

¹⁴⁸ *Id.* at 37.

¹⁴⁹ *Vivid Entm't, LLC*, 774 F.3d at 579, n.6.

¹⁵⁰ Four of the five top-grossing, non-animated feature films of 2014 (*The Hunger Games: Mockingjay—Part One*, *Guardians of the Galaxy*, *Captain America: The Winter Soldier*, and *The Hobbit: The Battle of the Five Armies*) had production budgets of \$125 million or more. See *2014 Domestic Grosses*, BOXOFFICEMOJO.COM, <http://boxofficemojo.com/yearly/chart/?yr=2014&p=htm> (last updated Feb. 26, 2015 8:36 AM); *The Hobbit: Battle of the Five Armies*, IMDB.COM, <http://www.imdb.com/title/tt2310332/> (last visited Mar. 17, 2015).

¹⁵¹ Matt Richtel, *Lights, Camera, Lots of Action. Forget the Script*, N.Y. TIMES (July 7, 2009), <http://www.nytimes.com/2009/07/08/business/media/08porn.html>.

¹⁵² *Pirates II: Stagnetti's Revenge*, the popular sequel to the hit adult film *Pirates: XXX*, had an estimated budget of \$8 million. *Box Office / Business for Pirates II:*

The added costs of special effects to digitally remove any condoms from a film will likely prove too burdensome for some producers, forcing them to give in to the condom requirement, resort to trick shots that obstruct view of the condoms, or merely simulate rather than actually depict sex acts. Even those producers who can afford these special effects and choose to implement them in their films will have to accept the practical imperfections of computer generated imagery. The biggest-budget adult films do not have the kind of financial freedom to pay for Industrial Light & Magic¹⁵³ to conduct their computer generated imagery.¹⁵⁴ And while it may be *technically* true that filmmakers are not required to actually show the condoms on camera,¹⁵⁵ using special effects, trick camera angles, or simulated sex acts could all interrupt viewers' suspension of disbelief and materially alter adult films.¹⁵⁶

The Ninth Circuit's opinion in *Vivid Entertainment* too narrowly defines the relevant, protected First Amendment message in these condomless adult films. The condom itself is not just a prop or costume piece; it conveys messages about real-life risks, the relationship between the characters, the sexual identities of the performers and viewers, and the setting in which the scene takes place. Moreover, the average porn viewer is perfectly capable of appreciating those differences. It doesn't take a degree in English Literature or Film Studies to see a condom and infer the types of information listed above. Measure B will impose substantial restrictions on those producers who wish to depict consenting adults engaging in condomless sex. While it is conceivable that special effects could ameliorate the visual impact of the condom in these scenes, they aren't a realistic alternative, given the budget and time constraints and the practical limitations of special effects. Nor is the solution simply to require adult filmmakers to shoot

Stagnetti's Revenge, IMDB.COM, http://www.imdb.com/title/tt1266097/business?ref_=tt_dt_bus (last visited Feb. 25, 2015).

¹⁵³ Industrial Light & Magic is one of the foremost special effects companies in the world, founded by George Lucas in 1975, and responsible for the visual effects from many of the most popular films of the last few decades. See INDUS. LIGHT & MAGIC, <http://www.ilm.com>.

¹⁵⁴ Bryn Pryor, *How the Porn Industry Set the Stage for Micro-Budget Filmmaking*, INDIEWIRE.COM (Feb. 6, 2015), <http://www.indiewire.com/article/how-the-porn-industry-set-the-stage-for-micro-budget-filmmaking-20150206> ("The average five-scene, two-hour feature costs around \$25,000 all-in, post included.").

¹⁵⁵ Intervenor Defendants-Appellees' Answering Brief at 2, 13, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

¹⁵⁶ Brief of Plaintiffs-Appellants at 41-42, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

from such angles as to avoid showing sexual penetration. If the only options for producers in Los Angeles County who don't want condoms to appear in their films are to (1) spend substantial budget resources on VFX or (2) film from angles that conceal the condom, the producers will choose the latter; the measure will operate as a de facto regulation against "hardcore" pornography.¹⁵⁷ For those reasons, Measure B's restriction on adult films in Los Angeles County is not de minimis, but is in fact substantial. For that reason, the law should be subject to strict scrutiny.

