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Skin Flicks Without the Skin: Why Government Mandated Condom Use in Adult Films is a Violation of the First Amendment

Elizabeth Sbardellati[1]

ABSTRACT

The filming of sexual acts for publication is legal in California, which has led to the development of a robust adult film industry in Southern California, particularly in the Los Angeles area. Recently, regulations have been proposed that would require actors in pornographic films to wear condoms. This comment examines legal objections to "The County of Los Angeles Safer Sex in the Adult Film Industry Act" and CalOSHA's assertion that California law requires the use of prophylactics in adult films. It argues that sexual expression in these adult films is protected under the First Amendment, although it may still be subject to government regulation. The mandate that actors wear condoms or use other prophylactic devices is unconstitutional because it cannot satisfy the standard laid out in United States v. O'Brien.

> "Sex is more exciting on the screen and between the pages than between the sheets . . . . Fantasy love is much better than reality love." – Andy Warhol[2]

INTRODUCTION

Sex has mystified and entertained humanity for millennia. The technological developments of the modern world, most notably video production and the Internet, have allowed our curiosity for sex to be easily satiated through virtually effortless access to adult films.

Despite this widespread access to adult films, California is one of only two states where adult filmmaking is legal.[3] California's San Fernando Valley is the site of the majority of adult film production in the United States.[4] Because most of the adult film industry is comprised of small production companies, the exact revenue it generates is

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[2] ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL: FROM A TO B AND BACK AGAIN 44 (Harcourt Books 1975).

[3] *See* People v. Freeman, 46 Cal.3d. 419 (1988); Michael Hiltzik, *Regulators on Collision Course with Porn Industry Over Condoms*, L. A. TIMES, Nov. 2, 2011, *available at* http://www.latimes.com/health/la-fi-hiltzik-20111102,0,395281.column.

[4] *See The Trouble with Pornography, Hard Times: A Big Industry in Northern Los Angeles is Among the Worst Hit by the Recession*, THE ECONOMIST, Sept. 10, 2009, *available at* http://www.economist.com/node/14416740/print.

hard to quantify; however, it is estimated that the industry earns between 1.8 billion and 3 billion dollars in revenue per year.[5] Approximately 17% of adult film performers in heterosexual films use condoms.[6] The San Fernando Valley adult film industry produces between 3000 and 4000 films each year and employs just over 1000 performers.[7] As with any film production, "for every performer there are several people in support, from sound-tech to . . . wardrobe."[8] Needless to say, the San Fernando Valley Adult Film Industry makes a lot of money, employs a lot of people and produces massive amounts of erotica. Although the adult film industry has not been immune to the financial challenges resulting from the economic recession,[9] the numbers listed above indicate a vigorous market for porn. In 2007, there were over seven million rentals from adult film stores in the United States, and as common sense would indicate, "it's not just one guy renting all those disks."[10]

Sexual expression in adult entertainment is protected speech under the First Amendment.[11] All protected speech is potentially subject to government regulation.[12] However, the adult entertainment industry is often the target of highly specific government regulations.[13] Of particular relevance to this Comment are the ongoing and concurrent attempts by the California Division of Occupational Safety and Health (Cal/OSHA), the AIDS Healthcare Foundation (AHF), and the County of Los Angeles to legislate the mandated use of condoms for high-risk sexual behavior in adult films.[14]

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[5] *Id.*

[6] Corita Grudzen & Peter Kerndt, *The Adult Film Industry: Time to Regulate?*, 4 PUB. LIBR. OF SCI.: MED. 993, 993 (2007), *available at* http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0040126.

[7] *The Trouble with Pornography*, *supra* note 4.

[8] *Id.*

[9] *Id.*

[10] Letter from Mark Kernes, Senior Editor, Adult Video News (Nov. 9, 2011) (on file with author).

[11] U.S. CONST. amend. I.; Roth v. U.S., 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973). *See also* Doran v. Salem Inn, 422 U.S. 922, 932 (holding that a bare minimum of First Amendment protection be extended to nude dancing); Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981) (holding the First Amendment extends to nude dancing as expressive conduct).

[12] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

[13] *See, e.g.*, New York v. Ferber 458 U.S. 747, 761 (1982) (holding that child pornography may be banned without being deemed obscene because the government's interest in protecting children from exploitation is compelling). *But see* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002) (holding that adult films made with simulated images of minors, or youthful looking actors could not be proscribed because no children were exploited in the making of the films). *See also* Young v. American Mini Theatres, 427 U.S. 50 (1976) (setting precedent that zoning laws and public safety laws may limit the locations of adult entertainment establishments).

[14] Statement by the Los Angeles County Department of Public Health to the Cal/OSHA Advisory Subcommittee on Medical Issues, Bloodborne Pathogens in the Adult Film Industry (September 14, 2011). *See also* Cal/OSHA Discussion Draft, Advisory Meeting 5 (June 7, 2011) (proposing amendment to Cal. Code Regs. tit. 8 § 5193 that would specifically mandate condom use in adult films). According to the Los Angeles County Department of Public Health, high-risk sexual activity includes "unprotected, prolonged and repeated sexual acts with multiple sexual partners over short time periods." *Id.* These practices are considered high risk because they "increase the likelihood of acquisition and transmission of STDs." *Id. See also* Mary Hennessey-Finke, *Condoms-in-Porn L.A. Ballot Initiative Petition Underway*, L.A. TIMES,

Through an analysis of obscenity categorization and adult entertainment-related First Amendment jurisprudence, this Comment argues that legislation mandating the use of condoms in adult films is an unconstitutional infringement on the First Amendment rights of those involved in making the films.

Part I of this Comment discusses the extension of the First Amendment protections to sexually charged material by tracing the Supreme Court's obscenity jurisprudence.[15] Part I also describes the conflicts over condom use in the segment of the American adult film industry located in Los Angeles' San Fernando Valley. This section will explain current self-enforced industry safety provisions and governmental standards regarding worker safety before focusing on Cal/OSHA and the AIDS Healthcare Foundation's response to HIV outbreaks on adult film sets.[16]

Part II provides insight into how the Supreme Court has interpreted the First Amendment in the adult entertainment context. Specifically, it lays out the tests for content-based and content-neutral legislation.[17] Part III argues that any legislation mandating the use of condoms for certain high-risk sexual behaviors is an infringement on the First Amendment rights of the producers, directors, and actors involved in adult film-making. First, the Comment argues that such restrictions are likely to be found content-neutral. It further argues that the application of intermediate scrutiny as required by *U.S. v. O'Brien* would lead to the determination that such restrictions are unconstitutional. Finally, Part III evaluates the right to privacy under a substantive due process argument.

I. BACKGROUND

Sexually explicit materials have been the subject of many debates throughout American public discourse, legal academia, and Supreme Court jurisprudence. Central to those debates is when and how to define material as obscenity—which is unprotected by the First Amendment—and when sexually explicit material falls into the category of protected speech. Some schools of thought contend that all pornography is obscene and therefore unprotected;[18] meanwhile, others would protect pornography no matter how

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Aug. 15, 2011, *available at* http://latimesblogs.latimes.com/lanow/2011/08/condoms-in-porn-la-ballot-initiative-petition-effort-underway.html (describing AHF's attempts to get a ballot measure on the June 2012 ballot that would have Los Angeles residents vote on the issue of condom use in porn); Tom Hymes, *LA City Council Seeks State Cover to Tie Condoms to Film Permits*, ADULT VIDEO NEWS (May 25, 2011), http://business.avn.com/articles/video/LA-City-Council-Seeks-State-Cover-to-Tie-Condoms-to-Film-Permits-436664.html. *See also* LA City Council Report of the Chief Legislative Analyst (May 23, 2011), (recommending that changes be made to Cal. Code Regs. tit. 8 § 5193 "that would specifically use the word 'condoms' as a form of barrier protection") (on file with author).

[15] *See generally* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

[16] *See What is HIV?*, CENTER FOR DISEASE CONTROL AND PREVENTION, DIVISION OF HIV/AIDS PREVENTION, http://www.cdc.gov/hiv/resources/qa/definitions.htm (last visited Jan. 25, 2012). HIV stands for Human Immunodeficiency Virus. HIV is the virus that can result in AIDS, Acquired Immunodeficiency Syndrome. The virus is spread primarily through unprotected sex with a partner who is HIV positive. All such unprotected sex may lead to contracting the virus. However, certain sexual activity, such as unprotected anal sex, is considered riskier. *Id.*

[17] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[18] *See, e.g.*, Frederick Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO L. J. 900 (1978-79).

graphic or seemingly offensive.[19] The Supreme Court has come out somewhere in the middle, which poses problems for determining whether any given "porno flick" might be covered.

