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Sex Panic and Videotape

*Stephan Ferris**

INTRODUCTION

November 2016 saw a large but rather quiet victory for sexual expression. Californians voted on Proposition 60, a measure which, among other things, attempted to mandate condom usage (barrier protection) in the use of all adult entertainment production throughout the state. This proposition, financed by the AIDS Healthcare Foundation, could have struck a vital blow to the adult entertainment industry, but was defeated by an astounding 53.67 percent vote.¹ This legislation, in effect, unfairly targeted the LGBT community's production of pornography by expanding a condom mandate enacted in Los Angeles to Northern California, an area in which LGBT production thrives. The story of how Proposition 60 almost came to pass illustrates the need for a well-informed public when it comes to enacting legislation and policy surrounding sexual autonomy and expression. In the era of a Trump administration, the need for transparency becomes much more vital.

The LGBT community has achieved major strides in regards to civil liberty, but much of the community's success rests on assimilationist practices formed by drawing parallels between LGBT people and their straight counterparts.² This tactic has been incredibly successful when it comes to ensuring new rights for LGBT individuals, but it has also caused a "schism within the gay community between those who see assimilationist practices as a means to further equality and those who wish to preserve the transgressive nature of the gay community."³ The AIDS Healthcare Foundation's (AHF) attack on the adult entertainment industry is a prime

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1. CAL. PROPOSITION 60, CONDOMS IN PORNOGRAPHIC FILMS, BALLOTPEdia (2016) https://ballotpedia.org/California_Proposition_60, Condoms_in_Pornographic_Films (2016).

2. Bailey J. Langner, Commentary, *Unprotected: Condoms, Bareback Porn, and the First Amendment*, 30 BERKELEY J. GENDER L. & JUST. 199, 213 (2015).

3. *Id.*

example of assimilationist practices. AHF, a nonprofit organization, notorious for using anachronistic and fear-based sexual education strategies, financed a campaign against the adult entertainment industry and achieved enough signatures to merit a place for Proposition 60 on the 2016 California State Ballot.

The HIV epidemic of the 1980s significantly impacted the LGBT community, so it is reasonable to assert that the choice to use or not use condoms represents a vibrant aspect of the transgressive nature of the community. “Constraining the behavior [of the community] in any way will damage and diminish the culture—imagine the reaction if the government mandated the sound levels at which musical groups could perform in order to keep the musicians from possibly developing tinnitus.”⁴

One may postulate that after the *Obergefell*⁵ decision, mainstream LGBT practices may be able to veer away from assimilationist strategies and return to its transgressive foundation, but that hope died with the inauguration of President Donald Trump.⁶ Unfortunately, “many people fail to understand or appreciate the profound role that our sex plays in all the various gay subcultures and identities. For a lot of people, sex is only what you do if you’re making a baby. Anything beyond that is sinful or immoral.”⁷ Condomless, or “bareback porn,” represents a transgressive and politicized LGBT culture that is in danger of being eradicated by moralistic and assimilationist organizations, such as the AHF.

This is not the first time the gay community has been forced to trade sexual expression for public health concerns.

Gay bathhouses represent[ed] a major success in a century-long political struggle to overcome isolation and develop a sense of community and pride in sexuality, to gain [a] right to sexual privacy, to win [a] right to associate with each other in public, and to create safety zones where gay men could be sexual and affectionate with each other.⁸

The AHF’s crusade against the adult entertainment industry mirrors the closure of the bathhouses in San Francisco. “Early attempts to explain and combat AIDS often assumed a profoundly moralistic cast that had little connection to the exigencies of epidemiological intervention . . . Sex prejudice, sex moralism, and sex panic often powered analysis and policy.”⁹ However, in 2017, much more is known about HIV and its prevention, begging the question: *Why is such an anachronistic remedy*

4. Stephan Ferris & Paul Morris, *Interview 1* (2016).

5. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

6. Langner, *supra* note 2.

7. Ferris & Morris, *supra* note 4.

8. Gayle Rubin, *Sex Panic Closes Bathhouses*, FOUNDSF (May 19, 2016), http://foundsf.org/index.php?title=Sex_Panic_Closes_Bathhouses.

9. *Id.*

being forced upon an industry which self-regulates despite the ineffectiveness of condoms and the availability of modern remedies. “Because porn work is sex work it’s easy to promulgate false and negative ideas . . . Americans love getting hysterical over nonsense concerning sex work of any kind.”¹⁰ Moreover, although the scientific community finds progress in the prevention of HIV, a large portion of the public remains severely uneducated about how HIV is prevented and transmitted.

Just as the closure of the bathhouses was a knee-jerk and hotly debated response to the HIV epidemic, so is the banning of condomless sexual expression in adult films. “Bathhouse closure exemplifies the way in which public policy decisions driven by misplaced passions often had unintended and unanticipated consequences.”¹¹ In response to the epidemic, it was actually the gay companies that took affirmative steps to make condom usage the norm in the production of adult content.¹² Proponents of the condom mandate argue that it is a common sense measure to save lives in the same way that Randy Shiltz, a journalist for *The San Francisco Chronicle*, argued for the closure of the bathhouses.¹³ The Proposition 60 ballot language to the voter reads, “A YES vote for Prop. 60 is a vote to protect California adult film workers from disease.”¹⁴ In both debates, major conflict exists between public health issues and civil liberties. “Shultz in particular wrote as if public health professionals agreed on the desirability of closing the baths, and that only political considerations were preventing them from doing so.” However, those closures resulted in elimination of opportunities for sex education in the same way that a condoms-only approach silences the discussion of other HIV prevention tools, such as PrEP. “The social costs of closing the baths were treated cavalierly. Many of the leather clubs were relatively small operations . . . [and] could not afford prolonged litigation.”¹⁵ The same goes for smaller production companies today in opposition to Proposition 60.