IV. THE CONDOM MANDATE: A NECESSARY RESTRICTION

Whether strict scrutiny or intermediate scrutiny is the proper standard, most people would concede that the government generally has a compelling interest in preventing the spread of infectious diseases among its citizens. In this case, the plaintiffs didn't challenge the government's interest in the health of its citizens, but instead argued that requiring condoms in adult films to prevent the spread of HIV/AIDS to the general public was a solution in search of a problem.¹⁵⁸ Put differently, they did not believe that performers actually spread disease among each other and in the outside community at such a rate as to create a meritorious problem. That's been one of the contentious issues throughout this litigation: is there any proof that adult film actors are endangering public health?

We know little about the prevalence of infectious diseases on adult film sets, and even less about how often those infections are spread to the larger community. Because adult film performers "are a highly stigmatized population and are a difficult population to identify for any study," it is difficult to establish what percentage of the industry is infected with any given STD.¹⁵⁹ While it may seem perfectly logical that Measure B's condom requirement

¹⁵⁷ "Hardcore" pornography depicts actual sexual penetration while "softcore" pornography does not. See *Hard-core Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/hard-core> (last visited Feb. 25, 2015) ("[O]f pornography: containing explicit descriptions of sex acts or scenes of actual sex acts—compare soft-core.")

¹⁵⁸ Brief of Plaintiffs-Appellants at 37, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445) ("There is thus no basis for evaluating the government interest in enforcing Measure B, identifying an actual problem in need of solving, or establishing a direct causal link between adult film and the spread of STDs, as constitutional scrutiny requires.") (internal quotes omitted).

¹⁵⁹ Cristina Rodriguez-Hart et al., *Sexually Transmitted Infection Testing of Adult Film Performers: Is Disease Being Missed?*, SEXUALLY TRANSMITTED DISEASES (2012), available at http://www.aidshealth.org/wp-content/uploads/2012/11/OLQ201418_1.pdf (finding that among a sample group of 168 adult film performers, 47 (28%) tested positive for gonorrhea or chlamydia over the course of 4 months).

could prevent porn stars from passing their infections on to the general population of Los Angeles County, plaintiffs argue that the empirical data simply doesn't exist *en masse* to support or refute that proposition.¹⁶⁰ Plaintiffs argue that because there is no clear link between unprotected sex in the adult film industry and HIV infections in the populous at large, the law should not pass constitutional muster.¹⁶¹

One point of uncertainty in this case, at least in the district court, was the degree of correlation that Measure B's proponents had to show between a condom requirement and a reductive effect on HIV transmission. Generally, local governments are not required to commission their own studies or find new evidence linking a law to undesirable secondary effects, and may instead rely upon research previously conducted in other locations.¹⁶² Provided that local governments rely upon evidence that "is reasonably believed to be relevant to the problem that the city addresses," they are not required to act as independent research hubs in order to confront the secondary effects of protected expression.¹⁶³ Vivid Entertainment argued that the County's failure to mention the adult film industry in its recent comprehensive HIV/AIDS study and plan¹⁶⁴ reveals that unprotected sex between adult film performers does not play "any significant role in the incidence of HIV in the county."¹⁶⁵ After all, if this was truly a problem in need of a solution, why wouldn't it arise in a study about the major contributors to HIV/AIDS in the County?

Here, Los Angeles presents a particularly difficult issue because the adult film industry is overwhelmingly concentrated within the area;¹⁶⁶ studies from other locations about the spread of STDs from the adult film industry to general populations are not available because there aren't meaningful sample sizes in many

¹⁶⁰ Brief of Plaintiffs-Appellants at 21, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445) ("Indeed, there is no record evidence in the first instance that [HIV] transmissions from adult film performers to the public occur.").

¹⁶¹ Brief Of Plaintiffs-Appellants at 21, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

¹⁶² *Id.* at 42-44.

¹⁶³ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (holding that the City of Renton, WA could justify its adult zoning ordinance by relying upon studies conducted in nearby Seattle, WA).

¹⁶⁴ *Id.*

¹⁶⁵ HUSTED, *supra* note 2.

¹⁶⁶ Brief of Plaintiffs-Appellants at 43, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

¹⁶⁷ Josh Sanburn, *Sexodus: Porn Industry Mulls a Future Outside L.A.*, TIME MAG. (Sept. 13, 2013), <http://nation.time.com/2013/09/13/sexodus-porn-industry-mulls-a-future-outside-l-a/>.

places outside of Los Angeles County. But the AIDS Healthcare Foundation argued that Measure B is based upon Los Angeles' own findings that in 2009, approximately 20% of the adult film industry was infected with a sexually transmitted disease.¹⁶⁷ Even in 2009, the County concluded that "screening alone is insufficient to prevent STDs and HIV/AIDS" and "other preventive measures . . . should be employed . . . such as condom use."¹⁶⁸ It's not a smoking gun link between the adult film industry and infectious diseases in the general public, but the idea that the condom mandate will reduce STDs among performers and the public at least accords with our common sense notions about safer sex practices.