The contemporary push for harsh regulation of sexually explicit materials, coupled with the fear of an epidemic of sexually transmitted diseases (STDs),[20] has given rise to attempts by government regulatory forces and public interest groups to regulate the adult film industry without sufficient thought given to potential First Amendment issues.[21]

A. Development of Modern Obscenity Law

Modern obscenity jurisprudence is primarily based on a determination as to the social value of any material in question.[22] In the seminal case *Roth v. United States*, the Supreme Court held that obscene materials are not protected speech.[23] However, the *Roth* Court went on to say that "sex and obscenity are not synonymous . . . obscene material is material which deals with sex in a manner appealing to the prurient interest. The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[24] In light of this position on sex and the portrayal of sex, the Court affirmed that the appropriate test for determining obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[25] Under this standard, a piece of pornographic material would be protected under the First Amendment so long as its dominant theme appealed to non-prurient interests.

The *Roth* test was broadened approximately a decade later when the Supreme Court considered whether the novel *Memoirs of a Woman of Pleasure* was obscene.[26] In applying the test, the Court focused on whether the novel "was utterly without social importance," and found that even sexually explicit material "may not be proscribed unless it is found to be utterly without redeeming social value."[27] The court noted that a work may both appeal to the prurient interest and be deemed patently offensive, but is still protected by the First Amendment so long as it has a "modicum of social value."[28]

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[19] *See generally* Gey, *supra* note 15.

[20] *See STD Trends in the United States: 2010 National Data for Gonorrhea, Chlamydia, and Syphilis*, *2010 Sexually Transmitted Disease Surveillance*, CENTER FOR DISEASE CONTROL, http://www.cdc.gov/std/stats 10/trends.htm (last visited Jan. 25, 2012). According to the Centers for Disease Control, approximately 19 million new infections occur each year in the United States. *Id.*

[21] *See generally* Michael Hiltzik, *Regulators on Collision Course with Porn Industry Over Condoms*, L.A. TIMES, Nov. 2, 2011, *available at* http://www.latimes.com/health/la-fi-hiltzik-20111102,0,395281.column.

[22] Gey, *supra* note 15, at 1571.

[23] Roth v. United States, 354 U.S. 476, 485 (1957).

[24] *Id.* at 489.

[25] *Id.* at 490.

[26] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966). *Memoirs of a Woman of Pleasure by* John Cleland, commonly known as *Fanny Hill*, is an erotic novel first published in England in 1748. JOHN CLELAND, FANNY HILL: MEMOIRS OF A WOMAN OF PLEASURE (1748). *See also* Roger Lonsdale, *New Attributions to John Cleland*, 30 R. ENG. STUD., NEW SERIES 268, 268 (1979).

[27] *Memoirs,* 383 U.S. at 418-19.

[28] *Id.* at 420.

This test, however, proved unworkable to the Court in later cases and was subsequently abandoned.[29]

In *Miller v. California*, the Court differentiated between *Roth's* assertion that obscenity is, by its nature, "utterly without redeeming social importance,"[30] and *Memoirs'* requirement "that to prove obscenity it must be affirmatively established that the material is 'utterly without social value.'"[31] The *Miller* Court acknowledged that government regulation of any form of expression—even the obscene—is inherently dangerous, and confined such regulation to material that portrays sexual conduct.[32] Further, the Court defined a three-part test for determining whether a description or depiction of sexual conduct would be considered obscene: the work must, when taken as a whole and according to contemporary community standards (1) appeal to the prurient interest; (2) portray sexual conduct in a patently offensive way; and (3) have no serious literary, artistic, political, or scientific value.[33] This test, which is still applied in obscenity cases today, requires a stronger confirmation of social value than the previous *Memoirs* standard.[34] However, the test does not proscribe *all* pornography from First Amendment protection. Since the test requires that a piece fulfill all three prongs of the test before it can be considered obscene, it "implicitly acknowledges that a work of art can combine prurient interest with artistic value."[35]

B. The War against the San Fernando "Porn" Valley

Getting paid to have sex is not legal everywhere,[36] but *People v. Freeman* differentiated between the act of prostitution and being paid to have sex on camera as an actor.[37] In that case, the Supreme Court of California noted that the film at issue was not deemed obscene.[38] The court found that prosecution of the producer for paying actors to

[29] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973).
[30] *Roth*, 354 U.S. at 484.
[31] *Miller*, 413 U.S. at 21-22.
[32] *Id.* at 23-24.
[33] *Id.* at 24. It is interesting to note that, according to a recent Gallup Poll, 42% of young Americans view pornography as morally acceptable. *See* Lydia Saad, *Doctor Assisted Suicide Is Moral Issue Dividing Americans Most,* GALLUP (May 31, 2011), http://www.gallup.com/poll/147842/doctor-assisted-suicide-moral-issue-dividing-americans.aspx. According to some studies, approximately 70% of men ages 18-24 and approximately 40 million Americans are *regular* visitors to pornographic websites. *See, e.g.*, *The Stats on Internet Porn,* ONLINEMBA, *http*://www.onlinemba.com/blog/the-stats-on-internet-porn/ (last visited Nov. 1, 2013). In 2007 there were approximately 70 million porn rentals in adult stores. Letter from Mark Kernes, *supra* note 10. It would seem that contemporary community standards are accepting of pornography.
[34] Gey, *supra* note 15, at 1577.
[35] Andrew Koppelman, *Is Pornography "Speech"*? NW. PUB. LAW RES. PAPER NO. 07-08 at 71, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976914.
[36] *See* People v. Freeman, 46 Cal.3d. 419 (Cal. Ct. App. 1988). *See also* Hiltzik, *supra* note 3 (noting that only New Hampshire and California recognize adult filmmaking as a legal endeavor).
[37] People v. Hill, 103 Cal. App. 3d 525, 534-535 (Cal. Ct. App. 1980) ("For a 'lewd' or 'dissolute' act to constitute 'prostitution,' the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute").
[38] *Freeman*, 46 Cal.3d. at 422-23. Note that the film, "Caught From Behind II" was not considered obscene despite its explicit and graphic sexual nature. The film included scenes of sexual intercourse, oral

make the film, which involved engaging in sexual activity, would "impinge unconstitutionally upon First Amendment values"—that is, the conduct performed in furtherance of producing the film was a protected aspect of expression.[39] The Government's primary argument was that although the film may be protected speech, the conduct required for the making of the film could be regulated "without reference to the First Amendment."[40] The State also put forth two possible government interests for the regulation: "prevention of profiteering from prostitution;" [41] and prevention of the spread of sexually transmitted diseases.[42] The Court, however, found no credence in these interests and asserted that the government was attempting to prevent "profiteering in pornography," a perfectly legal undertaking, "without the necessity of proving obscenity."[43] Fundamentally, *Freeman* extended First Amendment freedom of expression protection to the *conduct* involved in making sexually explicit films in California, so long as those films are not deemed obscene.

The adult film industry in the San Fernando Valley is currently engaged in a battle against CalOSHA and the AIDS Healthcare Foundation over the required use of condoms in adult films. Although the government interests put forth in *Freeman* indicated that STD and AIDS prevention in adult films has been a significant concern since at least the late 1980s, it did not really come to the forefront as a regulatory matter until an HIV outbreak that infected four performers in 2004.[44] After this outbreak, CalOSHA began investigating the adult film industry and asserted that the federal and state bloodborne pathogen regulations mandated the use of condoms and other protective prophylactics[45]—e.g., female condoms and dental dams—for adult film performers who were employed by production agencies.[46] Subsequent to this assertion CalOSHA fined

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copulation, and sodomy—some of the very same high-risk sexual behaviors for which AHF and Cal/OSHA want to require condoms.

[39] *Id.* at 425.

[40] *Id.* at 427.

[41] *Id.*

[42] *Id.* This is the same interest asserted by CalOSHA and AHF in their current drive to regulate condom-use. Los Angeles County Department of Public Health. *See* Statement by the Los Angeles County Department of Public Health, *supra* note 14. Here, the court noted that the public health interest is belied by the fact that the exact same film could have been made legally with unpaid actors.

[43] *Freeman*, 46 Cal.3d. at 427.

[44] *See* Nick Madigan, *Voice of Health in a Pornographic World*, N.Y. TIMES, May 10, 2004, *available at* http://www.nytimes.com/2004/05/10/us/voice-of-health-in-a-pornographic-world.html. See also Rong-Gong Lin II, *Former Porn Star Daren James Speaks Out About Latest HIV Case,* L.A. TIMES, October 12, 2010, *available at* http://latimesblogs.latimes.com/lanow/2010/10/former-porn-star-darren-james-speaks-out-about-latest-hiv-case.html (In 2004, adult film performer Daren James tested positive for HIV. Following James' positive test there was a 60-day production moratorium during which any performers who had unprotected sexual contact with James and those who had contact with them were tested. Three female performers tested positive.).