In the same vein, the assimilationist sector of the LGBT community treats the adult entertainment industry and general sex work with the same disregard because it distracts from the streamlined agenda of a heteronormative living. The AIDS Healthcare Foundation, the world’s largest voice in HIV care, does not allow an informed discussion to occur regarding HIV prevention and it preys on the stigma surrounding sexual expression within the LGBT community. The AHF sells to the public a

10. See Ferris & Morris, *supra* note 4.

11. See Rubin, *supra* note 8.

12. See Langner, *supra* note 2.

13. See Rubin, *supra* note 8.

14. PROP. 60 ADULT FILMS, CONDOMS, HEALTH REQUIREMENTS, INITIATIVE STATUTE, CAL. GENERAL ELECTION NOVEMBER 8, 2016, OFFICIAL VOTER INFORMATION GUIDE (2017) <http://voterguide.sos.ca.gov/en/propositions/60/arguments-rebuttals.htm>.

15. See Rubin, *supra* note 8.

condom mandate to save lives, promoting its own moralistic agenda by using fear tactics instead of scientific data, and its views are in direct opposition to actual performers in the industry.

Below, I will explore the story of how the nonprofit AIDS Healthcare foundation, despite modern research, continues to assert its power and influence to promote a moralistic and self-serving agenda. In Part I, I will first provide a medical background of the HIV virus and scientific advancements regarding prevention. Part II will analyze how major voices in the community control the narrative surrounding HIV policy. Part III will center around the AIDS Healthcare Foundation and its efforts to use its power to influence the political system to advance a condoms-only agenda that is out of touch with the scientific community. Finally, I will conclude by opening dialogue to discuss what options are available moving forward.

I. MEDICAL BACKGROUND

Testing HIV-positive is no longer a death sentence as the virus can be treated, suppressed, and prevented. “We’ve come a very long way from those early days of the quiet and deadly AIDS epidemic . . . We’ve made great strides in treating and preventing HIV and AIDS. More people with HIV are leading full and happy lives than ever before.”¹⁶ I know this to be true because I live with HIV. However, this was not always the story. Different models of HIV treatment and prevention have come and gone over the years, from AZT to PrEP. When I first tested positive, it was common practice to delay treatment until completely necessary. The goal of this strategy was to keep toxic medication out of the body for as long as possible, for HIV medications can greatly strain the organs. Today, newer medications react much more positively with the body, and it is better to start treatment immediately. The following describes the true, scientific meaning of being HIV-positive and the modern HIV defense mechanisms available. Not surprisingly, the science is different than what most may believe.

A. Early Detection and Treatment

Evidence based medicine (as used in the medical field) suggests it is important for people who test HIV-positive to immediately begin treatment. The medicinal cocktails available today cause less strain on the body, and regular blood work and testing ensure that stress on the liver is alleviated.¹⁷ Most importantly, early treatment suppresses the patient’s

16. HIVisNotaCrime Conference, *Hillary Clinton Talks HIV Criminalization*, YOUTUBE (May 18 2016), <https://www.youtube.com/watch?v=bThbZwZQmq0&feature=youtu.be&app=desktop>.

17. *HIV and Hepatotoxicity*, AIDS INFO (May 19, 2016), <https://aidsinfo.nih.gov/education-materials/fact-sheets/22/67/hiv-and-hepatotoxicity>.

viral load, a strong indicator of whether a person can transmit the virus to another person,¹⁸ to an undetectable level.¹⁹

After 1999, both scientists and HIV-activists “believed that treating HIV-infected persons also significantly reduced their risk of transmitting the infection to sexual and drug-using partners who did not have the virus.”²⁰ This theory was speculative for years, but recent data strongly suggests that persons with an undetectable viral load do not transmit the HIV virus.²¹ In 2011, the HIV Prevention Trials Network (HPTN) study illustrated that “early initiation of ART [antiretroviral therapy] can prevent the sexual transmission of HIV among heterosexual couples in which one partner is HIV-infected and the other is not.”²² This landmark study verified the previously speculative and socially conscious reason for early treatment, known as Treatment as Prevention (Tap).²³ TasP “refers to the personal and public health benefits of using ART to continuously suppress HIV viral load in the blood and genital fluids, which decreases the risk of transmitting the virus to others.”²⁴ The HPTN study concluded that early treatment reduced the risk of transmitting HIV by ninety-six percent.²⁵ A more recent study in 2015 by UNC Chapel Hill confirmed the 2011 findings and asserted that the “probability of transmission is zero while on antiretroviral treatment.”²⁶

B. Prevention

TasP for HIV-positive individuals works in unison with prevention efforts geared towards the HIV-negative population. TasP, combined with another tool, PrEP (preexposure prophylactic treatment), which currently comes in the form of the daily pill Truvada, works together to reduce HIV transmission in its entirety.²⁷ TRUVADA “is a type of medicine called a nucleoside analog reverse transcriptase inhibitor (NRTI) that is used to treat HIV-1 infection . . . [It] is a combination therapy because it has 2

18. Gus Cairns, *No-one with an Undetectable Viral Load, Gay or Heterosexual, Transmits HIV in First Two Years of PARTNER Study*, AIDS MAP (Mar. 4, 2014), <http://www.aidsmap.com/No-one-with-an-undetectable-viral-load-gay-or-heterosexual-transmits-HIV-in-first-two-years-of-PARTNER-study/page/2832748>.