But that leads to the larger issue of whether this condom requirement is really necessary to protect public health. Many within the adult film industry have protested Measure B because they believe the industry's own testing standards and self-policing are more than effective controls on the spread of sexually transmitted diseases among performers. Diane Duke, the president of the Free Speech Coalition, says "it's much safer . . . to be a performer . . . in our industry than just out in the general public, meeting new people and having sex that way."¹⁶⁹ However, Measure B's proponents argue that the industry's testing simply is not effective enough at curbing the spread of blood borne pathogens between performers, a conclusion supported by the Los Angeles County Department of Health in 2009, finding that industry "screening alone is insufficient to prevent STDs and HIV/AIDS."¹⁷⁰ Since Vivid Entertainment and the porn industry plaintiffs in the case at issue imply that industry standards make Measure B a "solution in search of a problem,"¹⁷¹ whether blood testing alone is a sufficient safeguard is an integral question in assessing Measure B's merits.

In 1998, Dr. Sharon Mitchell, a former adult film actress, founded the Adult Industry Medical Health Care Foundation (AIM) with the goal of preventing the spread of HIV/AIDS

¹⁶⁷ Memorandum from Jonathan E. Fielding to Supervisors, *supra* note 87, at 2. By comparison, this memorandum cites that only 2.4% of the general public was infected with an STD, and only 4.5% of the population from the most infected area of the Los Angeles County (SPA 6). *Id.*

¹⁶⁸ *Id.* at 3.

¹⁶⁹ Mandalit Del Barco, *New HIV Cases Spotlight Adult Film Industry's Testing System*, NAT'L PUB. RADIO (Sept. 10, 2013), <http://www.npr.org/2013/09/10/221006125/hiv-outbreak-spotlights-adult-film-industrys-testing-system>.

¹⁷⁰ Memorandum from Jonathan E. Fielding to Supervisors, *supra* note 87, at 3.

¹⁷¹ Intervenor Defendants-Appellees' Answering Brief at 27, *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (No. 13-56445).

between performers through increased testing.¹⁷² AIM's goal was to provide specialized clinic services that catered to adult performers and producers; AIM maintained a database of performer test results online that producers could check for the most recent information about a performer's bill of health.¹⁷³ However, AIM had to declare bankruptcy and terminate services after Measure B's proponent, the AIDS Healthcare Foundation, filed suit in the wake of an online medical records leak, claiming that the database violated performers' privacy rights.¹⁷⁴ The AHF used AIM's closing as an opportunity to continue publicly pushing for mandatory condom use in the industry.¹⁷⁵ The fact that AHF helped close the industry's performer testing infrastructure and now defends a law requiring performers to use condoms, largely because they say testing standards are not sufficient to prevent the spread of HIV, only underscores the long-standing entanglement between Measure B's proponents and the porn industry. Measure B was by no means the first shot fired in a long-standing battle.

No matter how often the industry chooses to test its performers, the science behind those blood tests will inherently impose some limits on their preventative effectiveness. One such limitation is that it takes time for HIV to be detectable within the human body, otherwise known as a test's "windows period."¹⁷⁶ Currently, most adult film performers have their blood tested for HIV and other blood borne pathogens every 14 to 28 days.¹⁷⁷ The porn industry widely uses RNA testing to detect HIV in performers, which can identify infections after 9 to 11 days of viral exposure.¹⁷⁸ The problem with these testing limitations is that, if a performer is exposed to HIV several days

¹⁷² Nick Madigan, *Voice of Health in a Pornographic World*, N.Y. TIMES (May 10, 2004), <http://www.nytimes.com/2004/05/10/us/voice-of-health-in-a-pornographic-world.html>.

¹⁷³ Dennis Romero, *Porn Clinic AIM Closes For Good: Valley-Based Industry Scrambles to Find New STD Testing System*, L.A. WKLY. (May 3, 2011), http://blogs.laweekly.com/informer/2011/05/porn_clinic_closed_aim_testing.php.