[45] 29 C.F.R § 1910.1030 (2011). The federal bloodborne pathogens regulation calls for the use of protective equipment to prevent the spread of disease due to occupational exposure to bloodborne pathogens. The statute lists examples of environments where such protection would be necessary, all of which are related to the healthcare industry. *Id.;* Cal. Code Regs. tit. 8 § 5193. The California bloodborne pathogens regulation parallels the federal regulation and likewise seems restricted to medical related industries. *Id.*

[46] Dennis Romero, *California, Federal Laws Already Mandate Condoms In Porn: State Has Been Citing Adult Video Makers For Allegedly Failing to Protect Performers*, THE INFORMER, L.A. WEEKLY BLOGS (October 22, 2010), http://blogs.laweekly.com/informer/2010/10/california_porn_condom_laws.php.

two production companies for noncompliance;[47] however, enforcement of the regulations became sporadic and whether those regulations applied to the adult film industry remained a point of contention between AHF, Los Angeles County, and industry insiders.[48]

Another HIV infection occurred in 2009 and another in 2010, which prompted AHF and CalOSHA to file two lawsuits: the first petitioning for a writ of mandamus that the Los Angeles County Department of Health enforce the use of condoms on set,[49] and the second for access to Adult Industry Medical Healthcare Foundation's medical records.[50] Neither claim prevailed.[51] In the former case, the court held that officers of the Los Angeles County Department of Health had discretion regarding how to control the spread of sexually transmitted diseases and the Department's refusal to mandate that adult film actors wear condoms was not an abuse of discretion.[52] CalOSHA's claim was defeated at the summary judgment stage because the judge found that compliance with CalOSHA's request for patient HIV records would be a violation of California statutory code.[53] On August 29, 2011, Diane Duke, Executive of the Free Speech Coalition (FSC), learned that a San Fernando Valley adult film performer had tested positive for HIV at a Florida testing site.[54] She subsequently notified San Fernando Valley adult film production companies and requested a temporary moratorium on filming until follow-up tests had verified the positive result.[55] Producers complied with Duke's request and shutdown filming for approximately one week while retesting was underway; the HIV test was conclusively determined to be a false positive.[56]

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[47] Caitlin Lieu & Eric Malnic, *2 Porn Producers Get Safety Citations*, L.A. TIMES, Sept. 17, 2004 at B1.
[48] Dennis Romero, *Porn vs. Condoms: AIDS Healthcare Foundation Takes Case For Mandatory Condoms in L.A. Porn All the Way to State Supreme Court*, THE INFORMER, L.A. WEEKLY BLOGS (July 27, 2011), http://blogs.laweekly.com/informer/2011/07/porn_condom_la_county.php. *See also* Mark Kernes, *Judge Tosses AIDS Healthcare's Condom Lawsuit (v. 2.0)*, ADULT VIDEO NEWS (Dec. 23, 2009), http://business.avn.com/articles/legal/Judge-Tosses-AIDS-Healthcare-s-Condom-Lawsuit-v2-0-375829.html (quoting AHF spokeswoman Lori Yeghiayan, "In our view, the current regulation, which is about preventing the transmission of blood-borne [sic] pathogens in a work place—most often in a hospital or medical setting—also applies to the porn industry.").
[49] AIDS Healthcare Foundation v. Los Angeles County Department of Public Health, 128 Cal. Rptr. 3d 292 (Cal. App. 2d Dist. 2011), *review denied* (Aug. 31, 2011).
[50] Zero v. California Div. of Occupational Safety and Health, 2011 WL 2491784 (Cal. Super. Ct. Almeda Cnty. June 14, 2011).
[51] *See* Romero, *supra* note 48; Rong-Gong Lin II, *Judge Blocks Cal/OSHA Request in Agency's Porn HIV Investigation*, L.A. TIMES, June 22, 2011, *available at* http://latimesblogs.latimes.com/lanow/2011/06/judge-blocks-calosha-request-in-agencys-porn-HIV-investigation.html.
[52] *AIDS Healthcare Foundation*, 128 Cal. Rptr. 3d at 298-300 (Cal. App. 2d Dist. 2011).
[53] *Zero*, 2011 WL 2491784 (citing CAL. HEALTH & SAFETY CODE § 120975 providing that "no person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV.").
[54] Corina Knoll, *HIV Scare That Led to Porn Industry Shutdown a False Alarm*, L.A. TIMES, Sept. 6, 2011, *available at* http://latimesblogs.latimes.com/lanow/2011/09/hiv-scare-that-led-to-porn-industry-shutdown-a-false-alarm.html.
[55] Molly Hennessy-Fiske, *Porn Filmmaking Shut Down After Performer Tests HIV Positive*, L.A. TIMES, Aug. 29, 2011, available at http://articles.latimes.com/2011/aug/29/news/la-porn-hiv-shutdown-sl.
[56] Knoll, *supra* note 54 ("'Industry self-regulation and best practices are alive and well in the adult entertainment industry,' the group's executive director, Diane Duke, said in a statement").

Currently, each group is taking measures to ensure that condoms are used in adult films. CalOSHA is considering an amendment to its bloodborne pathogen statute that would "clarify required protections for workers in the adult film industry." That amendment would explicitly require "mandatory use of condoms for all penetrative sex acts" in an effort to limit the transmission of sexually transmitted diseases.[57] AIDS Healthcare Foundation, meanwhile, was gathering signatures from Los Angeles residents in support of a ballot initiative for the city's June 2012 election.[58] The goal of the initiative was to condition site permits for adult film production in the city of Los Angeles on the use of condoms among performers.[59] In early December 2011, AIDS Healthcare Foundation successfully collected approximately 64,000 signatures; well over the 41,000 required for a ballot initiative.[60] Subsequently, the L.A. City Council adopted the measure, "City of Los Angeles Safer Sex in the Adult Film Industry," rather than having it appear on the ballot as a proposed initiative.[61] Most recently, Los Angeles Mayor Antonio Villaraigosa signed the measure into law.[62] The industry, however, is worried that mandatory condom use will obliterate the testing mechanisms currently in existence and leave performers unaware of possible infections.[63] Moreover, as I explain below, such a requirement is an unconstitutional infringement on the First Amendment rights to free speech and expression.

II. WHEN THE CONTENT *IS* CONDUCT: CONTENT-BASED AND CONTENT-NEUTRAL STANDARDS OF REVIEW FOR FIRST AMENDMENT ANALYSIS

A. Strict Scrutiny v. the O'Brien Standard

It is inarguable that an essential aspect of adult films is the portrayal of sexual conduct, and the way in which that conduct is carried out is an indispensible part of the film's message. Furthermore, regardless of a court's "view of the social utility" of a

[57] Los Angeles County Department of Public Health, Statement to the CalOSHA Advisory Committee by the Los Angeles County Department of Public Health at 1 (June 29, 2010) *available at* http://www.dir.ca.gov/dosh/doshreg/comments/Statement%20from%20the%20Los%20Angeles%20County%20Department%20of%20Public%20Health%206-29-10.pdf.

[58] Mary Hennessey-Finke, *Condoms-in-Porn L.A. Ballot Initiative Petition Underway*, L.A. TIMES, Aug. 15, 2011, *available at* http://latimesblogs.latimes.com/lanow/2011/08/condoms-in-porn-la-ballot-initiative-petition-effort-underway.html (explaining that activists must gather over 40,000 signatures by Dec. 23rd 2011 in order guarantee the initiative makes it on the ballot—this information will need to be updated in subsequent drafts pending the outcome).

[59] *Id.*

[60] Sam Quinones, *L.A. Porn Condom Initiative Moves Closer to Ballot*, L.A. TIMES, Dec. 1, 2011, *available at* http://articles.latimes.com/2011/dec/01/local/la-me-porn-condoms-20111201.

[61] *2:00 PM Press Conference: City of Los Angeles Adopts Condoms Ordinance, Says AHF*, BUS. WIRE, Jan. 10, 2012, *available at* www.businesswire.com/news/home/20120110007093/en/200-PM-Press-Conference-City-Los-Angeles.

[62] Rong-Gong Lin II, *Landmark Condom Law for Porn Filming Signed by L.A. Mayor*, L.A. TIMES, Jan. 24, 2012, *available at* http://latimesblogs.latimes.com/lanow/2012/01/landmark-condom-law-for-porn-filming-signed-by-la-mayor.html.

[63] Quinones, *supra* note 60 ("'History has shown us that regulating sexual behavior between consenting adults does not work,' she [Diane Duke] wrote. 'The best way to prevent the transmission of HIV and other [sexually transmitted infections] is by providing quality information and sexual health services. If condoms were mandatory,' she wrote, 'existing testing protocols would likely disappear.'").

specific film, if it passes the *Miller* test and thereby is deemed non-obscene, it is "protected by the guarantee of free expression found in the First Amendment."[64]

Fundamental rights, like those protected by the First Amendment, are afforded a strict scrutiny standard of review.[65] However, First Amendment jurisprudence recognizes a two-tiered approach to judicial review of legislation that potentially infringes on the freedoms of speech and expression.[66] Expression is always "subject to reasonable time, place, and manner" restrictions;[67] however, those restrictions are valid only when "they are justified without reference to the content of the regulated speech."[68] Thus, judicial analysis of speech regulation turns on whether the legislation is content-based or content-neutral.