19. Gus Cairns, *supra* note 18.

20. PREVENTION BENEFITS OF HIV TREATMENT, CDC (2017) <http://www.cdc.gov/hiv/prevention/research/tap>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Katie Peoples, *New Research Shows Probability of Transmission Is Zero While on Antiretroviral Treatment*, HIV PLUS MAG, (Aug. 18, 2015), <http://www.hivplusmag.com/treatment/2015/07/23/breakthrough-study-shows-zero-hiv-transmissions-when-undetectable>.

27. PREP, CDC (2017), <http://www.cdc.gov/hiv/basics/prep.html>.

medicines in 1 pill—emtricitabine and tenofovir disoproxil fumarate.²⁸ PrEP can be taken by HIV-negative individuals to prevent HIV transmission.²⁹ “When someone is exposed to HIV through sex or injection drug use, [PrEP] work[s] to keep the virus from establishing a permanent infection.”³⁰ PrEP is proven to be most effective when taken consistently, and this is supported by several studies reporting a reduction in HIV transmission by up to ninety percent.³¹ Other studies suggest a much higher efficacy rate, indicating that zero persons contracted HIV when using Truvada a preexposure prophylactic treatment.³² Since the inception of PrEP, there has only been one prevention failure reported in the world from someone using this medication.³³

PrEP is a highly effective tool in the arsenal against HIV, but many opponents still believe that a condoms-only approach is the most effective method of prevention. However, condom failure occurs for a multiplicity of reasons, such as lack of education regarding usage, breakage, slippage, and “‘non-optimal use,’ which occurs when a condom is used after a partner has been exposed to virus in the partner’s pre-ejaculate.”³⁴

Scientific research illustrates that condoms have a much lower efficacy than PrEP due to lack of education regarding proper usage of the device.³⁵ When used correctly, condoms are proven to be eighty-seven percent effective at preventing the transmission of infections and viruses.³⁶ But the high efficacy rate is related to condoms being used according to a specific protocol in a laboratory setting.³⁷ As sex often does not occur in such a setting, unless on set for a fetishized adult film, it is unrealistic to project that condoms are actually ninety percent efficacious.

Further, many people do not know how to properly use a condom.³⁸ Rough play and friction significantly lowers the protection afforded by condoms.³⁹ “Of the 693 new HIV infections that occurred among men who

28. *How Is Truvada Used To Treat HIV-1 Infection?* TRUVADA (May 19, 2016), <http://www.truvada.com/treatment-for-hiv>.

29. PRE-EXPOSURE PROPHYLAXIS (PrEP), CDC (2017), <http://www.cdc.gov/hiv/risk/prep/index.html>.

30. PREVENTION BENEFITS OF HIV TREATMENT, *supra* note 20

31. PRE-EXPOSURE PROPHYLAXIS (PrEP), AIDS.GOV (May 19, 2016), <https://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis>.

32. *PrEP Study: Zero Transmissions*, POSITIVE LIVING (May 19, 2016), <http://www.positivelivingmagazine.com.au/content/prep-study-zero-transmissions-0>.

33. Les Fabian Brathwaite, *Gay Man on PrEP Tests Positive for HIV*, OUT MAGAZINE (Feb. 25, 2016), <http://www.out.com/news-opinion/2016/2/25/gay-man-prep-tests-positive-hiv>.

34. Emily Newman, *51% of New HIV Infections from Condom Failure During Anal Sex, Study Finds*, BETA BLOG, (Oct. 1, 2014), <http://betablog.org/51-new-hiv-infections-condom-failure-anal-sex-study-finds>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

have sex with men (MSM) in Ontario in 2009, over half (51%) were estimated to have occurred during anal sex with a condom.”⁴⁰ Because it is almost impossible to logistically and ethically conduct controlled and randomized trials to discover the efficacy in the use of condoms to reduce HIV transmission, scientists must rely on observational studies, “which inherently carry risk of bias.”⁴¹ The World Health Organization reports that consistent use of condoms results in only an eighty-percent reduction of HIV transmission.⁴²

Moreover, there remains a condom-resistant population who exercises the right to not use a condom, often due to personal preference.⁴³ For this community, the need for PrEP and its brother PEP (Post Exposure Prophylactic Treatment) becomes indispensable. A person who chooses not to use a condom can still protect his or herself by taking medication to reduce the risk of HIV transmission.

