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Unwrapped: How the Los Angeles County Safer Sex in the Adult Film Industry Act's Condom Mandate Hurts Performers & Violates the First Amendment

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UNWRAPPED: HOW THE LOS ANGELES COUNTY SAFER SEX IN THE ADULT FILM INDUSTRY ACT'S CONDOM MANDATE HURTS PERFORMERS & VIOLATES THE FIRST AMENDMENT

Jason Shachner[†]

CONTENTS

INTRODUCTION	345
I. BACKGROUND	350
<i>A. Structure of the Adult Film Industry in Southern California</i>	350
<i>B. The Adult Industry Medical Healthcare Foundation</i>	352
<i>C. The 2004 HIV Outbreak and AIM's Response</i>	354
<i>D. The Fall of AIM and the Rise of Measure B</i>	356
II. COUNTY OF LOS ANGELES SAFER SEX IN THE ADULT FILM INDUSTRY ACT	359
III. WHY DOES MEASURE B VIOLATE THE FIRST AMENDMENT?	360
<i>A. A Primer on the First Amendment</i>	360
<i>B. Measure B is Not a Content-Based Restriction on Free Speech, and the Supreme Court Would Not Subject It to Strict Scrutiny</i>	362
<i>C. Measure B Should Not Survive Intermediate Scrutiny</i>	364
1. Measure B Serves a Substantial Government Interest.....	365
2. Measure B Does Not Advance the Government's Interest	365
IV. THE PERFORMER AVAILABILITY SCREENING SERVICES AS REGULATOR OF THE ADULT FILM INDUSTRY	371
CONCLUSION	375

INTRODUCTION

The consistent and correct use of male latex condoms is one of the most effective methods of reducing the risk of sexually transmitted infections (STIs) and human immunodeficiency virus (HIV) transmission.¹ In the U.S., only two of one hundred condoms break when used

† J.D. candidate, 2014, Case Western Reserve University School of Law; B.S., 2009, Florida State University. Many thanks to: Professor Sharona Hoffman for her guidance and feedback; Professor B. Jessie Hill for her assistance; Michelle Murray for listening to me talk endlessly about this topic; and the Health Matrix staff.

1. CTRS. FOR DISEASE CONTROL & PREVENTION, CONDOM FACT SHEET IN BRIEF 1 (2012), *available at*

correctly.² Condom use is clearly the most effective and prudent method of preventing the spread of STIs and HIV. Then why is the adult film industry (AFI) fighting the Los Angeles Safe Sex in the Adult Film Industry Act (Measure B) that requires performers to use “condoms during any acts of vaginal or anal sexual intercourse?”³ There are two reasons: the condom mandate is damaging to performer health and the mandate infringes on adult film producers’ (producers) First Amendment rights.

Sex in adult films is dramatically different from sex in the average American bedroom. The average American will likely never experience the sexual practices that are commonly performed in adult films. A content analysis of fifty randomly selected heterosexual adult films found that 42% of the scenes involved anal intercourse, 94% involved oral-genital or oral-anal contact, and 22% involved anal-to-oral penile insertion.⁴ The duration of sexual intercourse required to produce even the shortest adult film scene, as one performer characterized it, is a minimum of “half an hour of hard thrusting by a well-endowed man.”⁵ This thirty-minute minimum is significantly longer than what sex therapists described as “too long” for comfort.⁶ The average size of a male performer’s erect penis is eight inches, whereas the average American woman is likely to encounter a man whose erect penis is less than six inches.⁷ Such difference in sexual activity led one performer to describe sex in the adult film industry (AFI) as follows, “This is not making love It’s athletic. It’s sweaty. It’s done for the camera.”⁸

Condoms, coupled with the sexual acrobatics the AFI requires, create unique problems that the average sexually active American is

<http://www.cdc.gov/condomeffectiveness/docs/CondomFactsheetInBrief.pdf>.

2. CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT: 1998 GUIDELINES FOR TREATMENT OF SEXUALLY TRANSMITTED DISEASES 4 (Jan. 23, 1998), *available at* <http://www.cdc.gov/mmwr/pdf/rr/rr4701.pdf>.
3. L.A. CNTY., CAL. CODE tit. 11, ch. 39, § 110(A) (2013).
4. Corita R. Grudzen et al., *Condom Use and High-Risk Sexual Acts in Adult Films: A Comparison of Heterosexual and Homosexual Films*, 99 AM. J. PUB. HEALTH S152, S154 (2009).
5. Hugo Schwyzer, *Why Porn Sex Is the Safest Sex*, JEZEBEL (Oct. 5, 2012, 3:40 PM), <http://jezebel.com/5948719/why-porn-sex-is-the-safest-sex>.
6. Eric W. Corty & Jenay M. Guardiani, *Canadian and American Sex Therapists’ Perceptions of Normal and Abnormal Ejaculatory Latencies: How Long Should Intercourse Last?*, 5 J. SEXUAL MED. 1251, 1254 (2008).
7. *Sexy Little Numbers*, MEN’S HEALTH, Mar. 2004, at 168.
8. Jim Newton, *Porn, Safe Sex and Measure B*, L.A. TIMES (Oct. 1, 2012), <http://www.latimes.com/news/opinion/commentary/la-oe-newton-condoms-porn-20121001,0,7973598.column>.

unlikely to encounter. For men, condoms make the performance of their job more difficult.⁹ For women, condoms not only make the job more difficult but also increase the risk of injury.¹⁰ At the beginning of her career, one performer insisted on requiring her co-performers to wear a condom.¹¹ After performing only one scene she “was so abraded and uncomfortable by the condom that she feared she could not return for her second, which she was under contract to perform.”¹² Other female performers echo this aversion to condom use during scenes. One performer observed that, “Some people are allergic to condoms . . . One time I swelled up like a balloon and couldn’t work because of whatever was on the condom.”¹³ Nina Hartley, a former nurse and a performer in adult films since 1984, stated:

The average length of intercourse for most Americans is 10 minutes. [In my work the average length is] 30 to 60 minutes . . . it’s uncomfortable . . . it’s a friction burn, and it opens up lesions in the genital mucosa. I could handle two to three condom scenes a month. But [performers] are paid by the scene, and I couldn’t do three in a week.¹⁴

The risk of injury is even higher when a female performs an anal sex scene. According to the U.S. Food and Drug Administration, condoms are not only more likely to break during anal intercourse, but anal intercourse with condoms can “cause tissue in the rectum to tear and bleed. These tears allow disease germs to pass more easily from one partner to the other.”¹⁵ Female performers recognize this risk, and one female performer stated: “When you’ve got a condom on a big guy who’s working with a [small woman] and you have to do anal, you run the risk of tearing. If it’s me in an anal scene, I prefer no condom because I don’t want to get hurt.”¹⁶

9. 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, 248 (2012).

10. *Id.* at 248-49.

11. Newton, *supra* note 8.

12. *Id.*

13. Tibbals, *supra* note 9, at 243.

14. Donald G. McNeil Jr., *Unlikely Model in HIV Efforts: Sex Film Industry*, N.Y. TIMES (Nov. 5 2012), http://www.nytimes.com/2012/11/06/health/unlikely-model-for-hiv-prevention-porn-industry.html?pagewanted=all&_r=0.

15. *Condoms and Sexually Transmitted Diseases, Brochure*, FOOD AND DRUG ADM’N (Dec. 1990), <http://www.fda.gov/ForConsumers/byAudience/ForPatientAdvocates/HIVandAIDSActivities/ucm126372.htm#strong>.

16. Tibbals, *supra* note 9, at 243.

Measure B is reasonable when viewed in the context of average, everyday sexual activity. A survey of Canadian and American sex therapists found that the desirable duration of intercourse is approximately eight minutes, with twenty minutes considered “too long.”¹⁷ A woman is more likely to experience vaginal intercourse (89.2%) than anal intercourse (21.2%) in her lifetime.¹⁸ Certainly, the average sexually active American would not consider condoms anything more than a slight annoyance. However, the sexual activity of a performer is anything but average.

Failure to use a condom during intercourse increases the risk of contracting an STI. Performers recognize this and regard STI infection as an “expected occupational risk.”¹⁹ Some argue that performers accept this risk because they are vulnerable or “damaged” individuals. One performer attributed such a general misunderstanding to the passage of Measure B, stating: “When you mention porn to some [people] you just see the sleazy guy with the gold chains and some young helpless girl in a hotel room and that’s not how it is at all.”²⁰ A study that “compared the self-reports of 177 porn actresses to a sample of women matched on age, ethnicity, and marital status” refuted the belief that female performers “have higher rates of childhood sexual abuse (CSA), psychological problems, and drug use compared to the typical woman.”²¹ The study found that there was “no significant difference” between the groups regarding CSA;²² that performers were “more concerned” about contracting an STI than nonperformers;²³ that performers reported significantly higher levels of self-esteem than nonperformers;²⁴ that performers reported higher levels of sexual satisfaction, positive feelings, social support, and spirituality than nonperformers;²⁵ and that performers appear to have “tried many more different types of drugs compared to

17. Corty & Guardiani, *supra* note 6, at 1254.

18. Debby Herbenick et al., *Sexual Behavior in the United States: Results from a National Probability Sample of Men and Women Ages 14-94*, 7 J. SEXUAL MED. 255, 262-63 (2010).