Content-based legislation must stand up to the strict scrutiny test whereas content-neutral laws are subjected to a more intermediate level of review as defined by the Court in *U.S. v. O'Brien*.[69] The four part O'Brien test justifies government regulation of expression so long as the regulation is "within the constitutional power of the Government;" the regulation "furthers an important or substantial governmental interest;" the interest furthered "is unrelated to the suppression of free expression;" and any "incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of the interest."[70] The *O'Brien* Court further noted, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[71]

Many adult entertainment First Amendment cases regarding the regulation of expression have been reviewed according to the less stringent *O'Brien* standard., In rare instances, however, the Court has determined a regulation to be content-based and therefore applied a strict scrutiny level of review.[72] For the most part, litigation pertaining to the cross-section of adult entertainment and First Amendment rights has revolved around zoning laws and public indecency statutes which adversely affect proprietors of adult entertainment establishments; all such cases have been reviewed according to the *O'Brien* standard.[73]

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[64] People v. Freeman, 46 Cal.3d. 419, 425 (1988).
[65] *See, e.g.,* United States v. Playboy Ent. Group, Inc., 529 U.S. 803 (2000) (holding that a content-based restriction on free speech was subject to a strict scrutiny standard of review).
[66] *See generally*, Gey, *supra* note 17.
[67] Clark v. Community for Creative Non-Violence, 468 U.S. at 288, 293 (1984).
[68] *Id.*
[69] United States v. O'Brien, 391 U.S. at 367, 377 (1968).
[70] *Id.*
[71] *Id.* at 376.
[72] *See, e.g.*, United States v. Playboy Ent. Group, 529 U.S. 803 (2000) (applying the strict scrutiny standard of review to a government regulation which required all cable providers to scramble all sexually oriented material or limit such material to hours when children were unlikely to be viewing; holding that the regulation was a violation of the First Amendment because it was not the least restrictive means of furthering an important governmental interest); Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Comm. Comm'n, 518 U.S. 727 (1995) (holding that under strict scrutiny analysis provisions of Cable Television Consumer Protection and Competition Act pertaining to indecent and obscene programming violated First Amendment).
[73] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (holding that zoning ordinance restricting location of adult entertainment establishment was content-neutral and that the regulation satisfied the O'Brien standard); Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991) (holding that public indecency statute

B. How Courts Determine Whether a Regulation is Content-Based or Content-Neutral: The Invention of Secondary Effects of Expression

> "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express *any* thought, free from government censorship. The essence of this forbidden censorship is *content control* (emphasis added). Any restriction on expressive activity *because* of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[74]

The sentiment above, taken at face value, indicates that government regulation of expressive activity must be strictly prohibited. However, as Justice Stevens noted in *Young v. American Mini Theatres*, "broad statements of principle, no matter how correct in the context in which they are made," cannot be applied in every case.[75] Justice Stevens then went on to explicitly state that quite often, First Amendment protection of speech depends on its content.[76] In *American Mini Theatres*, the Court held that although the government zoning regulations were content-neutral, they were permissible regardless of whether they were content-based or content-neutral because "society's interest in protecting" sexually explicit expression "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment."[77]

In his concurrence, Justice Powell expressed disagreement regarding Stevens' brazen opinion that speech could be restricted based on content.[78] Powell understood the ordinance in question as restricting only where the expression could be viewed, and as presenting no interference with the content of the expression.[79] This type of restriction

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barring totally nude dancing at adult entertainment establishments was content-neutral and satisfied the O'Brien standard); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (holding that a zoning ordinance restricting location of adult theater was a content-neutral regulation that satisfied the dictates of the First Amendment when reviewed according to the O'Brien standard); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (determining that zoning laws limiting locations of adult theaters were generally applicable to all motion picture theaters and holding that it did not violate First Amendment rights).

[74] *Young*, 427 U.S. at 64-65.

[75] *Id.* at 65.

[76] *Id.* at 66. This is certainly true when adjudging whether the First Amendment applies *at all* to certain forms of speech, e.g. obscenity is a category based on speech content to which the First Amendment does not apply. However, here, Stevens seems to say that even speech that has been adjudged protected by the First Amendment can be subjected to government regulation based on its content. Moreover, 'speech' has a vast number of different uses, and different categories of protected speech exist, e.g. commercial speech, to which the First Amendment affords less protection than to political speech. These categories are implicitly developed based on content.

[77] *Young*, 427 U.S. at 70 (referring to the famous statement attributed to Voltaire by Evelyn Beatrice Hall—pseudonym, S.G. Tallentyre—in her work *Friends of Voltaire*, "I disapprove of what you say, but I will defend to the death your right to say it."); *see The Quotations Page,* http://www.quotationspage.com/quote/35374.html.

[78] *Young*, 427 U.S. at 73. (Powell, J. concurring).

[79] *Id.* at 78-79.

implicated the "First Amendment only incidentally and to a limited extent."[80] Essentially, Powell determined that the ordinance was content-neutral and applied the *O'Brien* test, but he did that without explicitly stating so. His approach was closely mirrored in *City of Renton v. Playtime Theatres, Inc.*, in which the Court determined that the regulation at issue was content-neutral and then established the theory of secondary effects.[81]

The *Renton* Court developed a theory to determine whether a government regulation limiting sexually expressive speech was aimed at content or merely at the secondary effects that followed the presence of sexually expressive content.[82] Specifically, the Court noted that regulations "designed to combat the undesirable secondary effects of" the adult entertainment business should be reviewed according to "the standards applicable to 'content-neutral' . . . regulations."[83] After the *Renton* decision, other decisions involving restrictions on adult entertainment establishments primarily used the theory of secondary effects to determine whether a regulation was content-based or content-neutral; upon a finding of neutrality, the courts applied an intermediate standard of review as required by *O'Brien*. [84]

III. MANDATORY CONDOMS IN ADULT FILMS: FIRST AMENDMENT PROTECTED EXPRESSIVE CONDUCT TARGETED BY REGULATION

> "Keep your laws off my body," she demanded. "It's really important to make sure our side is heard . . . ."
>
> "As an individual and as a performer, I would rather have unprotected sex with someone I know for sure has been tested for HIV . . . than have barrier-protected sex with someone whose STD status is either unknown or positive." ". . . I absolutely, unequivocally, love what I do, and I do not want that taken away from me . . . . We are not a hazmat [sic] team. We are not radioactive. We are fucking, something almost everyone does, and almost no one encases themselves in plastic wrap to do. I am not opposed to safety, but our testing protocol kept us safe. Regulations requiring condoms, dams, gloves, eye protection, the prevention of any and all body

[80] *Id*. at 73.
[81] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).
[82] *Id.* at 47. ("[T]he Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's '*predominate* concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves.").
[83] *Id.* at 49.
[84] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (plurality opinion) (noting that "the ordinance does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we previously recognized" are prevalent near adult entertainment establishments); Barnes v. Glen Theater, Inc., 501 U.S. 560, 568 (1991) (holding that public indecency statute barring totally nude dancing at adult entertainment establishments was content-neutral based on its finding that governmental interest was unrelated to suppression of expression because the purpose of the statute was protect "societal order and morality" from the pernicious effects of nakedness).

> fluid contact with skin. . . are unnecessary and divorced from . . . reality."[85]

The Court has established a precedent that prohibits the regulation of private consensual sexual activity.[86] However, that prohibition only extends so far, as public sexual acts and prostitution are heavily regulated. [87] What happens when consenting adults are paid to engage in sexual conduct with one another in private, but with the end goal of publishing their sexual exploits for public consumption? This section will explore the First Amendment ramifications inherent in mandating condom use on adult film sets.

Regulations restricting the actual manner in which adult film performers have sex on screen have never been challenged in court on the basis of First Amendment claims.[88] Now that Mayor Villaraigosa has signed the "City of Los Angeles Safer Sex in the Adult Film Industry Act" and if CalOSHA implements its redrafted, adult film specific, bloodborne pathogen regulation, litigation will surely ensue. The first task any court will have to undertake is to determine whether the regulation is content-based or content-neutral. Once that determination is made, review must be done according to the appropriate standard: strict scrutiny or the *O'Brien* standard, respectively. Below I analyze how under either of those standards, regulation requiring the use of condoms for certain sexual activities on film would violate the First Amendment.

Because neither the ballot initiative proposed by The AIDS Healthcare Foundation nor CalOSHA's proposed amendment to Section 5193 have been published, Section A is speculative based on what those institutions have asserted as their goals and methods for the proposed regulations. Likewise, Sections B and C are based on the analysis in Section A of this comment and are similarly speculative. However, these sections will provide guidance regarding how a court would likely interpret the proposed

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[85] *More Performers Speak Out Against Cal/OSHA Sanctions*, ADULT VIDEO NEWS (June 8, 2011), http://business.avn.com/articles/video/More-Performers-Speak-Out-Against-Cal-OSHA-Sanctions-438251.html.

[86] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding a law forbidding the use of contraceptives unconstitutional because of its intrusion in the private lives of married adults). *See also* Lawrence v. Texas, 539 U.S. 558, 560 (2003) (holding anti-sodomy law unconstitutional because of its interference in the lives of "two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle.").

[87] *See, e.g.*, Cal. Penal Code § 314 (West 2008) (prohibiting exposure of the genital area in any public place "or in any place where there are present other persons to be offended or annoyed thereby"); Cal Penal Code § 647 (West 2012) (prohibiting prostitution and solicitation of prostitution; "a person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution.").