PEP and PrEP essentially utilize the same medication Truvada. It is a tool to protect people against HIV “by taking a pill every day” in a similar fashion that acyclovir controls the transmission of the herpes virus.⁴⁴ While this medication has only been studied to be effective when paired with condoms, its efficacy has not been shown to be dependent upon condom usage; condom usage is merely recommended as an additional layer of protection against HIV transmission.⁴⁵ Truvada is most effective when taken daily to prevent HIV, but it still receives a high efficacy rating when taken at least four days per week.⁴⁶ This allows for time shifting of HIV prevention to occur outside of the actual sexual activity. While one may, in the heat of the moment, decide against using a condom, he or she may simply set an alarm to remember to take the preventative medication

40. Newman, *supra* note 34.

41. *Condom Effectiveness in Reducing Heterosexual HIV* transmission, last viewed May 19, 2016, http://apps.who.int/rhl/hiv_aids/dwcom/en/.

42. *Id.*

43. Recent research suggests that HIV-positive men and women who take medications to suppress their viral load to an undetectable level do not transmit the virus to their sexual partners. This information is highly valuable to serodiscordant couples, where one partner is HIV-positive and one partner is HIV-negative, who choose to not use condoms. Furthermore, the stigma surrounding HIV is lessened so that someone outside of a serodiscordant relationship feels more comfortable to have sexual intercourse with someone that is HIV-positive without fear of transmission. There still remain at risk groups for HIV transmission that are condom resistant, such as drug users and segments of the population that simply do not prefer to utilize condoms, including some of the users of prep exposure prophylactic treatment (PrEP).

44. PrEP, *supra* note 27. See Jennifer Warner, *Daily Therapy Cuts Herpes Transmission Risk*, WEBMD, (Dec. 31, 2003), <http://www.webmd.com/genital-herpes/news/20031231/daily-therapy-cuts-herpes-transmission-risk>.

45. Liu, Albert. *PrEP: Your Burning Questions Answered*, (Apr. 14, 2014), BETA, <http://betablog.org/prep-burning-questions-answered>.

46. Tong, Warren. *Zero HIV Infections When PreP Is Taken 4 or More Times A Week*, *The Body Pro*, (Jul. 24, 2014), <http://www.thebodypro.com/content/74799/zero-hiv-infections-when-prep-is-taken-4-or-more-t.html>.

at a time divorced from sexual activity. This method of preexposure prevention is highly recommended for serodiscordant⁴⁷ couples, IV drug users, and people who chose to not use condoms, such as many adult film performers.

C. Policy

President Obama has acknowledged that teaching abstinence-only is unrealistic and useless in the fight against HIV and STI infection, and he has eliminated federal funding for abstinence-only education to support other options.⁴⁸ This is likely to change with the new administration. However, The World Health Organization (WHO), backed by the United States Center for Disease Control, released an announcement promoting Early Release HIV Treatment and PrEP guidelines “that will significantly increase the number of people eligible for life-saving anti-retroviral treatment (ART) and expand access to a powerful tool for preventing HIV among those at greatest risk.”⁴⁹ The Center for Disease Control issued its first ever “clinical guidance,” recommending physicians to consider advising the use of PrEP for gay men, bisexual men, heterosexuals, and injection drug users whom are all at substantial risk for HIV infection.⁵⁰ Medical research in support of PrEP is robust and illustrates an efficacy higher than condoms (ninety percent) in both scientific study and “real world” situations.⁵¹ Research, such as the IPRIX and Kaiser Permanente study, indicate a much greater efficacy, illustrating that “one hundred percent of participants taking HIV prevention pill Truvada remained infection-free.”⁵² Furthermore, the White House acknowledges this advancement in its policy for the National HIV/AIDS strategy in an executive order signed by President Obama that lists “full access to comprehensive pre-exposure prophylaxis (PrEP) services” as a “priority activity.”⁵³ Hillary Clinton echoed this need for access to PrEP in her 2016

47. A serodiscordant relationship, also known as magnetic or mixed status, is one in which one partner is infected by HIV and the other is not. This contrasts with seroconcordant relationships, in which both partners are of the same HIV status. Raymond A. Smith, *Couples*, THE BODY (1998), <http://www.thebody.com/content/art14009.html>.

48. Sharon Javson, *Obama Budget Cuts Funds for Abstinence-only sex Education* USA TODAY (Mar. 11, 2009, 7:51 PM), http://usatoday30.usatoday.com/news/health/2009-05-11-abstinence-only_N.htm.

49. CDC SUPPORTS NEW WHO EARLY RELEASE HIV TREATMENT AND PREP GUIDELINES, CDC & PREVENTION (2017), <http://www.cdc.gov/media/releases/2015/s0930-hiv-prep.html>.

50. *Id.*

51. *Id.*

52. Ariana Eunjung Cha, *In New Study, 100 Percent of Participants Taking HIV Prevention Pill Truvada Remained Infection-free*, WASH. POST (Sept. 4, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/09/04/in-new-study-hiv-prevention-pill-truvada-is-startlingly-100-percent-effective>.