19. Tibbals, *supra* note 9, at 250.

20. Erin Gloria Ryan, *Dental Dams and Latex Gloves in Porn Are Just Solutions in Search of a Problem*, JEZEBEL (Nov. 9, 2012), <http://jezebel.com/5958951/la-passes-law-requiring-condoms-possibly-dental-dams-and-latex-gloves-in-porn>.

21. James D. Griffith et al., *Pornography Actresses: An Assessment of the Damaged Goods Hypothesis*, 50 J. SEX RES. 623, 623 (2012), available at <http://www.tandfonline.com/doi/pdf/10.1080/00224499.2012.719168>.

22. *Id.* at 625.

23. *Id.* at 626.

24. *Id.*

25. *Id.*

[nonperformers], although there was only one significant difference related to recent drug use,” as compared to similarly situated women.²⁶

Performers have long taken effective precautions against the transmission of STIs and HIV. The AFI’s intra-industry mandatory testing regime, originally implemented by the Adult Industry Medical Healthcare Foundation (AIM) and currently enforced by Performer Availability Screening Services (PASS),²⁷ has led to significantly lower incidences of HIV infection among performers than among the general public.²⁸ Drafters of the condom mandate in Measure B were likely acting in good faith to protect both performers and the public from contracting STIs and HIV. However, the condom mandate is not only unnecessary but also restricts performers’ and producers’ First Amendment rights.²⁹ James Deen, a male performer, claims that Measure B “unfairly singles out” the AFI while other entertainment industries are given exemptions from state safety laws.³⁰ For example,

[A] law requires motorcycle riders in the state of California to wear a helmet. But the movie industry isn’t subject to the law, provided the helmet-less stunts are executed in a controlled environment by professionals. Having sex without a condom is a risky behavior, but it’s much less risky when you consider the voluntary testing actors undergo and the controlled environment of a shoot.³¹

This Note argues that the current testing regime is superior to Measure B’s condom mandate in protecting performers and meeting their unique healthcare needs, without infringing on producers’ First Amendment rights. In Part I, this Note provides insight into the structure of the AFI in Southern California, discusses how the AFI successfully self-regulates, and explores the rise and fall of the Adult Industry Medical Healthcare Foundation. This Note focuses on the portion of Measure B that mandates condom use and ignores other constitutional and compliance issues that the government could cure by redrafting the ordinance.³² The condom mandate is the most critical

26. *Id.* at 627.

27. *Changes Name to “PASS”*, PASS BLOG (Aug. 23, 2013), <http://blog.aphss.org/?p=449>.

28. *See also* Alexandre Padilla, *Self-Regulation in the Adult Film Industry: Why Are HIV Outbreaks the Exception and Not the Norm?* 21-22 (Oct. 25, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285283.

29. *See infra* Part III.

30. Ryan, *supra* note 20.

31. *Id.*

32. *See generally* Complaint, *Vivid Entertainment, LLC v. Fielding*, 2013 WL 136043 (C.D. Cal. 2013) (asserting that the Measure B is vague, over- and

portion of Measure B and other localities are likely to mimic it. For instance, on February 14, 2013, California Assembly Member Isadore Hall III introduced a bill, AB 332, that would mandate condom use in all adult films produced in the state.³³ Therefore, Part II only provides the basic obligations that Measure B imposes on the AFI. Part III concludes that a court should apply intermediate scrutiny to Measure B and that the United States Supreme Court would deem a condom mandate to be unconstitutional because it does not advance the government's interest of public health. Part IV argues that the current intra-industry testing regime is the best way to minimize the spread of STIs and HIV among performers, making the condom mandate unnecessary.

I. BACKGROUND

A. Structure of the Adult Film Industry in Southern California

The AFI produces approximately 80% of its films in Los Angeles, California.³⁴ The vast majority of those films feature heterosexual sexual activity.³⁵ The majority of the AFI's films are produced in Los Angeles because of the breadth of resources available for producing films in the area³⁶ and the California Supreme Court's decision in *California v. Freeman*, legalizing the production of hardcore pornographic films.³⁷ The only other state where the production of hardcore pornography is legally protected is New Hampshire.³⁸ In *Freeman*, the state Supreme Court made the production of hardcore pornography³⁹ legal, finding where the

under-inclusive, a violation of due process, preempted by state law, and imposes a prior restraint on speech); Ryan, *supra* note 20.

33. Terry Schanz, *Assemblymember Hall Introduces Legislation Requiring Condoms in All Adult Films Made in California*, ASMDC.ORG (Feb. 14, 2013), <http://www.asmdc.org/members/a64/news-room/press-releases/item/3050-assemblymember-hall-introduces-legislation-requiring-condoms-in-all-adult-films-made-in-california>. California's Assembly Appropriations Committee shelved the bill in May of 2013. Patrick McGreevy, *Assembly Panel Puts Hold on Condom, Bullet Tax Bills*, L.A. TIMES (May 24, 2013), <http://articles.latimes.com/2013/may/24/local/la-me-pc-porn-condom-bill-20130524>.
34. MARGARET C. JASPER, *THE LAW OF OBSCENITY AND PORNOGRAPHY* 38 (2d ed. 2009).
35. Tibbals, *supra* note 9, at 233.
36. See Richard Verrier, *Porn Producers Look Beyond L.A. Following New Condom Law*, L.A. TIMES (Nov. 13, 2012), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-onlocation-20121113,0,5772989,full.story>.
37. 758 P.2d 1128, 1135 (Cal. 1988).
38. See *State v. Theriault*, 960 A.2d 687, 692 (N.H. 2008).

defendant hired actors to perform in a film that portrayed sexually explicit acts, “no prostitution was involved and therefore no procurement for purposes of prostitution and no pandering.”⁴⁰ The Court further held that punishing the defendant under the pandering statute violated the First Amendment.⁴¹

In 2004 the Centers for Disease Control (CDC) estimated that in Los Angeles County there were 200 production companies employing approximately 6,000 workers, of whom 1,200 were workers that engaged in direct work-related sexual contact.⁴² Nearly 13,000 hardcore adult films were produced in 2006 and more than 300,000 hardcore sex scenes have been filmed since 2004.⁴³ In 2006, the AFI generated approximately \$13 billion in the United States.⁴⁴ Generally, performers based in Southern California consider working in the AFI to be their profession, as opposed to working in the AFI temporarily to supplement their income.⁴⁵ These performers also primarily work on a scene-by-scene basis with multiple production companies.⁴⁶ All of the production companies work under a “no condom” or “condom optional” policy, except for Wicked Pictures, which is the only mainstream production company that has a mandatory condom policy.⁴⁷

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39. Hardcore pornography is defined as “containing explicit descriptions of sex acts or scenes of actual sex acts.” *Hard-core*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/hard-core> (last visited Apr. 13, 2014).
40. *Freeman*, 758 P.2d 1128, 1130-31 (Cal. 1988).
41. *Id.* at 1131-35.
42. H. Rotblatt et al., *HIV Transmission in the Adult Film Industry—Los Angeles, California* 2004, CTRS. FOR DISEASE CONTROL (Sept. 23, 2005), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5437a3.htm>.
43. Chauntelle Anne Tibbals, *Sex Work, Office Work: Women Working behind the Scenes in the US Adult Film Industry*, 20 GENDER, WORK & ORG. 20, 20 (2013); Schwyzer, *supra* note 5.
44. *The Internet Porn “Epidemic”: By the Numbers*, THE WEEK (June 17, 2010), <http://theweek.com/article/index/204156/the-internet-porn-epidemic-by-the-numbers>.
45. Tibbals, *supra* note 9, at 233-34.
46. *Id.* at 234.
47. Tibbals, *supra* note 9, at 234. *See also*, Amanda Hess, *Porn Stars May Soon Have to Wear Condoms. Will You Still Watch?*, SLATE (Oct. 25, 2012, 3:18 PM), http://www.slate.com/blogs/xx_factor/2012/10/25/california_s_measure_b_what_s_so_bad_about_condoms_in_porn.html (noting that New Sensations, a production company with no policy pertaining to condoms, markets a line of adult films with condoms for “couples and women”). *Cf.* McNeil, *supra* note 14 (“Gay pornography, by contrast, has included condoms since the 1980s, because producers assume some actors are infected and because many gay men consider forced testing an invasion of privacy.”).

B. The Adult Industry Medical Healthcare Foundation

The AFI is successful at maintaining the good health of its performers. Producers and performers have strong economic incentives to ensure that all performers are free of STIs before filming. Female performers can make up to \$350,000 a year and male performers can make more than \$100,000 a year.⁴⁸ If a performer contracts an STI or if an outbreak occurs, both producers and performers can lose a substantial portion of their annual earnings. The Adult Industry Medical Healthcare Foundation (AIM) worked within the AFI and revolutionized performer health management.