¹⁷⁴ *Id.*

¹⁷⁵ Press Release: AIM Closed, Condoms Should Follow, AIDS Healthcare Found. (May 3, 2011), *available at* <http://www.marketwired.com/press-release/aim-closed-condoms-should-follow-says-ahf-1509625.htm>.

¹⁷⁶ *Testing for HIV*, FOOD AND DRUG ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, <http://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/HIVHomeTestKits/ucm126460.htm> (last updated Aug. 8, 2013).

¹⁷⁷ Sydney Lupkin, *Porn Industry Lifts Production Ban, Increases STD Testing*, ABC NEWS (Sept. 17, 2013), <http://abcnews.go.com/blogs/health/2013/09/17/porn-industry-lifts-production-ban-increases-std-testing/>; Mandalit Del Barco, *supra* note 169.

¹⁷⁸ *See* Testing for HIV, San Francisco AIDS Foundation, SFAF.org, <http://sfaf.org/hiv-info/testing/> (last visited Apr. 15, 2015); Chris Morris, *Mounting HIV Cases Have Porn Industry Questioning its Own Trade Group*, CNBC.COM (Sept. 12, 2013), www.cnn.com/id/101029395.

after his or her last HIV test, but is tested every 14 days, the test's detection limitations makes it possible for that infection to go undetected for several weeks. Assume, *arguendo*, that a performer is tested for HIV on January 1. If he or she contracts HIV on January 6, and is tested, according to schedule, on the fifteenth, the RNA test is not designed to detect that infection. The infection might not be detected until the next testing cycle, potentially 14 days later. Anyone who has sexual contact with the infected performer is at risk for HIV exposure. Adding to the windows of uncertainty about a performer's bill of health, test results usually take several days to several weeks to process.¹⁷⁹ So a performer may not know of his or her infection until a few days after being tested. Presently, the adult film industry's own procedures protect performers from other performers in these types of cases. According to the industry safety standards, a performer's test results are stored in a centralized database and, before filming, producers must "verify that performers have been tested and that those tests have been negative."¹⁸⁰ But the duration between infection and showing symptoms of HIV infection is also problematic for performers engaging in sexual activity outside the workplace; there is no database for members of the general public who have sex with adult film performers. Accordingly, the margin of error for a false negative performer HIV test extends to the general public; as long as performers have sex with non-performers, the problem is not just an industry issue.

Moreover, alternative methods of testing cannot provide the industry with a shorter window period. Antibody HIV tests, which are popular as home HIV testing kits, are not suitable since most people do not develop detectable HIV antibodies for 2 to 8 weeks.¹⁸¹ The plasma RNA tests that the industry already uses are more efficient than antibody testing, but are still subject to potentially dangerous false negatives.¹⁸² Testing technologies continue to improve, as recently developed fourth-generation HIV testing standards reduced window periods by an estimated five days.¹⁸³ But whether porn producers can reasonably rely upon the accuracy of a performer's clean bill of health depends largely upon

¹⁷⁹ *Testing for HIV*, *supra* note 176.

¹⁸⁰ *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 581 (9th Cir. 2014).

¹⁸¹ *Testing Makes Us Stronger: HIV/AIDS Facts*, U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://gettested.cdc.gov/stronger/hiv/index.html> (last visited Feb. 25, 2015).

¹⁸² *Morris*, *supra* note 178.

¹⁸³ James W. Galbraith, Jr., MD, *Fourth-Generation HIV Tests*, MEDSCAPE.COM, <http://emedicine.medscape.com/article/1982802-overview> (last updated Mar. 26, 2014).

the current limitations of HIV testing and scientists' continued development of those technologies.

As to whether mandatory condoms are more effective than current industry testing standards, some performers and producers express doubts while others embrace condoms for all scenes. Some adult film production companies, like industry juggernaut Wicked Pictures and feminist adult filmmaker Tristan Taormino, already required performers in their films to use condoms.¹⁸⁴ On the other side of the debate, popular adult performer Stoya is skeptical about the efficacy of condoms in preventing HIV among porn stars because condoms break, even under routine sexual circumstances.¹⁸⁵ Performers in adult films engage in much longer instances of sexual activity than non-performers, male performers are typically better endowed than the average man, and performers' sexual activities are often more vigorous and aggressive than typical intercourse.¹⁸⁶

The adult film industry's anti-condom push also seems to be inconsistent with the wishes of some of its own performers. While producers publicly state that performers are free to ask for condoms in any given scene, some performers like recently-infected Cameron Bay say that in reality, performers aren't so free to ask for condoms because doing so will cost them their roles.¹⁸⁷ Performer Stoya seems to be unhappy with both the AHF and the Free Speech Coalition's agendas:

The most grounded and realistic things I've heard being said in all of this are coming out of the mouths of performers, and neither the AHF or the Free Speech Coalition . . . seem to be doing much listening to us. In my ideal world, the people who are supposedly concerned with the health and well-being of adult performers would listen to us as a group . . . Rather than government mandated condom use and the avoidance of those laws, adult performers would continue to use regular testing and have an actual option to use a condom whenever they please.¹⁸⁸

¹⁸⁴ Chris Morris, *Condoms in Porn? Just Another Day at Wicked Pictures*, CNBC.com (Jan 15, 2013), <http://www.cnbc.com/id/100359796>; Elizabeth Cohen, *Porn Producer Vows to Mandate Condoms After HIV Scare*, CNN.COM (Sept. 20, 2013), http://www.cnn.com/2013/09/20/health/porn-industry-condoms-hiv/?hpt=hp_t3.

¹⁸⁵ Stoya, *Stoya on HIV Transmission in Pornography*, VICE.COM (Aug. 29, 2013), <http://www.vice.com/read/stoya-on-hiv-transmission-in-pornography>.

¹⁸⁶ *Id.*

¹⁸⁷ Abby Sewell, *Tearful Porn Actress Speaks Out About HIV Risk in Adult Film Industry*, L.A. TIMES (Sept. 18, 2013), <http://www.latimes.com/local/lanow/la-me-ln-porn-hiv-20130918,0,3425220,full.story>. Perhaps it is time for adult film performers to unionize, as they are not a part of the Screen Actors Guild despite being screen actors.

¹⁸⁸ Stoya, *supra* note 185.

It is disturbing that some performers want to use condoms but feel compelled to stifle those concerns or lose their jobs. The industry cannot continue to bury its head in the sand about condoms; they are not fail safe, but adding an additional level of pathogen protection at the request of performers is only reasonable. Perhaps, for those performers who feel like they cannot speak up and request a condom during filming, Measure B can provide an additional excuse to insist on safer work practices.

The tough reality for the adult film industry and for free speech advocates is that current industry testing standards simply are not, by themselves, effective enough at curbing the spread of infectious diseases. Performers still contract sexually transmitted diseases at a higher rate than the general public,¹⁸⁹ and HIV infections continue to endanger the lives of performers. Even if the industry would rather take infection risks on as an occupational hazard and keep regulations like Measure B from affecting their films, more safeguards are necessary. If performers are passing infections they receive from each other onto members of the general public, which even without conclusive evidence is still logically probable, then Measure B is protecting the public, and not just performers.

Even if, as some performers argue, condoms are less effective in porn than in the general public because porn scenes differ in their degree of physicality and duration, the condom requirement still makes many performers safer. Just because the solution is not a cure-all means of preventing the spread of HIV does not mean that it is not a suitable means of achieving the government's interest. Until HIV testing windows are reduced, it is unlikely that many courts will favor a testing-only regime over a condom requirement for adult film stars, no matter what level of scrutiny that requirement faces.

CONCLUSION

While the Los Angeles County Measure B condom mandate is an unfortunate, substantial limitation on protected First Amendment expressive activity, it is a necessary restriction. Despite disagreement from the porn industry, it seems that requiring performers to wear condoms will, at least to some degree, help prevent the spread of sexually-transmitted disease among performers and to the general public. The Ninth Circuit's opinion in *Vivid Entertainment* too narrowly defines the

¹⁸⁹ Memorandum from Jonathan E. Fielding to Supervisors, *supra* note 87, at 2.

protected expressive activity, and erroneously argues that the condom requirement is a de minimis restriction. Condoms themselves limit the messages that some adult filmmakers wish to convey; they substantially change the on-screen content of adult films in a way that is appreciable to viewers. Moreover, any suggestions that special effects or creative camera angles are viable methods to relieve filmmakers from actually showing condoms on film are both misinformed and impractical. Without doubt, Measure B will change what adult films look like in Los Angeles County. But in the interests of public health and performer safety, Measure B's condom mandate would be constitutional even under strict scrutiny. To that end, while the Ninth Circuit's validation of Measure B comes as a loss to free speech advocates, it remains a necessary limit on free expression that could very well save the lives of performers and citizens of Los Angeles County. For the time being, that's a wrap on unprotected adult films in Los Angeles.

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