53. *FACT SHEET: The National HIV/AIDS Strategy: Updated to 2020* (July 30, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/30/fact-sheet-national-hiv-aids-strategy-updated-2020>.

election campaign materials; however, currently there is no mention of HIV strategy available from the White House.⁵⁴

II. POLITICAL INTERESTS

The AIDS Healthcare Foundation (AHF), commonly referred to as the Wal-Mart of HIV care, is a Los Angeles-based 510(c)(3) tax-exempt organization, providing “cutting-edge medicine and advocacy to more than 713400 [sic] people in 38 countries.⁵⁵ It is the largest provider of HIV/AIDS medical care in the United States, generating capital from self-created enterprises, including AHF pharmacies, thrift store sites, healthcare contracts, and litigation.⁵⁶ The hallmark of AHF’s success comes from “generating and defining new, innovative ways of treatment, prevention and advocacy.”⁵⁷ However, even though the AHF has garnered much wealth and support, its policies regarding HIV prevention are out of sync with modern science. In fact, the foundation’s policies on prevention run contrary to what most organizations support, including the San Francisco Department of Public Health and the Center for Disease Control. AHF, whose hallmark of success arises from “generating and defining new, innovative ways of treatment, prevention and advocacy” reviles PrEP by refusing to acknowledge the vast amount of scientific research in its support, instead directing its in-demand resources to promote its own assimilationist and moralistic agenda.

PrEP continues to gain momentum from the scientific community on a global scale as more and more research becomes available,⁵⁸ but AHF refuses to reason with science. Michael Weinstein, the foundation’s director, utilizes sex-shaming publicity to denounce this new tool, referring to it simply as a “party drug.”⁵⁹ AHF equates Truvada, a lifesaving pharmaceutical drug, with methamphetamine or cocaine use. The AHF aggressively promotes this sentiment and has the advantage of significant power and recognition, while the rest of the community, who has

54. See HIVisNotaCrime Conference, *supra* note 16. See also Colby Itkowitz, *LGBT Rights Page Disappears from White House Web Site*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/local/2017/live-updates/politics/live-coverage-of-trumps-inauguration/lgbt-rights-page-disappears-from-white-house-web-site/?utm_term=.526e2aeb07ee.

55. *About*, AIDS HEALTHCARE FOUNDATION, <http://www.aidshealth.org/#/about> (last visited Apr. 9, 2017).

56. *Id.*; Kat Greene, *AIDS Group Can’t Nix LA County’s \$5.2M Overbilling Claim*, LAW360 (Apr. 13, 2015, 7:53 PM), <http://www.law360.com/articles/642511/aids-group-cant-nix-la-county-s-5-2m-overbilling-claim>; Mark S. Green, *AHF Offers Loans to the Louisiana HIV Agencies They Are Suing*, POZ (Apr. 10, 2016), <https://www.poz.com/blog/ahf-offers-loans-louisiana-hiv-agencies-suing>.

57. Itkowitz, *supra* note 54.

58. *UK Trial for PrEP*, BETTER2KNOW, <https://www.better2know.co.uk/blog/uk-trial-for-prep/> (last visited May 19, 2016).

59. Sean Mandell, *AHF Not Backing Down from Claim That PrEP Is a ‘Party Drug’*, TOWLEROAD, (Jan. 21, 2016), <http://www.towleroad.com/2016/01/299825>.

significantly less power and resources, cries out in silenced opposition. Staunch defenders of the LGBT and HIV community, such as San Francisco author HIV activist Race Bannon, believe “Michael Weinstein is a direct threat to modern HIV prevention.”⁶⁰ The views and tactics of AHF emanate from an alarmist and fear-based anachronistic reaction to HIV, which hurts rather than progresses the general fight against HIV.⁶¹ In regards to the proposed California condom mandate, it would seem logical that any organization truly trying to protect the safety of adult performers would consider PrEP technology in its prevention strategy.

III. THE AIDS HEALTHCARE FOUNDATION'S (AHF) ATTEMPTS TO REGULATE

A. Attempts to Regulate Through the Cal/OSHA Bloodborne Pathogens Statute

The AIDS Healthcare Foundation first attempted to assert its agenda with attempts to regulate the adult entertainment industry through Cal/OSHA. Cal/OSHA, California's Division of Occupational Safety and Health, is part of the Department of Industrial Relations, whose mission is to “protect and improve the health and safety of working men and women in California” by setting and enforcing standards, providing outreach and education, and issuing permits and licenses.⁶² In 2004, CAL/OSHA urged the adult entertainment industry to adopt voluntary measures to “protect performers from sexually transmitted diseases.”⁶³ While performers in the gay adult entertainment industry predominantly wear condoms, the heterosexual side of the industry claim that condoms “ruin the ‘fantasy’ effect for consumers, and that a mandate would send the industry underground or out of state.”⁶⁴ Assembly Labor and Employment Committee Chairman Paul Koretz acknowledged the fear of driving the industry underground and further stated that the “very nature of adult media production involved some risks of infection.”⁶⁵ When the alternative is driving the adult industry underground, allowing the industry to adopt voluntary measures instead of “overly stringent regulations” keeps the adult entertainment industry within the ambit of the protection of workplace safety standard.⁶⁶

60. Stephan Ferris & Race Bannon, *Interview 1* (2016).

61. *Op-Ed: 10 Worst Offenses of AIDS Healthcare Foundation's Michael Weinstein* (June 24, 2015), <http://www.hivplusmag.com/opinion/2015/06/24/op-ed-10-worst-offenses-aids-healthcare-foundations-michael-weinstein>.