AIM was founded as a private nonprofit clinic in Sherman Oaks, California and primarily served performers in the AFI.⁴⁹ Dr. Sharon Mitchell, a former performer, founded AIM in 1998 with a \$13,000 grant from the Free Speech Coalition.⁵⁰ Dr. Mitchell's goal was to start an industry-wide standard for HIV testing.⁵¹ The clinic became the AFI's preferred clinic, with some producers refusing to accept test results from any other facility.⁵² AIM tested around 1,200 performers a month, primarily for HIV, chlamydia, and gonorrhea.⁵³ Performers had to pay \$110 out of pocket for the tests.⁵⁴ AIM used a polymerase chain reaction (PCR) test for HIV DNA instead of the more standard serologic methods (i.e., enzyme-linked immunoassay (EIA) or Western blot) because the PCR-DNA test can detect an HIV infection ten to fifteen days earlier than the more standard tests.⁵⁵ An added benefit to using the PCR-DNA test is that the test "will not hide a positive reading if [a

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48. Daniel Miller, *Inside the Risky Business of Porn Star Agents*, HOLLYWOOD REPORTER (Nov. 15, 2012; 2:00 AM), <http://www.hollywoodreporter.com/news/porn-star-agents-inside-risky-390466>.
49. Rotblatt et al., *supra* note 42; Nick Madigan, *Voice of Health in a Pornographic World*, N.Y. TIMES, May 10, 2004, at A14.
50. LEGS MCNEIL ET AL., THE OTHER HOLLYWOOD 575 (2005); Madigan, *supra* note 49.
51. MCNEIL ET AL., *supra* note 50.
52. *Rob Spallone Questions AIM*, ADULT VIDEO NEWS (Apr. 23, 2004), <http://business.avn.com/articles/video/Rob-Spallone-Questions-AIM-38375.html> (quoting prominent industry attorney Paul Cambria, "I am recommending that all companies who are shooting in the state of California stay with the exclusive testing from AIM Healthcare Foundation. AIM has the track record, and the written endorsement of the Department of Health of Los Angeles. AIM has also received support of the State Assembly and the Cal/OSHA").
53. Madigan, *supra* note 49; MCNEIL ET AL., *supra* note 50. *See also Rob Spallone Questions AIM*, *supra* note 52.
54. *Rob Spallone Questions AIM*, *supra* note 52.
55. Rotblatt et al., *supra* note 42.

performer] is on medication.”⁵⁶ AIM formerly used the free chlamydia and gonorrhea tests provided by the county’s health department but switched to a different method of testing after a sharp rise in STI cases in the summer of 2003.⁵⁷ Test results from the new method were returned within two days, whereas the results from the county’s test were not returned until more than a week later.⁵⁸

AIM also maintained an online database of performers.⁵⁹ The database included information such as the performers’ legal name, a history of their test results, and production information.⁶⁰ The database required producers and performers to have user names and passwords in order to obtain access to a performer’s test results.⁶¹ This prevented performers from presenting altered or fake test results to producers and provided performers with the information they needed in order to make informed decisions about who their co-stars were.⁶² The producers were able to download this information because “performers [were] required to sign a release form allowing AIM to disclose test results to interested parties.”⁶³ Normally, producers were only permitted to see information that pertained to the performers in their scene.⁶⁴ If an outbreak occurred, AIM would create a quarantine list and distribute it to producers.⁶⁵

The standard procedure that performers generally follow before a shoot is described as follows:

First, [the performers] show each other their cellphones: Each has an e-mail from a laboratory saying he or she just tested negative for HIV, syphilis, chlamydia and gonorrhea. Then they sit beside the film’s producer . . . as he checks an industry database with

56. MCNEIL ET AL., *supra* note 50, at 578.

57. *Rob Spallone Questions AIM*, *supra* note 52.

58. *Id.*

59. Thomas J. Stanton, *AIM Health Care Goes National*, ADULT VIDEO NEWS (Oct. 7, 2006), <http://business.avn.com/articles/video/AIM-Health-Care-Goes-National-28604.html>.

60. Padilla, *supra* note 28, at 14.

61. *Id.*

62. The 1998 HIV outbreak may have been prevented if this system was in place because the performer who began the outbreak used a fake test. *See* MCNEIL ET AL., *supra* note 50 (“I think I contracted HIV through Marc Wallace. Because when I looked at his test, I saw the name Mark Goldberg—which is his real name—and I saw negative for HIV next to his name . . . Later, I saw a test from 1997, the same period when I worked with him—and it said he was a forty-four-year-old female named Mark Goldberg who was negative for HIV. Marc Wallace was thirty-nine and male.”).

63. Padilla, *supra* note 28, at 14.

64. *Id.*

65. *Id.*

their real names to confirm that those negative tests are less than 15 days old. Then . . . they yank down their pants and stand around . . . as [the producer] quickly inspects their mouths, hands and genitals for sores.⁶⁶

C. The 2004 HIV Outbreak and AIM's Response

The 2004 HIV outbreak was the first since the founding of AIM and was the organization's first real test. Only nine performers had tested HIV-positive from 1998 through 2004.⁶⁷ That is merely .003% of the adult talent pool of that period.⁶⁸

Darren James was infected with HIV while performing in an adult film in Brazil.⁶⁹ Brazil is home to Latin America's largest AFI and has been an attractive location for American producers.⁷⁰ The majority of male performers in Brazil use condoms while filming scenes involving vaginal and anal intercourse because testing is "scoffed at in Brazil as expensive and unreliable." The country has more cases of HIV or AIDS infection than any other country in the Western Hemisphere except for the United States.⁷¹ Mr. James did not wear protection while filming his scenes. When Mr. James returned to the United States he received a negative test result from AIM on March 17, 2004.⁷² AIM recommends that performers voluntarily quarantine themselves until they receive another negative test result fifteen days later. Mr. James ignored the recommendation and continued to perform in adult films. Mr. James tested HIV-positive on April 9, 2004.⁷³ AIM did not initially announce the positive result because of its policy that calls for two confirmation tests before notifying the AFI that a performer is HIV-positive.⁷⁴

66. McNeil, *supra* note 4.

67. *Day 8: LA County Health Department Seeks Involvement; Condoms May Become Mandatory*, ADULT VIDEO NEWS (Apr. 20, 2004), <http://business.avn.com/articles/video/Day-8-LA-County-Health-Department-Seeks-Involvement-Condoms-May-Become-Mandatory-38319.html>.

68. *Id.*

69. Rotblatt et al., *supra* note 42.

70. Charles Farrar, *Brazil Shakes over HIV Scare: Report*, ADULT VIDEO NEWS (Apr. 28, 2004), <http://business.avn.com/articles/video/Brazil-Shakes-Over-HIV-Scare-Report-38432.html>.

71. *Id.*

72. Rotblatt et al., *supra* note 42.

73. *Id.*

74. *Rob Spallone Questions AIM*, *supra* note 52.

After confirming the test results, AIM immediately quarantined twelve first-generation performers⁷⁵ and began the search for second-generation performers.⁷⁶ The adult film trade magazine, *Adult Video News*, reported that,

The first generation performers were required to wait thirty days, the amount of time it could take for HIV to appear in measurable quantities, before taking a PCR-DNA and RNA HIV test. If those tests come back negative, the first-generation performers will be declared ‘clear,’ and they will no longer be quarantined.⁷⁷

AIM later extended the quarantine period to sixty days because:

The rate of collection for the HIV virus is at 75 percent at 30 days, but does not hit 99 percent until 60 days. If the quarantine were only 30 days, there would still be a 25 percent chance that one of the first-generation would end up testing positive – after having been active for a month.⁷⁸

Three of the thirteen first-generation partners tested HIV-positive.⁷⁹ All three of the women engaged in unprotected sex while filming scenes with Mr. James.⁸⁰ AIM then identified all of the first- and second-generation partners⁸¹ of the three women, which came to a total of 61 performers.⁸² All of the performers were tested and all tests were negative.⁸³

An outbreak that could have led to the infection of hundreds of performers was limited to infecting only four. Since the 2004 outbreak, more than 300,000 hardcore sex scenes have been filmed with “only two cases

75. A first-generation partner is a performer who had direct sexual contact with the outbreak patient. Rotblatt et al., *supra* note 42.

76. *AIM Working to Contain HIV; Search for Second-Generation Continues*, ADULT VIDEO NEWS (Apr. 13, 2004), <http://business.avn.com/articles/video/AIM-Working-to-Contain-HIV-Search-for-Second-Generation-Continues-38255.html>.

77. *Id.*

78. *Quarantine Extended to 60 Days; Moratorium Recommended*, ADULT VIDEO NEWS (Apr. 14, 2004), <http://business.avn.com/articles/video/Quarantine-Extended-to-60-Days-Moratorium-Recommended-38258.html> (quoting Dr. Sharon Mitchell, executive of AIM: “I don’t feel comfortable leaving that 25 percent out there. We need to be absolutely certain that we’ve contained this.”).

79. Rotblatt et al., *supra* note 42.

80. *Id.*

81. A second-generation partner is a performer who had “direct sexual contact with a first-generation partner.” *Id.*

82. *Id.*

83. *Id.*

of HIV infection – both in performers who contracted the virus from untested civilian partners.”⁸⁴

D. The Fall of AIM and the Rise of Measure B

AIM’s troubles began in the summer of 2010 when two former performers filed a lawsuit alleging that “AIM violate[d] the privacy rights of performers in the adult film industry by allowing the producers of adult films online access to workers’ health care information without the individual consents and releases required by federal and California law.”⁸⁵ Diana Grandmason, the lead plaintiff in the case, explained that in order to perform, she had to “sign sweeping release-of-information forms” and expressed concern that even though she is no longer part of the industry, her private health information still remained available in the online database.⁸⁶ The AIDS Healthcare Foundation (AHF) provided the plaintiffs’ attorneys.⁸⁷ The suit was likely settled out of court because there is no record of a final order in the case.