[88] Such regulations are arguably non-existent at this point because there has not been any determination that CalOSHA regulations apply to the adult film industry. However, CalOSHA is considering amending its current regulations to explicitly include the adult film industry. Although, courts have heard cases regarding the mandatory use of condoms in adult films, these cases revolved around which agency was responsible for enforcement against adult film industry. *See generally* Mark Kernes, *CalOSHASez: Almost All Adult Movies are Non-Compliant*, ADULT VIDEO NEWS (June 29, 2010), http://business.avn.com/articles/legal/CalOSHA-Sez-Almost-All-Adult-Movies-Are-Non-Compliant-401733.html (stating that CalOSHA officials assert that according to California and Federal regulations "condoms are *already* required for sex scenes, and any production that doesn't use them is breaking the law" and further noting that the amendment to current regulations is simply to provide a more workable standard for the adult film industry). As of yet, CalOSHA's assertions have not been interpreted by a court and are highly contentious.

regulations under a First Amendment analysis. Regardless of the exact text of the proposals, if confronted with the issue, a court would likely determine that they are unconstitutional on the basis that they unduly infringe on protected expression.

A. Content-Neutral or Content-Based: The First Step in Determining the Constitutionality of Mandated Condom Use in Adult Films

To begin, the content of adult films must be articulated before we can understand whether a particular regulation is content-based or content-neutral. "Pornography…conveys a host of messages,"[89] and pornographic films are no exception. It is common knowledge that adult films contain actual sexual activity between individuals and groups; but what is their content, and is the sexual conduct a part of that message? According to consumers of adult films—who better to determine the message conveyed by a film than its audience—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.[90]

Producers of adult films should then argue that the inclusion of a condom or other prophylactics in their films would alter the fantasy content to an extent that changes its message. Regulators, on the other hand, would contend that the sexual actions necessary to create the adult films is conduct that is separable from the content of the film and thereby subject to regulation without regard to First Amendment concerns. However, as the Court pointed out in *People v. Freeman*, the conduct of paying actors to engage in sex on camera was subject to First Amendment protection and could not be proscribed without injurious effects to the freedom of expression inherent in the First Amendment. In light of *Freeman* and the zoning and public indecency cases described above, courts would likely view such regulation as subject to First Amendment analysis. But despite producer and consumer contentions that that the content of sexually explicit films is sexual fantasy and that sexual fantasy cannot be depicted using condoms, courts would likely view the regulations as content-neutral and therefore subject to the less stringent *O'Brien* standard. As demonstrated in the zoning and public indecency cases above, courts are reluctant to describe regulations as content-based in the sexual realm, finding instead that any infringement posed by regulations is incidental.[91]

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[89] JOSEPH W. SLADE, *The Definition of Pornography, in* PORNOGRAPHY IN AMERICA: A REFERENCE HANDBOOK (2000), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/porn/etc/definition.html.

[90] *See generally* Susannah Bresslin, *Letters From Men Who Watch Pornography*, http://lettersfromwatchers.blogspot.com ("In porn I like seeing women who are enjoying themselves…I can pretend that I am there with them and they enjoy my company . . .It embraces our fetishes and makes them acceptable, giving us a right to do or say just about everything . . . Why I watch porn today is because I have fantasies just like every other person. To see them on screen is a plus."). *Letters From Men Who Watch Pornography* is a closed "online project featuring letters from men about why they watch pornography. The project launched on April 26, 2010 and ended on April 26, 2011." It was created by Susannah Bresslin, a journalist and author. *Id.*

[91] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (holding that zoning ordinance restricting location of adult entertainment establishment was content-neutral and that the regulation satisfied the O'Brien standard); Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991) (holding that public indecency statute barring totally nude dancing at adult entertainment establishments was content-neutral and satisfied the O'Brien standard); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (holding that a zoning ordinance restricting location of adult theater was a content-neutral regulation that satisfied the dictates of the First Amendment when reviewed according to the O'Brien standard); Young v. American Mini

1. CalOSHA: Current Regulations v. Amended Porn Specific Regulations

Because CalOSHA asserts that current state law mandates the use of condoms in adult films,[92] both the current regulation and the proposed amendment must be analyzed to determine whether they are content-neutral or content-based.

a. CalOSHA's Current Bloodborne Pathogen Regulation is Content-Neutral

As noted above, CalOSHA contends that its current regulations already mandate the use of condoms and other protective gear for sexual activity on adult film sets.[93] The current regulations, written primarily with the medical industry in mind, would require more than just condoms during sexual activity. In fact, they would call for gloves, goggles, barriers, etc. (there is no mention of condoms, however), anytime blood or "other potentially infectious materials" (OPIM), including semen, vaginal secretions, etc., could come into contact with the eyes, mouth, other mucous membrane, or skin of another.[94] Regardless of content-neutrality, these regulations would likely be unworkable in the adult film industry.

Nevertheless, the courts must determine whether the current regulations are content-based or content-neutral. Unlike the zoning cases discussed above, where zoning laws were considered content-neutral because they did not directly interfere with the content shown inside of adult theaters, the current CalOSHA regulation would completely prohibit adult filmmakers from producing a certain type of film—a film about fantasy sex that does not involve STDs and other unattractive realities.[95] Moreover, the regulation implies that in oral sex scenes, not only would the receiving performer have to wear a condom, but the other performer would need to wear goggles to protect against the potential contact of OPIM should the condom fail, presenting a great burden on the filmmaker to make anything resembling what is commonly thought of as an adult film.

A more workable analogy for showing that this law is content-neutral can be found in the public nudity cases that prohibited completely nude dancing inside of adult entertainment establishments, despite the protected status of nude dancing as expressive content.[96] In *Pap's*, a public indecency ordinance making it an "offense to knowingly or

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Theaters, Inc., 427 U.S. 50 (1976) (determining that zoning laws limiting locations of adult theaters were generally applicable to all motion picture theaters and holding that it did not violate First Amendment rights).

[92] Cal. Code Regs. tit. 8 § 5193; Kernes, *supra* note 88.

[93] Cal. Code Regs. tit. 8 § 5193; Kernes, *supra* note 88.

[94] Cal. Code Regs. tit. 8 § 5193 (c)(4)(A) ("(A) Provision. Where occupational exposure remains after institution of engineering and work practice controls, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective equipment will be considered "appropriate" only if it does not permit blood or OPIM to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used.).

[95] *See, e.g.,* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

[96] *See, e.g.,* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

intentionally appear in public in a 'state of nudity'" was applied to a nude dancing facility.[97] The public indecency statute applied to the adult entertainment establishment in that the City of Erie required dancers to "wear, at a minimum, 'pasties' and a 'G-string.'"[98] The Court was faced with the question of whether the government interest in enacting the statute was "related to the suppression of expression."[99]

In determining the government's interest the Court noted that the ordinance was "on its face a general prohibition on public nudity."[100] Likewise, the current CalOSHA standard is, on its face, a general mandate for protection in the workplace where exposure to blood or OPIM is likely.[101] The Court went on to say that the ordinance explicitly regulated only nudity—"conduct alone"—without targeting "nudity that contains an erotic message; rather it bans all nudity, regardless of whether that nudity is accompanied by an expressive activity."[102] Again, the broadness of the present CalOSHA regulation does not explicitly regulate sex or condoms, but rather mandates barrier precautions for all industries in which exposure to blood or OPIM may occur. Consequently, as it stands, it is likely that, should CalOSHA determine that its current regulation is adequate to address issues in the adult film industry, it would be considered content-neutral and subject to the *O'Brien* test.

b. CalOSHA's Proposed Condom-Specific Amendment to the Bloodborne Pathogen Regulation is Content-Neutral

The proposed amendment to CalOSHA's bloodborne pathogen regulation presents more issues than the current regulation from a content-neutral, content-based standpoint because a judge could determine that the amended regulation is not one of general applicability, but rather is a content-based regulation targeting pornography. As the attorney for Vivid Entertainment (an adult film production company) pointed out, by specifically targeting the adult film industry in the amendment, the regulation targets the content of those films.[103] In *Pap's*, the respondent and Justice Stevens were of the mind that the ordinance related directly "to the suppression of expression because language in the ordinance's preamble" suggested that it was written in order to prohibit erotic dancing.[104] Similarly, CalOSHA documents indicate that it is regulating the industry

[97] *Pap's A.M.*, 529 U.S. at 283.
[98] *Id.* at 284.
[99] *Id.* at 289 (quoting Texas v. Johnson 491 U.S. 397, 403 (1989)).
[100] *Pap's A.M.*, 529 U.S. at 289.
[101] Cal. Code Regs. tit. 8 § 5193.
[102] *Pap's A.M.,* 529 U.S. at 290.
[103] Mark Kernes, *Industry Expresses Its Feelings–Loudly–at Cal/OSHA Meeting*, ADULT VIDEO NEWS (Jun. 7, 2011), http://business.avn.com/articles/legal/Industry-Expresses-Its-Feelings-Loudly-at-Cal-OSHA-Meeting-438135.html.
[104] Justice Stevens was concerned with the following language:

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Pap's A.M., 529 U.S. at 290.

because adult performers engage in sex acts.[105] The Court in *Pap's* found that, regardless of the preamble, the ordinance was drafted with the purpose of "combating crime and other negative secondary effects caused by the presence of adult entertainment establishments."[106] In sum, because the ordinance did not attempt to regulate "the effect on the audience of watching nude erotic dancing" the Court considered it content-neutral.[107] Similarly, CalOSHA has not included in its agenda or any publications thus far that it desires to regulate the effect of watching pornography.[108] Therefore, it would be unsurprising if a court were to find such an amendment content-neutral, despite its specific aim at the adult film industry.