62. Cal/OSHA, STATE OF CAL. DEP'T OF INDUSTRIAL RELATIONS, <https://www.dir.ca.gov/dosh> (last visited May 19, 2016).

63. *Assembly Labor Chairman Warns Adult Entertainment Industry Use Condoms or Risk Legislative Mandate*, 2004, <http://www.cal-osh.com/articles/COR00-20040820-002.htm.aspx>.

64. *Id.*

65. *Id.*

66. *Id.*

Currently, the bloodborne pathogens statute regulates the adult entertainment industry in the same way that it regulates bloodborne pathogens in a hospital setting.⁶⁷ In 2004, an expert was brought to propose regulations that the industry may adopt, including mandatory condom usage, mandatory use of acyclovir (a herpes suppressing medication), and HIV education including Post Exposure Prophylactic treatment (PEP).⁶⁸ The adult entertainment industry has always self-regulated itself in regards to STI and HIV prevention.⁶⁹ Porn performers are perhaps one of the most educated populations concerning sexual health, as this information is directly relevant to their safety and career, for the body of the adult entertainment performer is their instrument.

In 2009, AHF filed a formal complaint with California's Division of Occupational Safety and Health (DOSH) against sixteen production companies over the depiction of condomless sex in roughly sixty adult films in California.⁷⁰ AHF President Michael Weinstein stated,

As a global HIV and STD medical provider operating treatment clinics and prevention facilities here in California, we see it as our duty to pursue action on the issue of safety in the workplace—in these instances, unprotected sex acts taking place in albeit non-traditional workplaces—porn sets located throughout the San Fernando Valley that are churning out billions of dollars of adult fare every day.⁷¹

The adult industry was still reluctant to adopt additional standards in 2010, including mandatory barrier protection.⁷² While AHF “sees this proposal as a commonsense occupational health and safety measure, the adult-film industry frames it as a job killer.”⁷³ In response to the impasse, the Cal/OSHA Standards Board formed an advisory committee to determine whether new regulations were needed.⁷⁴ At issue is General Industry Safety Orders §5193, the bloodborne pathogens standard. AHF is pushing for a subsection that would require new work practice controls to prevent exposure during adult filmmaking, including engineering controls: condom

67. *Assembly Labor*, *supra* note 63.

68. *Id.*

69. Michael Hiltzik, *Regulators on Collision Course with Porn Industry over Condoms*, L.A. TIMES (Nov. 2, 2011), <http://articles.latimes.com/2011/nov/02/business/la-fi-hiltzik-20111102>.

70. *Workplace Safety Investigations: Feds Tight-lipped on SLO Death*, CAL-OSHA REPORTER (2009), <http://www.cal-osha.com/Feds-Tight-Lipped-on-SLO-Death.aspx>.

71. *Id.*

72. Bess Shapiro, *No Glove, No Cal/OSHA Love: Will Requiring Condoms Force the Adult-film Industry to Flee CA?*, CAL-OSHA REPORTER (2010), <http://www.cal-osha.com/Will-Requiring-Condoms-Force-the-Adult-Film-Industry-to-Flee-California.aspx>.

73. *Id.*

74. *Id.*

use on all film sets.⁷⁵ These would include but not be limited to: simulation of sex acts, ejaculation outside of workers' bodies, provision and use of condoms for vaginal and anal sex, provision of safe lubricants, and plastic and other disposable materials to clean up sets.⁷⁶ At the time of this committee, PreP was only in its preliminary trials so it was not a viable option for inclusion. In its discussion surrounding the adoption of an advisory committee, the adult industry was described "as an 'X Factor,' putting legislators in the difficult position of having to at least defend, if not assist, the industry . . . 'Do they like porn or do they not like porn? Is a vote against this bill because they don't like porn at all, or because they don't want the actors to be safe?'"⁷⁷ AHF, the driving force of the proposed regulation, answered this question, vigorously stating, "We're coming straight at this. Is this something that can be handled [through regulation]? If you can do it that way, that's better than having to deal with legislation," acknowledging Cal/OSHA's supportive efforts.⁷⁸

However, Diana Duke, former Executive Director of the Free Speech Coalition (FSC), a trade association for the adult industry, suggests, "To have the same bloodborne pathogen [regulation as required in a medical setting] with gloves and goggles, isn't really going to work on an adult-film set."⁷⁹ The Standards Board staff pointed out in 2010 that, "except for construction, all industries must comply with §5193 where there is an occupational exposure to blood or other potentially infectious materials. This includes all the fluids that flow on an adult-film set . . . Cal/OSHA makes it clear that §5193 covers the adult-film industry but acknowledges that there is 'high level of non-compliance.'"⁸⁰

The FSC works very closely with the adult industry to oppose mandated condom use and promote performer autonomy. An advisory committee was approved based on the petition by AHF to impose stricter regulations, and several public hearings commenced to provide the opportunity for AHF and industry professionals to voice their opinion. Performers claim that stringent regulations would run the adult entertainment industry underground. California simply cannot compete with outside production companies that do not mandate condom usage, and "the less responsible producers will go underground and the more responsible producers will go out of state."⁸¹ In an attempt to reach a middle ground, DOSH suggested that in light of a condom mandate,

75. A "Tragedy Waiting to Happen", CAL-OSHA REPORTER (2010), <http://www.cal-osha.com/A-Tragedy-Waiting-to-Happen.aspx> [hereinafter A "Tragedy Waiting to Happen"].