On October 13, 2010, AIM announced that a performer, Derrick Burts, had tested positive for HIV.⁸⁸ Mr. Burts performed in both heterosexual and homosexual⁸⁹ adult films.⁹⁰ At a press conference held by AHF, Mr. Burts claimed that both he and AIM believed that he

84. Schwyzer, *supra* note 5.

85. LexisNexis Litig. Res. Comm’y Staff, *Former Porn Stars File Class Action Lawsuit Against Clinic Over Health Disclosures*, LEXISNEXIS (July 2, 2010, 1:33 PM), <http://www.lexisnexis.com/community/litigationresourcecenter/blogs/newlawsuitfilings/archive/2010/07/02/former-adult-film-stars-file-california-class-action-lawsuit-against-clinic-over-health-disclosures.aspx>.

86. *Former Adult Film Stars File California Class Action Lawsuit against AIM Porn Clinic over Health Disclosures, Notes AHF*, BUSINESSWIRE (June 27, 2010, 6:00 PM), <http://www.businesswire.com/news/home/20100627005057/en/Adult-Film-Stars-File-California-Class-Action>.

87. *Id.* The AIDS Healthcare Foundation is the largest provider of HIV/AIDS medical care in the U.S. and provides medicine and advocacy in twenty-eight countries. *Mission & History*, AIDS HEALTHCARE FOUNDATION, <http://www.aidshealth.org/about/mission-history> (last visited Mar. 3, 2014).

88. Lyla Katz, *HIV-Positive Performer Suspects Transmission at Fla. Shoot, AIM Responds*, XBIZ.COM (Dec. 8, 2010, 12:45 PM), <http://newswire.xbiz.com/view.php?id=128223>.

89. The homosexual adult film industry is primarily located in Northern California and has an industry wide mandate for condom use. Tibbals, *supra* note 9, at 235. Some in the industry are against allowing performers to do both homosexual and heterosexual shoots because the homosexual adult film industry does not mandate monthly HIV tests. Molly Hennessy-Fiske & Rong-Gong Lin II, *Porn Industry Clinic Comes under Fire for Its Handling of HIV Case*, L.A. TIMES (Oct. 15 2010), <http://articles.latimes.com/2010/oct/15/local/la-me-porn-hiv-20101015>.

90. *Id.*

contracted the virus during a homosexual film shoot.⁹¹ There is no record of AIM coming to that conclusion. A statement by an AIM attorney contradicted Mr. Burt's claim, implying that Mr. Burts was infected by his HIV-positive girlfriend.⁹² Despite the inconclusive evidence that the infection took place on an adult film set and the fact that no other performer was infected, AIM was attacked for not immediately disclosing the infected performer's private information to county health officials.⁹³ According to the Los Angeles Times, AHF "demanded that Los Angeles public health officials investigate AIM immediately, seizing records if necessary."⁹⁴ This forced AIM to respond with the following statement explaining its policies and sharply criticizing AHF:

The inflammatory comments from private entities, primarily interested in self-promotion, are based upon ignorance and fear-mongering. At this time, it is impossible to know if the patient acquired the HIV virus from private conduct or on-camera activity. The industry is behaving responsibly and cautiously, as it always has, by placing a moratorium on filming any person one or two generations removed from sexual contact with the current patient. Upon completion of testing that cohort, in about 10 days or two weeks, as well as highly sophisticated analyses of the genetic components of the infection, the nature of the exposure will be determined. The current round of crudely defamatory and baseless criticism is unrelated to genuine concerns about the patient's well being or the health and welfare of the community.⁹⁵

One performer questioned AHF's motives stating: "[The criticism of AIM] is endangering a system that works. If people really care about our health they should work with us."⁹⁶

91. *Id.*

92. The statement also noted that, "AIDS Healthcare Foundation, has a history of aggressive and hostile actions against AIM, and the most distressing aspect of this situation is that [Mr. Burts] is simply being manipulated for AHF's own purposes and in furtherance of their agenda." *Id.* See also Molly Hennessy-Fiske, *California Denies License to Porn Industry Clinic*, L.A. TIMES (Dec. 9, 2010), <http://articles.latimes.com/2010/dec/09/local/la-me-porn-hiv-20101209>.

93. See, e.g., Hennessy-Fiskey & Lin, *supra* note 89.

94. See Molly Hennessy-Fiske & Rong-Gong Lin II, *Porn Film Performer Tests Positive for HIV*, L.A. TIMES (Oct 13, 2010), <http://articles.latimes.com/2010/oct/13/local/la-me-porn-hiv-20101013>.

95. Steve Javors, *AIM Issues Statement on HIPAA Compliance*, ADULT VIDEO NEWS (Oct. 13, 2010, 3:37 PM), <http://business.avn.com/articles/video/AIM-Issues-Statement-on-HIPPA-Compliance-415572.html>.

96. Rong-Gong Lin II & Molly Hennessy-Fiske, *Porn Performers on Edge After New HIV Case*, L.A. TIMES (Oct 15, 2010, 7:52 AM),

In June 2010 the state told AIM that it was “operating as a community clinic without a license and would need to obtain one.”⁹⁷ On December 9, 2010 the state denied AIM’s application, and the clinic was forced to shut down.⁹⁸ After learning of this development, Michael Weinstein, president of AHF, called for Film L.A., the city’s film permitting organization, to stop issuing permits to adult film producers and called on the county to shut down all adult film production stating: “The adult film industry needs to shut (sic) or use condoms starting today.”⁹⁹ On February 8, 2011, AIM reopened under private ownership and claimed that it was now “[r]elieved from pointless harassment that came with oversight from the County Health Department”¹⁰⁰ AIM’s founder and CEO, Dr. Sharon Mitchell, was premature in saying, “We’re up and running and here to stay!”¹⁰¹ because AIM shut down and filed for bankruptcy three months later.¹⁰² AIM’s closing was primarily the result of the PornWikiLeaks scandal in which disgruntled former performer Donny Long¹⁰³ obtained access to AIM’s database and released the full legal names, birth dates, and stage names of more than 12,000 past and present performers.¹⁰⁴ A privacy lawsuit was filed against AIM because of the scandal and bankrupted the clinic.¹⁰⁵ AIM’s closing

<http://latimesblogs.latimes.com/lanow/2010/10/porn-performers-on-edge-after-new-hiv-case.html>.

97. Dennis Romero, *Sherman Oaks-Based Porn Industry Health Clinic Shut Down by State and L.A. County Officials*, L.A. WEEKLY (Dec. 9, 2010, 4:24 PM), http://blogs.laweekly.com/informer/2010/12/porn_clinic_shut_down.php.
98. *Id.*
99. *Id.*
100. Molly Hennessy-Fiske, *Porn Industry Healthcare Clinic Is Back in Business under New Ownership*, L.A. TIMES (Feb. 7, 2011, 6:37 PM), <http://latimesblogs.latimes.com/lanow/2011/02/porn-industry-healthcare-clinic-is-back-in-business-under-new-owners.html>.
101. *Id.*
102. Dennis Romero, *Porn Clinic AIM Closes for Good: Valley-Based Industry Scrambles to Find New STD Testing System*, L.A. WEEKLY (May 3, 2011, 4:15 PM), http://blogs.laweekly.com/informer/2011/05/porn_clinic_closed_aim_testing.php.
103. Barbie Davenport, *Porn Wikileaks Founder Allegedly Is Disgruntled Former Porn Star, Talent Agent*, L.A. WEEKLY (Apr. 11, 2011, 9:15 AM), http://blogs.laweekly.com/afterdark/2011/04/porn_wikileaks_founder_is_disg.php.
104. Barbie Davenport, *Porn Wikileaks, AIM & You: The Facts & How to Protect Yourself*, L.A. WEEKLY (Apr. 8, 2011, 2:59 PM), http://blogs.laweekly.com/afterdark/2011/04/porn_wikileaks_the_facts_how_y.php.
105. Romero, *supra* note 102.

opened the door for AHF to push for an ordinance requiring performers to wear condoms. Michael Weinstein, responding to the news that AIM had closed for good, stating:

Now that AIM has closed –and the industry “fig leaf” is gone –the responsible thing for the industry to do is to put performers’ health first and require condom-use on all adult film sets . . . [I]t is time for the Los Angeles County Department of Public Health . . . to enforce condom use on all adult film sets in the County.¹⁰⁶

II. COUNTY OF LOS ANGELES SAFER SEX IN THE ADULT FILM INDUSTRY ACT

The AIDS Healthcare Foundation is largely responsible for the passage of Measure B. The AHF asserts that it is primarily concerned with performer health and has no moral qualms with the content of adult films,¹⁰⁷ but shutting down the AFI’s successful and trusted healthcare provider was a strange way of showing support for performer health. AHF collected 371,000 signatures in order to qualify Measure B for the November 6, 2012 ballot and spent \$1.6 million in order to get the measure passed.¹⁰⁸

Measure B requires all producers¹⁰⁹ of adult films¹¹⁰ to obtain a public health permit from the Los Angeles County Department of Public Health and pay the required fee in order to engage in the legal production of an adult film in Los Angeles County.¹¹¹ The producer must “require performers to use condoms during any acts of vaginal or anal

106. *Id.*

107. See Michael Weinstein, *Condoms in Porn Are Important*, HUFFINGTON POST (Mar. 8, 2012, 2:02 PM), http://www.huffingtonpost.com/michael-weinstein/condom-use-porn_b_1313436.html.