2. "City of Los Angeles Safer Sex in the Adult Film Industry Act": A Content-Neutral Regulation

The AIDS Healthcare Foundation collected approximately 64,000 signatures as part of its "For Adult Industry Responsibility" (FAIR) campaign.[109] Now that the Los Angeles City Council has approved the initiative and Mayor Villaraigosa has signed it into law, obtaining permits for filming adult films in the City of Los Angles is contingent on condom use.[110] AIDS Healthcare Foundation's understanding of the regulations that were in place before the "City of Los Angeles Safer Sex in the Adult Film Industry Act" aligns with CalOSHA's—that those regulations already mandated condom use.[111] However, AHF points to the city and state's lack of commitment to the safety of adult film performers as its reason for getting involved:

> To date, the City of Los Angeles and the City Council have been unwilling or unable to put forth a motion tying adult film permits to condom use in the productions, or County, to enforce state statutes. This is why we have spearheaded this ballot initiative: so the people—the voters in Los

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[105] *Vital Information for Workers and Employers in the Adult Film Industry*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, http://www.dir.ca.gov/dosh/adultfilmindustry.html (last visited Nov. 12, 2011). ("In addition to general health and safety hazards associated with film and video production, workers in the adult film industry face particular hazards because actors perform sex acts in the course of making the films or videos. Many diseases can be transmitted through blood, semen, vaginal fluid and fecal material, or by mucous membrane contact.").

[106] *Pap's A.M.*, 529 U.S. at 291.

[107] *Id.* at 291, 295-96.

[108] Statement by the Los Angeles County Department of Public Health to the Cal/OSHA Advisory Subcommittee on Medical Issues, Bloodborne Pathogens in the Adult Film Industry (Sept. 14, 2010) (The stated purpose of adding a new subsection to Cal. Code Regs. tit. 8 § 5193 would be to "clarify required protections for workers in this industry and limit their exposure to bloodborne pathogens, other potentially infectious material, fecal pathogens and STDs, including HIV.") (copy on file with author).

[109] Quinones, *supra* note 60; *Condoms in Porn*, AIDS HEALTHCARE FOUNDATION (Oct. 19, 2011), http://www.aidshealthcare.net/archives/1812/.

[110] 2:00 PM Press Conference, *supra* note 61; Rong-Gong Lin II, *Landmark Condom Law for Porn Filming Signed by L.A. Mayor*, L.A. TIMES, Jan. 24, 2012, *available at* http://latimesblogs.latimes.com/lanow/2012/01/landmark-condom-law-for-porn-filming-signed-by-la-mayor.html.

[111] Dennis Romero, *Would You Vote to Force Porn Stars To Use Condoms On-The-Job? You Might Get Your Chance in the City of LA*, THE INFORMER, LA WEEKLY (Aug. 16, 2011), http://blogs.laweekly.com/informer/2011/08/porn_condom_ballot_angeles.php.

> Angeles—may decide on this important health and safety issue affecting adult film performers.[112]

As indicated by the above statement from AHF president Michael Weinstein, the driving force behind the condom requirement is health and safety. The act, at least officially, is in no way motivated by a desire to suppress the expression of adult films protected by the First Amendment. For that reason, as the analysis above indicates regarding the CalOSHA regulation and proposed amendment, the new ordinance will likely be deemed content-neutral as well.[113]

C. The O'Brien Standard: Is Full Prohibition of Condom-less Sex in Adult Films Necessary?

If a court were to deem the regulations discussed above content-neutral, the *O'Brien* standard would apply. As already noted, the *O'Brien* standard is comprised of four parts, and provides that government regulation of First Amendment expression is justified when (1) it is within the "constitutional power of the government;" (2) it "furthers an important or substantial" government interest; (3) "the governmental interest is unrelated to the suppression of free expression" and; (4) "the incidental restriction" on freedom of expression is "no greater than is essential to the furtherance of that interest."[114] For the purposes of this section, the current regulation, proposed amendment, and the Act will be analyzed together. I will note where there are potential differences in treatment under each prong. But because all three have the purpose of public health and safety and result in similar "incidental restriction" on free expression, a court would likely treat all three regulations similarly.

1. Constitutional Power of the Government

Protection of public health and safety is a recognized state police power.[115] The relevant regulations are public health regulations and as such likely fall within the state's police power. However, the specific issue of required condom use has never appeared before the courts. This prong of the *O'Brien* standard might implicate the question of whether states can regulate the sexual acts between two consenting adults.[116] The question of state regulation here, although never treated with reference to pornography, would require the application of a Fourteenth Amendment substantive due process analysis.[117] While *Lawrence* established that the state cannot interfere in the sexual life of

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[112] *Id.* (quoting AHF president, Michael Weinstein).
[113] For discussion of the constitutionality of laws regulating pornography and nudity *see generally* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).
[114] United States v. O'Brien, 391 U.S. 367, 377 (1968).
[115] *See*, *e.g., Barnes,* 501, U.S. at 560 ("The States' traditional police power is defined as the authority to provide for the public health, [and] safety.").
[116] *See* Lawrence v. Texas, 539 U.S. 558, 560 (2003) (holding anti-sodomy law unconstitutional because of its interference in the lives of "two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle." This law was held unconstitutional, in part because the state police power was being employed to enforce moral judgments rather than to protect the public health.).
[117] *See* Lawrence, 539 U.S. 558; U.S. CONST. amend. XIV § 1.

consenting adults, that case dealt with consenting adults acting in the private realm,[118] as has most substantive due process litigation regarding the sexual activity of adults.[119] Because the sexual activity here is meant for public consumption, it is likely a court would uphold a state's right to protect the public health and safety of its citizens through regulatory measures rather than prohibit state interference.

2. Furthering an Important or Substantial Governmental Interest

The government's purported interest in these regulations is stopping the spread of STDs such as HIV within the adult film industry and the general public. In fact, the Los Angeles County Department of Health is statutorily charged with "tak[ing] measures as may be necessary to prevent the spread of . . . disease or occurrence of additional cases."[120]

A driving argument behind the condom requirement is that adult performers have substantially higher rates of STD transmission than do members of the general public.[121] AHF, Cal/OSHA, and the Los Angeles Department of Public Health rely on studies that indicate a higher transmission rate of STDs among adult film performers due to their high-risk sexual activities and the amount of sex in which they engage.[122]

Likewise, in the background of many secondary effects cases were studies indicating that the governmental concerns were real and valid *and* that the regulations would aid in furthering them.[123] However, studies about the STD rates of adult film performers and the general Los Angeles population are largely unsubstantiated and unreliable.[124] An analysis of the data presented to CalOSHA and the Los Angeles County Department of public health indicates that the numbers are statistically flawed, "without

[118] Lawrence, 539 U.S. at 560.

[119] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding a law forbidding the use of contraceptives unconstitutional because of its intrusion in the private lives of married adults); Loving v. Virginia, 388 U.S. 1, 3 (1967) (holding that Virginia's anti-miscegenation laws violated the due process clause of the 14th Amendment because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); Roe v. Wade, 410 U.S. 113, 164 (1973) (recognizing a constitutionally protected right to have an abortion citing the right to privacy under the due process clause of the 14th Amendment); Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (upholding the right to abortions as asserted in Roe v. Wade).

[120] CAL. HEALTH & SAFETY CODE § 120175 (West 2013); *See also*, AIDS Healthcare Foundation v. Los Angeles County 197 Cal. App. 4th 693 (2011) Review Denied (August 31, 2011) (holding that Los Angeles County Department of Health had discretion not to enforce condoms on adult film sets; "The Department has not failed to act; based upon the allegations in the petition the Department has failed to act in the manner the Foundation believes is effective to stem the spread of sexually transmitted diseases. We cannot compel the Department to implement the Foundation's agenda.").

[121] Mark Kernes, *Expert's Report Blasts LA Health Department's STD Statistics*, ADULT VIDEO NEWS (June 6, 2011), http://business.avn.com/articles/video/Doctor-s-Report-Blasts-Health-Department-s-STD-Statistics-437880.html.

[122] *Sexually Transmitted Disease Morbidity Rate 2010*, Los Angeles County Department of Public Health (2010) *available at* http://publichealth.lacounty.gov/std/.

[123] *See e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986) (Indicating that Renton relied on studies done by the city of Seattle showing that negative secondary effects occurred in conjunction with adult entertainment establishments).