76. *Id.*

77. Hilzik, *supra* note 69.

78. *Id.*

79. *Id.*

80. *Id.*

81. Shapiro, *supra* note 72.

studios could visually remove the appearance of condoms post-production.⁸² However, “digitally removing condoms from films is prohibitive and time consuming. One estimate put the cost at twelve thousand dollars per minute of footage.”⁸³

That same year, the Adult Industry Medical Healthcare Foundation (AIM) reported that a performer tested positive.⁸⁴ In response, AHF argued “voluntary industry efforts ‘are simply not enough’ to address HIV outbreaks in the industry,” and demanded Los Angeles County cease issuing permits for adult film production.⁸⁵ AHF also issued a cease-and-desist order to AIM attempting to shut down one of the only adult entertainment focused clinics for unknowingly operating with the wrong license.⁸⁶ In 2011, the California Court of Appeal denied a writ of mandate by AHF to force Los Angeles County to “take reasonable steps to prevent the spread of sexually transmitted diseases” stemming from the adult entertainment industry.⁸⁷ “In the AHF case, the organization sought a writ of mandate to compel Los Angeles County Department of Public Health to ‘discharge its ministerial and non-discretionary’ duty to combat an ‘epidemic’ of STDs in the hardcore pornography outfits in the county.”⁸⁸

AHF asserts that the Health and Safety Code imposes “a mandatory duty to act to control the spread of sexually transmitted diseases.”⁸⁹ The

82. *DOSH: Bloodborne Pathogens Standard Already Requires Condoms*, CAL-OSHA REPORTER (2010), <http://www.cal-osha.com/DOSH-Bloodborne-Pathogens-Standard-Already-Requires-Condoms.aspx>.

83. *Id.*

84. *Construction Worker Killed in San Mateo Beam Fall*, CAL-OSHA REPORTER (2010), <http://www.cal-osha.com/Construction-Worker-Killed-in-San-Mateo-Beam-Fall.aspx> [hereinafter *Construction Worker Killed in San Mateo Beam Fall*].

85. *Id.*

86. “The battle between the AIDS Healthcare Foundation (AHF) and the Adult Industry Medical Healthcare Foundation (AIM) took a dramatic turn on Dec. 9 when the Los Angeles County Department of Public Health (LACDPH) issued a cease-and-desist order to AIM, shutting it down for lack of a state license. It turns out that AIM, which opened its doors in 1998, has never been properly licensed and AHF blew the whistle on the testing clinic last June. AIM has been attempting to gain licensure since then, but hasn’t been successful . . . By state law, all facilities that provide medical services regulated by the state must ensure they meet appropriate standards of medical care. AIM had been operating as a doctor’s office, LACDPH said, but the California Department of Public Health Licensing and Certification office determined that the Sherman Oaks facility was a medical clinic and ‘subject to more rigorous standards.’ AHF said the clinic’s closure means the adult film industry has little or no process to show that performers have been tested and are free of disease, even as flawed as the foundation believes that process is.” *L.A. County Shuts Down Porn Clinic*, CAL-OSHA REPORTER (2010), <http://www.cal-osha.com/LA-County-Shuts-Down-Porn-Clinic.aspx>.

87. *Judges Deny Cal/OSHA’s “Patient Zero” Request, AHF Porn Writ*, CAL-OSHA REPORTER (2011), <http://www.cal-osha.com/Judges-Deny-CalOSHAs-Patient-Zero-Request-AHF-Porn-Writ.aspx>.

88. *Id.*

89. *Id.*

appellate court stated that whether it is a duty or a discretionary function is a matter of interpretation.⁹⁰

Health officers are required to take measures to prevent the spread of contagious or communicable diseases, it explained, but the course of action is up to the officer's discretion . . . Based on the overall statutory scheme, we find it unlikely that the Legislature intended for the health officers' mandatory duty to be carried out in a specific manner to control the spread of sexually transmitted diseases in a particular industry.⁹¹

When AHF failed to initiate legally mandated condom use specifically for the adult industry in Los Angeles, it began "taking aim" at gay studios in the Bay Area by filing formal complaints with DOSH.⁹² The complaints alleged violations of the Cal/OSHA bloodborne pathogens statute and Injury and Illness Prevention Program standards seeking fines for several gay "bareback" production companies, which depict the act of condom less sex.⁹³ "AHF's Cal/OSHA complaints document that the films demonstrate unsafe . . . potentially life-threatening . . . behavior in a California workplace."⁹⁴ While adult films depicting men who have sex with men (MSM) have been among "the most compliant with 'condom-only' production at a rate of about ninety percent," a shift has occurred in this practice, potentially due to "the stance many straight production companies have taken" regarding the depiction of [bareback] sex.⁹⁵ Perhaps this shift is also due to the emergence of life saving PrEP technology first introduced in the Bay Area and specifically targeted to the gay community.

In 2013, AB 332 and AB 1277 came before the Assembly Labor and Employment Committee. Assembly Bill 332, which explicitly required "engineering controls," or condoms, for performers passed through the advisory committee and came before the Appropriations Committee.⁹⁶ Assembly Bill 1277 allowed for several changes to state occupational safety and health regulations, including authorizing the Division of Occupational Safety and Health to issue citations for alleged violations of the Labor code.⁹⁷ Only AB 1277 passed.