108. Rong-Gong Lin II, *Porn Condom Measure Qualifies for Ballot*, L.A. TIMES (July 05, 2012), *available at* <http://articles.latimes.com/2012/jul/05/local/la-me-porn-condoms-20120705>; *LA County Measure B Would Enforce Existing Laws on Condom Use in Adult Films at No Cost to Tax Payers*, UPRISING (last visited Apr. 5, 2014).

109. A producer of an adult film is defined as “any person or entity that produces, finances, or directs, adult films for commercial purposes. L.A. CNTY., CAL. CODE tit. 11, ch. 39, § 75 (2013).

110. “Adult Film” is defined as: “any 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.” *Id.* at § 10.

111. *Id.*

sexual intercourse” to comply with the permit.¹¹² If a producer fails to comply with the ordinance then she is guilty of a misdemeanor, punishable by a fine of \$1,000, imprisonment in the county jail of up to six months, or both, in addition to the civil penalties of revocation or suspension of her permit and fines of up to \$500 per violation.¹¹³

III. WHY DOES MEASURE B VIOLATE THE FIRST AMENDMENT?

Measure B’s supporters assert that a condom mandate is necessary in order to “minimize the spread of sexually transmitted infection resulting from the production of adult films”¹¹⁴ Protecting the health and safety of both performers and the citizens of Los Angeles County is an important and worthy cause. However, a condom mandate is not only unnecessary but also violates the First Amendment rights of AFI producers. A U.S. District Court for the Central District of California denied in part and granted in part injunctive and declaratory relief against Measure B in a lawsuit brought by adult film producers and performers.¹¹⁵ Plaintiffs’ have filed a notice of appeal in response to the ruling.¹¹⁶

A. *A Primer on the First Amendment*

A plain reading of the First Amendment appears to forbid any government action that curtails the freedom of speech but analysis of such an action “is not always a simple task.”¹¹⁷ The First Amendment applies only to protected speech. Incitement of illegal activity, fighting words, and obscenity are categories of speech that the First Amendment does not protect.¹¹⁸ In *Joseph Burstyn, Inc. v. Wilson*,¹¹⁹ the United States Supreme Court recognized that motion pictures are fully within the protection of the First Amendment, and in *Jacobellis v. Ohio*, the Court

112. *Id.* at § 110(A).

113. *Id.* at § 120(D).

114. Los Angeles Cnty., Cal. Ordinance 181989 (2012).

115. *Vivid Entertainment, LLC v. Fielding*, 2013 WL 4451068, at *14 (C.D. Cal. Aug. 16, 2013).

116. Notice of Appeal at 3, *Vivid Entertainment, LLC v. Fielding*, No. CV 13-00190 DDP (AGRx) (C.D. Cal. Aug. 16, 2013), *available at* http://business.avn.com/downloadfile.pl?contentmap_id=526073.

117. U.S. CONST. amend. I, § 2 (“Congress shall make no law . . . abridging the freedom of speech”); *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 642 (1994).

118. ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW* 986 (3d ed. 2009).

119. 343 U.S. 495, 502 (1952).

extended that protection to sexually explicit, non-obscene material.¹²⁰ The point where an adult film becomes obscene is unclear. The best guidance available is the three-part test in *Miller v. California*, which takes into account community standards, state law, and the adult film’s artistic value.¹²¹

The Court applies a two-tiered system of review in evaluating government restrictions on speech.¹²² The Court applies strict scrutiny when the restriction is content-based and applies intermediate scrutiny when the restriction is content-neutral.

Content-based regulations “distinguish favored speech from disfavored speech on the basis of the ideas or views expressed”¹²³ For example, the Court recognized a law prohibiting candidates for judicial election from sharing their views on disputed legal or political issues as a content-based restriction.¹²⁴ The law distinguished speech on non-disputed legal or non-political issues from disputed legal issues or political issues. The government would then have the burden to prove, under the strict-scrutiny test, that the regulation “serve[s] a compelling governmental interest, and [is] narrowly tailored to further that interest.”¹²⁵

Content-neutral regulations “confer benefits or impose burdens on speech without reference to the ideas or views expressed . . .” and must meet the more permissive standard of intermediate scrutiny.¹²⁶ For example, the Court recognized an ordinance that prohibited the posting of signs on public property as a content-neutral restriction because the

120. 378 U.S. 184, 187 (1964) (“Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press . . . [b]ut . . . we held that obscenity is not subject to those guarantees.”). *See also* *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing a three part test determining obscenity and noting that “[s]tate statutes designed to regulate obscene materials must be carefully limited”).

121. *Miller*, 413 U.S. at 24 (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”).

122. CHEMERINKSY, *supra* note 118, at 1214 (3d ed. 2009).

123. *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 642 (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”).

124. *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002).

125. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

126. *Id.* (“[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny.”).

ordinance's text was silent "concerning any speaker's point of view."¹²⁷ The government then would have the burden to prove, under the intermediate-scrutiny test, that the regulation:

[I]s within the constitutional power of the Government; . . . it furthers an important or substantial government interest; . . . the governmental interest is unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹²⁸

B. Measure B is Not a Content-Based Restriction on Free Speech, and the Supreme Court Would Not Subject It to Strict Scrutiny

Measure B states that its purpose and intent is to "minimize the spread of sexually transmitted infections resulting from the production of adult films."¹²⁹ The analysis does not end merely because Measure B's purported intent is unrelated to the curtailment of protected speech. In *Turner Broadcasting System, Inc. v. F.C.C.* the Supreme Court stated:

[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases . . . [T]he mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face discriminates based on content.¹³⁰

Therefore, the nature of the restriction turns on the method of fulfilling Measure B's intent.

Measure B does not have an express content-based purpose, but in practice it restricts sexual speech on the basis of its content. Unlike the law that prohibited the posting of signs on public property that applied to all signs regardless of content, the ordinance only prohibits adult films that do not utilize condoms. Measure B distinguishes between favored speech (adult films that utilize condoms) and disfavored speech (adult films that do not utilize condoms) based on the adult film's content (whether or not condoms are utilized).

The U.S. Supreme Court has treated content-based restrictions on sexual speech as content-neutral, even if the regulation meets the

127. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984).

128. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

129. TEXT OF THE PROPOSED MEASURE: COUNTY OF LOS ANGELES SAFER SEX IN THE ADULT FILM INDUSTRY ACT, *available at* http://www.lavote.net/VOTER/PDFS/ELECTION_RELATED/11062012_LACOUNTY_WIDE_MEASURE_B.pdf [hereinafter PROPOSED MEASURE].

130. *512 U.S. 622, 642-43* (1995).

definition of a content-based restriction. The Court concedes that the complete suppression of adult films does not comport with the First Amendment; however, the Court affords such sexual speech less protection than other categories of speech.¹³¹ Justice John Paul Stevens articulated this position in *Young v. American Mini Theatres*, a case considering an ordinance that differentiated theaters based on the content of the films shown.¹³² Justice Stevens, explaining his reasoning behind regarding a content-based restriction as content-neutral, wrote:

Few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.¹³³

Measure B is not a content-based restriction on speech because the Supreme Court treats a content-based regulation as content-neutral if the predominate concern of the government is the harmful secondary effects of the speech. The Supreme Court articulated this principle in *Renton v. Playtime Theatres, Inc.*¹³⁴ *Renton* concerned a First Amendment challenge to a city ordinance that "prohibit[ed] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."¹³⁵

The ordinance in *Renton* plainly differentiated between theaters based on the content of the films the theaters presented.¹³⁶ The Supreme Court acknowledged that the ordinance appeared content-based because "the ordinance treat[ed] theaters that specialize in adult films differently from other kinds of theaters."¹³⁷ Nevertheless, the Court held that the ordinance was content-neutral because the stated *purpose* of the regulation was "aimed not at the *content* of the films shown . . . but rather at

131. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

132. *Id.* at 52 (stating that the ordinance differentiated "between motion picture theaters which exhibit[ed] sexually explicit 'adult' movies and those which [did] not").

133. *Id.*

134. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986).

135. *Id.*

136. *Id.* at 44 ("'[A]dult motion picture theater' was defined as "[a]n enclosed building used for presenting motion picture films . . . or any such visual media, distinguished or characteri[z]ed by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." (emphasis added)).