[124] *See* Kerns, *supra* note 121.

basis in science" and cannot be relied upon.[125] Dr. Lawrence Mayer, an epidemiologist and biostatistician at Johns Hopkins University Bloomberg School of Public Health and School of Medicine, analyzed the data collected and noted that the studies do not take into account re-infection rate or the fact that performers get tested more than once a year.[126] Furthermore, the reports on which CalOSHA relied differ drastically from the rates published by the Los Angeles County Department of Public Health, which shows a much higher rate of STDs among the general population than the reported studies indicate.[127]

The failure of the statistics to accurately show that the adult film industry actually has substantially higher rates of STD transmission undermines the state's important governmental interest. If the numbers of STDs among adult film performers are similar to those in the general population, then targeting adult film performers is an arbitrary, and largely ineffective, means of slowing down the spread of sexually transmitted diseases. Under a rational basis analysis the interest might be found legitimate; however, the intermediate level of scrutiny required by the *O'Brien* test mandates that the interest be important and substantial.[128] It is inarguably an important government interest to stop the spread of STDs and HIV, and such interest has been established in case law.[129] Restricting sexual activity among adult film performers, however, is an ineffective means of pursuing this goal because adult film performers do not have higher rates of STDs or HIV than the general population. Although regulation would likely halt the spread of STDs or HIV between adult film performers engaging in sexual acts on set, they would not protect the same performers from contracting diseases off set and would have little if any effect on the general population.

Because the condom requirement is unlikely to *further* the government interest, the regulations fail this prong of the *O'Brien* test. Should more credible statistics show an

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[125] *Id.*; see also, Lawrence S. Mayer, Assessment of the Presentations of Drs. Kim-Farley and Kerndt, (June 3, 2011), (on file with author).

[126] Mayer, *supra* note 125. According to industry standards, adult film performers get tested at least once per month in order to be cleared for work; therefore, the performers are tested more than once a year. Testing is often done before an STD has cleared, making data that ignores this fact inaccurate because it counts the same person, with same infection, more than once. "In other words, if a person with, say, a Chlamydia infection were treated with antibiotics on a Monday, but came back for retests on Tuesday, Wednesday, Thursday and Friday, when they would still be expected to test positive for the disease, AIM would report each retest of the same person to the health department, which would then count each positive retest as another incidence of the disease, thus improperly inflating the statistics." Mark Kernes, *Aids Healthcare Foundation Sues Over Bogus HIV/STD Statistics*, ADULT VIDEO NEWS (Jul. 7, 2009), http://business.avn.com/articles/legal/AIDS-Healthcare-Foundation-Sues-Over-Bogus-HIV-STD-Statistics-351734.html; Additionally, the studies used numbers for positive tests from Adult Industry Medical Foundation (AIM) to account for positive tests among adult industry performers; however, AIM is open to the public and serves many non-working "civilians" further skewing the accuracy of the statistics. Finally, while adult film stars are compulsorily tested, the general population is not and making it highly possible that many Los Angeles residents have undetected STDs. *Id. See also* Michael Hiltzik, Regulators on Collision Course with Porn Industry Over Condoms, LOS ANGELES TIMES, Nov. 2, 2011 *available at* http://www.latimes.com/health/la-fi-hiltzik-20111102,0,395281.column.

[127] *See* Kernes, *supra* note 121. For example, the Los Angeles County Department of Public Health's 2008 STD Clinic Morbidity Report showed an 11.3% rate of Chlamydia among Los Angeles County residents whereas the report to Cal/OSHA showed a 1.8% rate.

[128] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[129] *See* People v. Freeman, 46 Cal.3d. 419, 427 (1988).

actual discrepancy between the general population and the adult-film population, this analysis would have to be reassessed. However, the Adult Industry Medical Foundation, the testing site for adult performers, insists that according to its records, the rate of infection among adult performers is comparable to that of the general population.[130]

3. Government Interest Unrelated to Suppression of Free Expression

While some in the adult-film industry may view mandatory condom regulations as a "witch hunt against the State of California's porn production companies," such an argument is unlikely to hold up in court.[131] Rather, the court will look at the stated intent of the government regulation as well as what the regulation seeks to inhibit and determine whether that intent relates to the suppression of free expression.[132] Although any government regulation mandating the use of condoms in adult films will implicate the suppression of free expression, that fact does not mean that the interest is directly related to the suppression.

The California Supreme Court, in *People v. Freeman*, determined that a pandering law was unconstitutional after applying the *O'Brien* standard and determining that the statute clearly ran "afoul of the requirement that the governmental interest be unrelated to the suppression of free expression."[133] Despite the stated governmental interests of diminishing the availability of prostitutes and preventing the spread of STDs and AIDS, the court found that the real interest was the prevention of "profiteering in pornography," and therefore was directly related to the suppression of free expression.[134] The court noted that punishing a producer for making a non-obscene film "has little if anything to do with combating prostitution."[135] While a court may—in light of the statistical analysis above—agree with the *Freeman* interpretation regarding these regulations, the argument is more tenuous given United States Supreme Court decisions that look only to the language of the law, rather than to what the actual interest may be.[136]

But as the California Supreme Court pointed out in *Freeman*, "[t]he fact . . . that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted 'public health' interest."[137] So long as they are unpaid, adult performers—and amateurs for that matter—can engage in high-risk sexual activity on camera without being subjected to either the CalOSHA regulations or the Act tying film permits to condom use. Furthermore, members of the general public can engage in the

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[130] *See* Mark Kernes, *AIDS Healthcare Foundation Sues Over Bogus HIV/STD Statistics*, ADULT VIDEO NEWS (Jul. 17, 2009), http://business.avn.com/articles/legal/AIDS-Healthcare-Foundation-Sues-Over-Bogus-HIV-STD-Statistics-351734.html.

[131] Dennis Romero, *Porn And Condoms: California Workplace Safety Officials Get Earful on Move Toward Requiring Condoms in Adult Video*, THE INFORMER, LA WEEKLY (Jun. 2, 2011), http://blogs.laweekly.com/ informer/2011/06/porn_condom_cal_osha_la.php (quoting performer, Darryl Hannah XXX).

[132] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (finding that based on the city's "predominate intent" and the fact that ordinance "by its terms" was "designed to prevent crime…not to suppress the expression of unpopular views).

[133] *Freeman*, 46 Cal.3d. at 427.

[134] *Id.*

[135] *Id.*

[136] Here, I am not asserting that the actual interest of CalOSHA is the suppression of free expression, rather only that the Supreme Court would likely not delve into *actual* interest.

[137] *Freeman*, 46 Cal.3d. at 427.

same high-risk sexual activity without any oversight.[138] Because the regulations may be ineffective in preventing the spread of STDs, a court could rule—as the *Freeman* court did—that the regulations are aimed at the suppression of free expression since the use of condoms in many adult films would automatically suppress certain expressions. Should the goal be restated as trying to prevent the spread of STDs in the workplace, then the ineffectiveness of preventing STDs among the general public would be irrelevant. Regardless of the scope of the goal, however, a court may still determine that the true intention of the regulations was to restrict pornographic speech—as seen in *Freeman*.[139]

The Supreme Court, however, has shown a general propensity to look only at the "predominate intent" and the language of the regulations in evaluating this prong of the *O'Brien* standard.[140] As has been established, the "predominate intent" of the mandatory condom regulations is to prevent the spread of STDs—not to suppress adult film producer's freedom of expression. Moreover, the language of the current CalOSHA regulation and the language included in a discussion draft for an amendment to §5193 do not explicitly reference a desire to prevent expression through adult films.[141] Likewise, nothing about the proposed ballot measure indicates that its goal is to prevent expression through adult films. AHF president Michael Weinstein noted that AHF is pushing for the measure because "this [is an] important health and safety issue affecting adult film performers."[142] Given the "predominate interest" and language of the regulations, the court would likely view these regulations as furthering an important or substantial governmental interest. But this is not completely certain in light of the *Freeman* analysis above.

4. Evaluation of the Incidental Restriction on Freedom of Expression: Greater than Necessary

The last prong of the *O'Brien* standard is whether the "incidental restrictions on alleged First Amendment freedoms is not greater than is essential to the furtherance of the interest."[143] In evaluating this prong, the Court measures the actual restriction on

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[138] Any attempt to require members of the general public to wear condoms would be immediately attacked under a 14th Amendment substantive due process claim. However, it is an undeniable fact that members of the general public engage in non-monogamous sexual activity and have STDs. For a population that may be at risk for STDs, consider sex addicts:

> "The National Council on Sexual Addiction and Compulsivity has defined sexual addiction as 'engaging in persistent and escalating patterns of sexual behavior acted out despite increasing negative consequences to self and others.' In other words, a sex addict will continue to engage in certain sexual behaviors despite facing potential health risks, financial problems, shattered relationships or even arrest."

This population is also at risk for STD transmission, but the government would never require that all people diagnosed as sex addicts use condoms or face fines. *See* Michael Herkov, *What Is Sexual Addiction?*, PSYCHCENTRAL (Jan. 30, 2013), http://psychcentral.com/lib/2006/what-is-sexual-addiction/.

[139] *Freeman*, 46 Cal.3d. at 427.

[140] *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).