137. *Id.* at 47.

the *secondary effects* of such theaters on the surrounding community.”¹³⁸ The secondary effects that the ordinance was designed to target were crime, property values, and the overall quality of the city’s neighborhoods and commercial districts.¹³⁹ The Court reasoned that the regulations were content-neutral because the ordinance merely treated theaters differently because of the effects on their surroundings and did not completely ban adult theaters.¹⁴⁰ The Court upheld the ordinance under intermediate scrutiny because that ordinance served a substantial government interest and allowed for reasonable alternate avenues of communication.¹⁴¹

Measure B fits the requirements set out in *Renton*. Measure B is aimed at the secondary effects (STI transmission) of the production of adult films where performers do not wear condoms. Measure B is not concerned with the content of adult films in that it only requires the performers to *use* condoms and does not require the adult film to *portray* condom use. In fact, Michael Weinstein stated, “If [producers] want to digitally remove a condom [from the final cut of a film] there’s no issue.”¹⁴² As in *Renton*, Measure B does not foreclose the production of adult films in Los Angeles County. It provides producers who want to depict sex without condoms a “reasonable opportunity”¹⁴³ to produce adult films because filming techniques exist that can create such an illusion. The difficulty of producing adult films with condoms, the added expense of digitally removing condoms, or the loss of revenue as a result of producing adult films with condoms does not affect the Supreme Court’s analysis unless the effect is the complete foreclosure of the production of adult films.¹⁴⁴

C. Measure B Should Not Survive Intermediate Scrutiny

The Supreme Court would apply intermediate scrutiny to Measure B because the ordinance is aimed at the secondary effects of the failure of performers to utilize condoms during sex scenes, specifically STI and HIV transmission.¹⁴⁵ To pass intermediate scrutiny the government must show that the ordinance serves a substantial government interest and

138. *Id.*

139. *Id.* at 48.

140. *Id.* at 49.

141. *Id.* at 50.

142. Rong-Gong Lin II, *Prominent Porn Producer Swing L.A. County over New Condom Law*, L.A. TIMES (Jan. 12, 2013), <http://articles.latimes.com/2013/jan/12/local/la-me-condom-porn-20130112>.

143. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

144. *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 77-78 (1976).

145. *See supra* Part I.B.

that Measure B is “designed to serve its substantial interest.”¹⁴⁶ This Note concedes that Measure B serves a substantial government interest. However, in Section 2 of this Part, this Note argues that the condom mandate in Measure B does not advance the government’s stated interest, and therefore the condom mandate is unconstitutional.

1. Measure B Serves a Substantial Government Interest

Intermediate scrutiny review requires that a regulation “further an important or substantial government interest”¹⁴⁷ A government’s interest is considered important or substantial when the government has the constitutional authority to promote such an interest. The stated purpose of Measure B is “to minimize the spread of sexually transmitted infections resulting from the production of adult films . . . which have caused a negative impact on public health and the quality of life of citizens living in Los Angeles.”¹⁴⁸ Los Angeles County has the constitutional authority to impose regulations that protect the health and safety of their citizens under the police power.¹⁴⁹ Therefore, Measure B serves a substantial government interest.

2. Measure B Does Not Advance the Government’s Interest

In order to survive intermediate scrutiny, the government must produce evidence to support its contention that the condom mandate would “minimize the spread of sexually transmitted infections resulting from the production of adult films”¹⁵⁰ The government may “rely on any evidence that is ‘reasonably believed to be relevant’” to support its rationale that the condom mandate would advance the government’s interest in preventing the spread of STIs.¹⁵¹ However, this does not mean that the government “can get away with shoddy data or reasoning.”¹⁵² A challenger to Measure B can “cast direct doubt” on the government’s rationale “either by demonstrating that the [government’s] evidence does not support its rationale or by furnishing evidence that disputes the [government’s] findings.”¹⁵³ If, after its evidence is refuted, the government fails to “supplement the record with evidence renewing support for

146. *L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002).

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

148. PROPOSED MEASURE, *supra* note 129.

149. *Jacobsen v. Mass.*, 197 U.S. 11, 25 (1905) (“According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

150. PROPOSED MEASURE, *supra* note 129.

151. *Alameda Books*, 535 U.S. at 438.

152. *Id.*

153. *Id.* at 438-39.

a theory that justifies its ordinance,” then the ordinance fails under intermediate scrutiny.¹⁵⁴

There is no legislative history behind Measure B to extrapolate any evidence in support of the county’s rationale. The only evidence available is found in Measure B’s “Findings and Declarations.”¹⁵⁵ The relevant findings that the County made include:

The HIV/AIDS crisis, and the ongoing epidemic of sexually transmitted infection as *a result of the making of adult films*, has [sic] caused a negative impact on public health and the quality of life of citizens living in Los Angeles . . . The Los Angeles County Department of Public Health has documented widespread transmission of sexually transmitted infections associated with the activities of the adult film industry within Los Angeles County. . . The Los Angeles County Department of Public Health has stated that the use of condoms is the best and most effective way to stem the spread of sexually transmitted infection within the adult film industry.¹⁵⁶

Unlike in *Renton* and *Alameda Books, Inc.*, the County does not directly rely on studies that demonstrate that Measure B’s condom mandate is designed to serve its substantial government interest in preventing the spread of HIV/AIDS and other STIs to the public. The County instead provides conclusory statements as evidence –two suggesting that the AFI is the cause of an “HIV/AIDS crisis, and an ongoing epidemic of [STIs]” and one that declares that condoms are the most effective way of preventing the spread of STIs in the AFI.

There is no empirical evidence that the AFI is “ground zero” for Los Angeles County’s “HIV/AIDS crisis” and “epidemic of [STIs].” The “finding” assumes that infected performers are having unprotected sex with the County’s residents. This assumption is antithetical to both the economic interest and knowledge of performers. Performers make at least \$800 a scene.¹⁵⁷ A popular performer will perform at least ten scenes a month.¹⁵⁸ For the same reason a professional athlete will not engage in risky behavior, like riding motorcycles, that could jeopardize his career, a performer will not engage in risky behavior, like having unprotected sex in her private life, because contracting an STI could cost a performer at least \$8,000 a month and contracting HIV/AIDS would end her career. Performers are more likely to know their STI status than the general public because they are tested monthly. In 2010 there were 2,062 HIV

154. *Id.*

155. See PROPOSED MEASURE, *supra* note 129.

156. *Id.*

157. Miller, *supra* note 48.

158. *Id.*

diagnoses in Los Angeles County.¹⁵⁹ Since 2004 “350,000 sex scenes have been shot without condoms . . . and H.I.V. has not been transmitted on set once.”¹⁶⁰ One performer explained the disparity in the number of HIV infections between the general public and the AFI by stating:

In the [the general population], on average, there are around 2,150 new cases of HIV reported in Los Angeles County each year. This is possibly because there are a lot of people having sex with a lot of other people without verifying one another’s [STI] status. [Performers] are not those people. [Performers are] verified.¹⁶¹

Without evidence that the AFI is the cause of Los Angeles County’s “HIV/AIDS crisis” and “epidemic of [STIs],” a court should reject this rationale.

The County’s finding that “The Los Angeles County Department of Public Health has documented widespread transmission of sexually transmitted infections associated with the activities of the adult film industry within Los Angeles County” is likely referring to three Power-Point presentations by Los Angeles County health officials.¹⁶² The presentations “purport to give scientifically valid estimates of prevalence of chlamydia and gonorrhea among performers in the AFI within Los Angeles County and compare these to rates for other citizens of the

159. DIV. OF HIV AND STD PROGRAMS/ HIV EPIDEMIOLOGY, 2011 ANNUAL HIV SURVEILLANCE REPORT 3 (2012), *available at* http://publichealth.lacounty.gov/wwwfiles/ph/hae/hiv/2011_Annual%20HIV%20Surveillance%20Report.pdf.

160. McNeil, *supra* note 14.

161. Mish Way, *A Porn Story: My Weekend Behind the Scenes at the AVN Awards (Part Two)*, VICE (Feb. 18, 2013), <http://www.vice.com/read/a-porn-story-my-weekend-behind-the-scenes-at-the-avn-awards-part-two>.

162. ROBERT KIM-FARLEY, CNTY. OF LOS ANGELES, DEP’T. OF HEALTH SERVS., STD/HIV DISEASE AND HEALTH RISKS AMONG WORKERS IN THE ADULT FILM INDUSTRY, *available at* <http://www.dir.ca.gov/dosh/DoshReg/comments/STD%20and%20HIV%20Disease%20and%20Health%20Risks%20Los%20Angeles%20County%20DPH.pdf> (last visited Apr. 5, 2014); PETER R. KERNDT, LOS ANGELES CNTY. DEP’T. OF PUBLIC HEALTH, WORKER HEALTH AND SAFETY IN THE ADULT FILM INDUSTRY: POLICY IMPLICATIONS, *available at* bixby.ucla.edu/lectureslides/Kerndt_5-21-08.ppt (last visited Apr. 5, 2014); PETER R. KERNDT, LOS ANGELES CNTY. DEP’T OF PUBLIC HEALTH, PUBLIC HEALTH ISSUES IN THE ADULT FILM INDUSTRY: POLICY IMPLICATIONS OF AN OUTBREAK, bixby.ucla.edu/lectureslides/adult_film_may_23_2005 (last visited Apr. 5, 2014).

county.”¹⁶³ The presentations showed a higher prevalence of STIs among performers than among other citizens of Los Angeles County.¹⁶⁴

A challenger to Measure B only has to produce evidence that “disputes the [government’s] findings” in order to shift the burden of production back to the government to “supplement the record with evidence renewing support for a theory that justifies its ordinance.”¹⁶⁵ Dr. Lawrence S. Mayer’s¹⁶⁶ report that asserts that the presentations are “fundamentally flawed and . . . poorly documented” and that “it is clear that inferences based on [the presentations’] analysis are without basis in science, including epidemiology.”¹⁶⁷ Dr. Mayer strongly criticized the presentations for failing to “take account of re-infection rates and testing frequency” in their prevalence statistics.¹⁶⁸ Prevalence is “the percentage of a population that is affected with a particular disease at a given time.”¹⁶⁹ This failure results in “not only inaccurate [findings], but also misleading and inflammatory [findings of] the risk of contracting an STD in the AFI.”¹⁷⁰ These criticisms may meet a Measure B challenger’s evidentiary burden.

For example, Dr. Kim-Farley compared performers to the population of Los Angeles County and found that “the annual prevalence of chlamydia and gonorrhea among AFI performers is 8.5 to 18 times greater than that in L.A. County residents 18 to 29 years old, and 34 to 60 times greater than that in all L.A. County residents.”¹⁷¹ Dr. Mayer concluded that both the infection prevalence among performers and the comparison of performers to Los Angeles County residents that Dr. Kim-Farley utilized were “fatally flawed.”¹⁷² Dr. Kim-Farley did not ascertain “accurate counts of the population exposed, and so [used] counts of 2000 and 3000 performers to derive prevalence estimates. The counts are not

163. LAWRENCE S. MAYER, ASSESSMENT OF THE PRESENTATIONS OF DRs. KIM-FARLEY AND KERNDT 1 (June 3, 2011), *available at* http://www.xbiz.com/docs/xbiz/news/134769_Dr%20Mayer%20report%20FSC%20AFI%20STI%2006-03-11.pdf.

164. *Id.* at 4-6.

165. *L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002).

166. *Dr. Lawrence S. Mayer*, JURISPRO, [http://www.jurispro.com/Lawrence Mayer](http://www.jurispro.com/Lawrence%20Mayer) (last visited Apr. 5, 2014) (“Dr. Mayer is a full-time professor of biostatistics, epidemiology, biomedical informatics, public health and psychiatry.”).

167. MAYER, *supra* note 163.

168. *Id.* at 4.

169. *Prevalence*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/prevalence> (last visited Mar. 28, 2014).

170. MAYER, *supra* note 163, at 8.

171. Kim-Farley, *supra* note 162, at 5.

172. MAYER, *supra* note 163, at 4.

justified in the presentation.”¹⁷³ Dr. Kim-Farley’s comparison of performers to Los Angeles County residents was “not valid” because the two groups are not similarly situated. For instance, performers “may be at higher risk for [STIs] than the average resident of the county”; the general population of Los Angeles County includes individuals that are at high risk for STIs and at low risk for STIs; and that “the vast majority of the persons in [Dr. Kim-Farley’s] comparison group is not even tested within any given year for a [STI] and may not be sexually active enough to risk re-infection.”¹⁷⁴ Dr. Kim-Farley concludes that in 2008 the rate of chlamydia prevalence among the Los Angeles County population was 0.4% and among performers was 23.8% (based on 2,000 performers) and 15.2% (based on 3,000 performers).¹⁷⁵ However, Los Angeles County’s STD Clinic Morbidity Report 2008 shows that 11.3% of the 28,023 chlamydia tests performed showed a positive result.¹⁷⁶ This number is significantly larger than the 0.4% that Dr. Kim-Farley reported.

Dr. Mayer also found that the analyses used in the presentations “lacked transparency” and had no “[documentation] of the methodology used to derive [the] estimates.” Dr. Mayer concluded that because of these failures “it is not possible to confirm the validity of [the analyses] results.”¹⁷⁷ Dr. Mayer recommended that the “conclusions, analysis, and advice in [the] three presentations should be discarded”¹⁷⁸ and admonished the presenters for not providing “serious analysis” to the “serious issue” of estimating risk of STI contraction.¹⁷⁹ Unless the government can produce evidence that further supplements the rationale, the Supreme Court will reject it.

The third finding that “the use of condoms is the best and most effective way to stem the spread of sexually transmitted infection within the adult film industry” was previously disputed in this Note.¹⁸⁰ The AFI in Southern California does not mandate condoms because of the complications that arise from their use.¹⁸¹ The AFI has a highly effective

173. *Id.*

174. *Id.*

175. *Id.* at 3.

176. SEXUALLY TRANSMITTED DISEASE PROGRAM, L.A. CNTY. DEP’T OF PUB. HEALTH, STD CLINIC MORBIDITY REPORT LOS ANGELES COUNTY I-4 (2008), *available at* <http://publichealth.lacounty.gov/std/docs/STDclinicreport2008.pdf>.

177. MAYER, *supra* note 163, at 1.

178. *Id.*

179. *Id.* at 8.

180. *See supra* Introduction; *supra* Part I.B.; *supra* Part I.C.

181. *See supra* Introduction.

testing regime that protects performers from STI and HIV/AIDS infection.¹⁸² The condom mandate could have the unintended consequence of causing the AFI to abandon its testing regime. Measure B opponents argued that “the only 100% completely ‘safe sex’ is no sex at all” and that “[c]ondoms provide, at best, visible ‘evidence’ of mitigated STI risk . . . versus the ‘invisible’ testing system that performers engage currently (sic).”¹⁸³ The condom mandate could lull producers and performers into a false sense of security. Therefore, causing producers and performers to forgo testing and creating the potential for STI outbreaks to go undetected for long periods of time. Additionally, the condom mandate could cause the AFI to move overseas where there are little to no performer safety measures.¹⁸⁴ This is a possibility not only because of the complications that arise from condom use in the AFI¹⁸⁵ but also because of a strong consumer preference for films that do not depict condoms.¹⁸⁶ Performers’ shooting scenes in localities that do not have a testing regime is precisely how the 2004 outbreak began.¹⁸⁷ The condom mandate in Measure B could, therefore, put the County and performers at a greater risk of STI and HIV/AIDS infection than it is at currently.

Furthermore, Measure B mandates condom use only during “acts of vaginal and anal intercourse.”¹⁸⁸ This method could potentially prevent the spread of HIV, but HIV has not been transmitted on the set of an adult film since 2004.¹⁸⁹ The most common site of infection among performers is the oropharynx, which means that performers are most

182. See *supra* Part I.B; *infra* Part IV.

183. *PVV-LA County’s Measure B*, PVVONLINE (Oct. 1, 2012), <http://pvvonline.com/?p=2182>.

184. Dan Whitcomb, *Top Porn Producer Sues to Overturn Los Angeles Condom Law*, REUTERS (Jan. 11, 2013), <http://www.reuters.com/article/2013/01/12/us-usa-porn-losangeles-idUSBRE90B01D20130112>; *Overseas Shoots Threaten Porn Stars’ Health*, TODAY (April 21, 2004), <http://www.today.com/id/4752236#.UvBhI3ddXy8>.

185. See *supra* Introduction.

186. McNeil, *supra* note 14. (“For producers, it’s really about money. Vivid Entertainment shot with condoms for two years after a 1998 H.I.V. outbreak, and sales dropped 30 percent, Mr. Hirsch said. Producers have threatened to leave the state, taking the jobs of 1,200 actors and more than 5,000 crew members with them.”).

187. See *supra* Part I.C.

188. L.A. CNTY., CAL. CODE Tit. 11, Ch. 39, § 110(A) (2013).

189. McNeil, *supra* note 14 (“The industry’s medical consultants say that about 350,000 sex scenes have been shot without condoms since 2004, and HIV has not been transmitted on a set once.”).

likely to become infected during oral sex.¹⁹⁰ Thus, the condom mandate in Measure B cannot advance the government's purpose of minimizing the spread of STIs from the AFI. Without further evidence that supports the government's rationale behind the condom mandate, Measure B will fail intermediate scrutiny.

IV. THE PERFORMER AVAILABILITY SCREENING SERVICES AS REGULATOR OF THE ADULT FILM INDUSTRY

Measure B is a solution in search of a problem. Little evidence exists to support the County's proposition that the spread of STIs as a result of the AFI is an "actual problem"¹⁹¹ that needs solving. The Free Speech Coalition's Performer Availability Screening Services (PASS) is capable of protecting the health and safety of performers.

PASS created a database through which performers, producers, and agents can verify a performer's availability.¹⁹² The database shares with producers only "legal names, a membership number, and availability status indicated with a 'yes' or 'no.'"¹⁹³ The database protects the privacy of performers by only listing their availability instead of providing access to their medical records.¹⁹⁴ If the performer would like a copy of her test results to bring on to the set, then she must contact the testing facility to obtain a copy.¹⁹⁵ If a performer would like her test results made available to someone other than herself she may sign a HIPPA waiver authorizing access to her medical records.¹⁹⁶

PASS is more cautious about granting access to the database than its predecessor, AIM. According to PASS's blog:

All producers and agents *must* be vetted prior to their account being activated. A representative will contact you if more information is needed. Currently, APHSS.org is accept-

190. Christina Rodriguez-Hart et al., *Sexually Transmitted Infection Testing of Adult Film Performers: Is Disease Being Missed?*, 39 SEXUALLY TRANSMITTED DISEASES 987, 987 (2012) ("Gonorrhea was the most common STI (42/168; 25%) and the oropharynx the most common site of infection (37/47; 79%).").