[141] *See* Cal. Code Regs. tit. 8, § 5193 (2013); CalOSHA Discussion Draft, Advisory Meeting, June 7, 2011 (on file with author).

[142] Romero, *supra* note 111.

[143] United States v. O'Brien, 391 U.S. 367, 377 (1968).

freedom of expression against the governmental interest and alternative means that may further the interest with less restriction.[144]

The "incidental restriction on alleged First Amendment freedoms" presented by the mandatory condom regulations would be the total prohibition of condom-less sex in adult films; to completely change the content of a film by prohibiting an important aspect of it, here a sexual fantasy that does not include prophylactics, cannot be considered merely incidental.[145] Those in the industry argue that the restriction is unnecessary because the self-regulated testing procedures currently in place have prevented the spread of sexually transmitted diseases and HIV.[146] Based on the flawed statistics that Dr. Lawrence Mayer detected,[147] the adult film industry may well be right, making the incidental effect more than is essential to further the important government interest. Critics cite the time lapse between testing (30 days) to be reason enough for mandatory condoms.[148] However, regulations could simply require testing more often, even weekly.

Given the likelihood that STD rates within the adult film industry are substantially similar to those in the general Los Angeles population, and the gravity of the incidental restrictions that the regulations pose to the freedom of expression, a court would be hard-pressed to find that the regulations at hand are *essential* to the furtherance of an important government interest.

CONCLUSION

Freedom of expression protects adult films so long as they are not deemed obscene.[149] The standard of review for alleged infringement on freedom of expression is dependent on whether the infringing regulation is content-based or content-neutral.[150] The CalOSHA regulations and AHF ballot measure are likely to be found content-neutral by a court and thereby subjected to the *O'Brien* standard.[151] As the case law discussed in this Comment indicates, courts have been hesitant to find regulations dealing with public indecency, zoning related to adult film stores and theaters, or pornography to be content-based. Although the regulations at issue here would likely be found to satisfy the first and

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[144] *Id.* at 381.
[145] *Id.* at 377.
[146] *See* Mark Kernes, *AIDS Healthcare Foundation Sues Over Bogus HIV/STD Statistics*, ADULT VIDEO NEWS, (Jul. 17, 2009) http://business.avn.com/articles/legal/AIDS-Healthcare-Foundation-Sues-Over-Bogus-HIV-STD-Statistics-351734.html. As previously noted, the industry insiders suggest that the rate of STDs in adult film performers parallels that in the general population. Also, although some have claimed that 18 cases of HIV have come out of the adult film industry since 2004, AIM personnel contend that although AIM has tested 18 positive cases since 2004, only 5 cases came from adult film performers. *Id.*
[147] Mayer, *supra* note 125.
[148] Mayer, *supra* note 125. *See also* Katie Moisse, *HIV Positive Performer Shuts Down L.A. Porn Industry*, ABC NEWS (Aug. 30, 2011) *available at* http://abcnews.go.com/Health/Wellness/hiv-positive-performer-shuts-la-porn-industry/story?id=14412090 ("'Testing is not a substitute for condom use, and it never will be,' said Michael Weinstein, president of the AIDS Healthcare Foundation in Los Angeles. 'No test can detect HIV from the moment of infection. There will always be a window period,'" which might not reflect recent infection. Between testing, performers could shoot any number of scenes and have sexual interaction with people outside the adult film industry and be at risk of exposing those in and out of the industry to STDs.).
[149] *See* Miller v. California, 413 U.S. 15 (1973).
[150] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 292 (1984).
[151] United States v. O'Brien, 391 U.S. 367, 377 (1968).

third prongs of the standard, there is evidence showing that they would fail the second (based on current statistics) and in all likelihood, the fourth. Because of the regulations' inability to meet the *O'Brien* standard, they should be deemed unconstitutional. Therefore, the mandated use of condoms in adult films would be an unconstitutional infringement on First Amendment protections of the freedom of expression.

ADDENDA

Since this article was originally researched and written there have been developments that should be noted; however, these developments and occurrences do not undermine the efficacy of the argument made herein and in some instances strengthen it.

A. The Court Found that Measure B is Directly Related to the Suppression of Expressive Conduct Therefore Leaving the Plaintiffs a Viable Argument that Measure B Directly Violates the First Amendment.

After the California voters voted in favor of Measure B, "The County of Los Angeles Safer Sex in the Adult Film Industry Act" in November 2012, Vivid Entertainment sued County officials for declaratory and injunctive relief in federal district court.[152] Vivid Entertainment sought a preliminary injunction against the enforcement of Measure B. The defendants refused to defend the measure on constitutional grounds. Consequently, the court allowed Michael Weinstein and several others from the AIDS Healthcare Foundation to intervene.

Plaintiffs argued that Measure B violates their First Amendment rights because as producers of and actors in pornography, they are engaged in expressive conduct. The judge agreed that the making of pornography is expressive conduct. The judge further determined that the purpose of Measure B focused on the secondary effects of pornography, and therefore required the court to use intermediate scrutiny in its analysis. The court denied the defendant's motion to dismiss, finding that "in light of the alleged effective, frequent, and universal testing in the adult film industry, Plaintiffs allege sufficient facts…to show that Measure B's condom requirement does not alleviate the spread of STIs in a 'direct and material way.'"[153]

However, plaintiff's victory was bittersweet. The court noted that because the plaintiffs' claim asserted a strict scrutiny standard, it was unlikely to succeed on the merits. The court therefore denied plaintiffs' motion for a preliminary injunction. However, while plaintiffs lost their motion for a preliminary injunction, the judge recognized that the films and filming at issue contain expressive conduct and therefore warrant some First Amendment protection.[154]

The focus of this article is on intermediate scrutiny and is therefore more in line with the court's opinion. However, the court did note that "[b]ecause testing is Plaintiffs' proffered alternative, and because evidence indicates it may be ineffective, requiring condoms is a permissible way (at least at this stage) to target and prevent the spread of STIs. For these reasons, Plaintiffs' claim challenging the condom requirement is not likely to succeed on the merits."[155] While this is certainly a setback for the First Amendment claim, it can be overcome at the next stage by strategically using research

[152] *Vivid Entm't, LLC v. Fielding*, 2013 WL 4451068 (C.D. Cal. Aug. 16, 2013).
[153] *Id*. at *4.
[154] *Id*. ("[G]iven the multitude of cases that have analyzed restrictions on adult entertainment under the First Amendment, this Court concludes that sexual intercourse engaged in for the purpose of creating commercial adult films is expressive conduct, is therefore speech, and therefore any restriction on this expressive conduct requires First Amendment scrutiny.").
[155] *Id*. at *11.

and evidence to support plaintiffs' position that condom requirements targeted at the adult film industry will not affect the spread of STIs.

B. Amendments to CalOSHA Regulations Analogous to Los Angeles County's Measure B Died in the California State Legislature Leaving California with a Content-Neutral Statewide Standard

This Article focuses on the difference between CalOSHA's current standard as applied to the adult film industry and the effect, if any, that adult-film specific amendments to the current regulations would have on a First Amendment challenge. In August of 2013, the California State Legislature failed to pass a bill that would have amended the labor code to specifically include the adult film industry and act as an analog to the Los Angeles County ordinance.[156] The primary effect an amended regulation would have is to target the adult film industry specifically, and as explained in my Article, expose those regulations to an attack grounded in a content-based argument. However, as further noted in the Article, the current regulations are content neutral, so any challenge to them will be analyzed under intermediate scrutiny.

C. Another HIV Outbreak in the Adult Film Industry Calls the Adult Film Industry's Reliance on Testing as an Effective Means of Stopping the Spread of STIs Among Adult Film Workers into Question

There was another outbreak of HIV in the adult film industry in August 2013.[157] Cameron Bay and her boyfriend Rod Daily, both adult film actors, contracted HIV sometime during the 2013 summer months.[158] Although it is unclear whether Bay contracted HIV while shooting an adult film, it is likely that she performed between tests after being infected with HIV.[159] The Free Speech Coalition, the industry's trade association, called for a moratorium on filming in response.[160] The moratorium lasted for two weeks. The Free Speech Coalition subsequently announced that the frequency of its required testing for adult film actors would be increased from every 28 days to every 14 days.[161]

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[156] *See generally,* Susan Abram, *Condoms in Porn Bill Dies in Senate*, LOS ANGELES DAILY NEWS (September 13, 2013), http://www.dailynews.com/government-and-politics/20130913/condoms-in-porn-bill-dies-in-senate.
[157] Mandalit Del Barco, *New HIV Cases Spotlight Adult Film Industry's Testing System*, NPR (September 10, 2013), *available at* http://www.npr.org/2013/09/10/221006125/hiv-outbreak-spotlights-adult-film-industrys-testing-system.
[158] David Knowles, *Infected Porn Stars Say the Outbreak of HIV Infections Shows the Industry Needs to Get Serious About Condoms*, N. Y. DAILY NEWS (September 18, 2013), *available at* http://www.nydailynews.com/life-style/health/hiv-positive-porn-stars-argue-condoms-article-1.1460438.
[159] *Id.*
[160] *Id.*
[161] *Id.*