191. See *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 822-23 (2000).

192. *About Us*, ADULT PROD. HEALTH & SAFETY SERVS., https://aphss.org/about_us (last visited Apr. 5, 2014).

193. *FSC Rolls Out Plan for Adult Production Health & Safety Services*, FSC BLOG (May 27, 2011), <https://fscblogger.wordpress.com/tag/aphss/>.

194. *Performers*, ADULT PROD. HEALTH & SAFETY SERVS. BLOG, http://blog.aphss.org/?page_id=262 (last visited Apr. 5, 2014).

195. *Id.*

196. *About Our Testing Facilities*, PERFORMER AVAILABILITY SCREENING SERVS. BLOG, http://blog.aphss.org/?page_id=281 (last visited Apr. 5, 2014).

ing *only* licensed and bonded agents. Producers must be able to provide proof of a legitimate website, employment with a known AFI producer and/or provide professional references.¹⁹⁷

PASS's security measures will likely prevent the privacy issues that led to AIM's demise.¹⁹⁸

Unlike AIM, PASS does not manage a health clinic. PASS recommends healthcare providers and testing facilities that "use industry standards tests for STIs for monthly performer screenings, including the Aptima HIV-1RNA Qualitative Assay test and urine tests."¹⁹⁹ The facilities within the PASS network are located nationwide, with some clinics having over 2,000 locations.²⁰⁰ This creates easier access to testing facilities and encourages more frequent testing among performers.

PASS mandates a strict protocol to ensure performer safety.²⁰¹ Prior to arriving on the set, a performer must comply with "Performer Risk Reduction requirements and recommendations."²⁰² For instance, before arriving on set, all performers who are new to the AFI are required to obtain a blood test for HIV (by "PCR RNA Aptima"), syphilis (an "RPR" and Trep-Sure test), Hepatitis A, B, & C; a urine test for gonorrhea (by "ultra-sensitive DNA amplification") and chlamydia (by "ultra-sensitive DNA amplification"); and a skin test for tuberculosis.²⁰³ Performers are required to be retested every twenty-eight days for HIV, syphilis, gonorrhea, and chlamydia.²⁰⁴ If any of the tests are positive or if a performer fails to obtain any of the tests, then the producer will not permit the performer to perform. APHSS also recommends that performers refrain from "flossing teeth mouth or gums, using toothpicks of any kind, and chewing gum, shaving or waxing vaginal, genital, testicular and anal areas, [and the] consumption of excessively hot food and drink items" forty-eight hours prior to filming.²⁰⁵ This is to "ensure (as reasonably feasible) [that] all performers have a complete 'in-tact' skin condition for sensitive areas, which are exposed during the course of

197. *Producers and Agents*, PERFORMER AVAILABILITY SCREENING SERVS. BLOG, http://blog.aphss.org/?page_id=281 (last visited Apr. 5, 2014).

198. *See supra* Part I.D.

199. *About Our Testing Facilities*, PERFORMER AVAILABILITY SCREENING SERVS. BLOG, http://blog.aphss.org/?page_id=281 (last visited Apr. 5, 2014).

200. *APHSS Testing Facilities*, ADULT PRODUCTION HEALTH & SAFETY SERVS., <https://aphss.org/performer-info> (last visited Apr. 5, 2014).

201. *See* PASS, BLOODBORNE PATHOGEN EXPOSURE CONTROL PLAN [hereinafter PROTOCOLS] (on file with author).

202. *Id.* at 6.

203. *Id.* at 11.

204. *Id.*

205. *Id.*

work.”²⁰⁶ On the day of the scene, but at least thirty minutes before the scene takes place, “a designated competent person” inspects “performers for conditions that could pose potential risks during scenes.”²⁰⁷ The “designated competent person” inspects the performer’s mouth “(tongue, gums inside oral cheeks, uvular muscle),” hands, fingers, anus, vagina “(including inner/outer labia and clitoris),” pubic area, testicles, and rectal area.²⁰⁸ If through the course of the inspection the “designated competent person” discovers any sores, cuts, lesions, tears, hangnails, or any other non-intact skin condition, then the performer is not permitted to perform for twenty-four hours.²⁰⁹

PASS also requires performers to take additional precautions upon completing a scene. When a scene is completed performers are mandated to wash any body part that may have come in contact with other potentially hazardous materials.²¹⁰ If oral sex is performed, the performer is “expected to wash out his/her mouth with appropriate antiseptic mouthwash.”²¹¹ Additionally, at the completion of each scene, performers are required to “immediately urinate” in order “to clear any bacteria in the urethra so it does not enter the body.”²¹²

If a performer tests positive for HIV, PASS immediately initiates a moratorium and all adult film production is halted.²¹³ To initiate a moratorium,

[t]he doctor at the PASS facility that conducted the test checks to see if [the HIV positive performer] has worked on [an] adult film since 2 weeks prior to his or her last negative test. If he or she has, the doctor alerts the Free Speech Coalition, and the Free Speech Coalition calls an industry-wide moratorium. Production is halted while everyone can be retested to make sure no performers are exposed to the virus.²¹⁴

206. *Id.*

207. *Id.* at 12.

208. *Id.*

209. *Id.*

210. *Id.* at 6 (“For example if anal sex is performed on a female performer, the performers will stop at the end of this scene and wash affected body parts (hands, penis, vagina, anus, etc.) with appropriate sanitizing wipes (safe for human contact) before proceeding with the next scene.”).

211. *Id.*

212. *Id.* at 7.

213. *An FAQ about STIs, Testing and Moratoriums*, PASS BLOG (Dec. 8, 2013), <http://blog.aphss.org/?p=488>.

214. *Id.*

During the moratorium, all film production is halted while the genealogy of the virus is established.²¹⁵ This is accomplished by first interviewing the HIV positive performer to determine who had worked with or had sexual contact with her since her last negative test.²¹⁶ Then all of those performers are tested along with the performers who they worked with or had sexual contact with.²¹⁷ The moratorium is lifted after “the genealogy of the virus is established, and all sexual partners have been tested.”²¹⁸ Once the moratorium is lifted, all performers must get tested “no less than 14 days after the date the positive performer received his/her positive results or the date of the positive performer’s last sexual encounter with a performer.”²¹⁹ PASS will not clear a performer for work unless the performer was retested.²²⁰

PASS has successfully prevented the transmission of HIV on the adult film sets. In 2013 PASS instituted three moratoria in response to performers’ testing positive for HIV.²²¹ The viral genealogies of all HIV positive performers showed that the HIV transmission occurred in the performers’ private lives.²²² The most publicized HIV case involved the performer couple Cameron Bay and Rod Daily. Rod Daily performed in gay adult films where condom use is mandatory.²²³ Peter Acworth, the chief executive of Kink.com where Mr. Daily and Ms. Bay filmed scenes stated, “Rod Daily wore condoms in all his scenes. The strong indication is that Rod contracted [HIV] and transmitted it to Cameron Bay.”²²⁴

Even though some of the largest producers (including Wicked Pictures, Reality Kings, Evil Angel, Jules Jordan, Vivid Entertainment, Hustler, and Girlfriends Films) all support PASS, a concern with PASS is that it relies on voluntary compliance with its protocols. But AIM was successful with only voluntary compliance.²²⁵ Performers have a strong economic incentive to work exclusively with producers that follow

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *See Viral Genealogy Conclusive: Positive Performer from December Moratorium Contracted Virus in Personal Life*, PASS BLOG (Dec. 20, 2013), <http://blog.aphss.org/?p=499>.

222. *Id.*

223. Vivian Ho, *SecondKink.com Actor, Who Dated First, Has HIV*, SFGATE (Sep. 4, 2013, 9:27 AM), <http://www.sfgate.com/default/article/Second-Kink-com-actor-who-dated-first-has-HIV-4784475.php>.

224. *Id.*

225. *See supra* Part I.C.

PASS's protocols because the consequences of a performer becoming infected are devastating to both her health and livelihood.²²⁶ If the government is not satisfied with past results or economic incentives, then the government can allay its concerns by encouraging and facilitating compliance with PASS's rules and regulations. The government could publicly endorse PASS and strongly encourage producers to cooperate with its rules and regulations by providing films that comply with the PASS "seal of approval." The government could also promote cooperation with PASS by streamlining the film permitting process for or providing tax incentives to producers who have displayed compliance with PASS's rules and regulations. The government should be wary of codifying PASS's protocols because a government agency would have significantly less flexibility to respond to the unique needs of the AFI or be capable of taking the swift action necessary in order to stymie a future outbreak.

CONCLUSION

Nearly all Americans are familiar with the adult film industry, but few understand it. The desire of California's public officials to protect the health of a misunderstood and often criticized constituency is encouraging; but like an adult film scene, Measure B's condom mandate does not reflect reality. Performers and the citizens of Los Angeles County deserve serious legislation that is based on facts, not "feel good" legislation based on assumptions.

226. See also Nina Hartley, *Nina Hartley Rips "HIV in Porn" Myths, Moralizing*, KINKY (Sep. 12, 2013), <http://kinky.com/straight-talk-about-porn-hiv-with-nina-hartley/> ("Does everyone cooperate with this protocol? You bet. Any director or producer who puts a performer to work without that clearance is inviting major liability and performers as a matter of on-set etiquette show their test results to anyone they're going to work with before doing so.").