90. *Judges Deny*, *supra* note 87.

91. *Id.*

92. *AIDS Group Files Complaints with Cal/OSHA on Gay Adult Film Practices*, CAL-OSHA REPORTER (2013), <http://www.cal-osha.com/AIDS-Group-Files-Complaints-with-CalOSHA-on-Gay-Adult-Film-Practices.aspx>.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Legislative Update: Porn Rules Pass L&E Test; Omnibus Safety & Health Bill Also Gets Nod*, CAL-OSHA REPORTER (2013), <http://www.cal-osha.com/Porn-Rules-Pass-LE-Test-Omnibus-Safety-Health-Bill-Also-Gets-Nod.aspx>.

97. *Id.*

In March of 2014, AHF continued to battle the adult industry.⁹⁸

Month after month, like squeaky wheels, activists representing the AIDS Healthcare Foundation, a small special interest group, show up at Cal/OSHA Standards Board meetings. They demand action on its petition to require condoms for adult film productions. The organization filed its petition nearly five years ago.⁹⁹

It is continually AHF demanding the standard in spite of the fact that the industry continually asserts that there are proper alternatives in place, such as mandatory testing periods. Moreover, AHF attacks the existing protocols to impose its own agenda.¹⁰⁰ Furthermore, “complicating AHF’s petition is the fact that in the event of an infection there is no proof the virus came from a performance (or specific other performer) let alone for which of several employers the actor may have been working.”¹⁰¹ AB 1277 now allows the Division of Occupational Safety and Health to fine porn production companies for exposing workers to bloodborne pathogens; however, the courts have allowed only minimal fines.¹⁰²

“AHF has long packed Standards Board meetings with supporters, but longtime board meeting attendees have wondered aloud to *Cal-OSHA Reporter* if those showing up at the Northern California meetings were really affiliated with the organization, or picked up right off the street.”¹⁰³ A safety professional stated to the Cal-OSHA reporter “that she questioned one of the red-shirted protesters and was told that she was ‘paid’ to attend the meeting.”¹⁰⁴ Many advocates at the May 21, 2014, meeting were AHF’s under-served minority populations that were bussed in and given sponsored AHF shirts.¹⁰⁵ In response to these allegations, AHF responded that advocates “received cards worth up to \$25; \$15 for those who traveled from San Francisco” to cover meals and snacks on the free bus ride up to the meeting in Sacramento.¹⁰⁶

After AB 332’s failure, another attempt to change the law was pressed by the AIDS Healthcare Foundation. Much to dismay of the *Cal-OSHA Reporter* publisher Dale Debber wrote a special note concerning a 2015 meeting.

98. *Did LWDA Listen?: Standards Board Chair Threatens to Quit over AHF Proposal Delay*, CAL-OSHA REPORTER (2015), <http://www.cal-osha.com/Standards-Board-Chair-Threatens-to-Quit-over-AHF-Proposal-Delay.aspx> [hereinafter *Did LWDA Listen?*].

99. *Did LWDA Listen?*, *supra* note 98.

100. *Construction Worker Killed in San Mateo Beam Fall*, *supra* note 84.

101. *Did LWDA Listen?*, *supra* note 98.

102. *Safety Legislation Gets Key Votes*, <http://www.cal-osha.com/Safety-Legislation-Gets-Key-Votes.aspx> (2014).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

This is not a topic we relish covering but find it necessary to provide coverage in that this issue seems to typify the Standards Board's process. It is controversial and has and is taking up a considerable amount of the taxpayer's money, time, and energy, which could be better spent, on safety issues affecting a wider population. Cal-OSHA Reporter, while sympathetic to the LBGT community and AIDS patients, is taking an official position both the promulgation of this regulation and the Board's waste of time. It is our considered opinion that the Standards Board in this case is a victim of both its own political correctness and its inability to say no to a squeaky wheel, particularly one that is so represented inside Cal-OSHA. One makes mistakes when one acts out of fear.¹⁰⁷

Karen Tynan, representing the adult film industry, argued for the industry:

Each of the [adult industry] performers who have contracted HIV since 2004 have done so in their private lives. The industry points to the fact that in all the cases where performers contracted HIV, none of their fellow performers tested positive . . . The proposed regulations are out of touch with the realities of film production in California.¹⁰⁸

Again, citing that the current regulations are most like bloodborne pathogens in a hospital setting, Karen reminds the committee that performers have voiced their view, but the "AIDS Healthcare Foundation has simply shouted louder and more frequently. Frankly, it's just disheartening that the [Division of Occupational Safety and Health] has been hijacked by AHF."¹⁰⁹

In 2015, the mainstream media started to report that proposed regulations would require performers to wear protective eyewear and gloves during the filming of an adult production. "Section §5193.1 in and of itself contains no language regarding goggles, but the main bloodborne pathogens standard includes goggles as a form of personal protective equipment," written to protect healthcare professionals who may be exposed to bloodborne pathogens.¹¹⁰ However, Cal/OSHA enforcement can cite under whatever standards it sees fit. In a situation where the potential exists for bodily fluids to come in or near the eyes of performers, it can conceivably cite under the PPE provision and test the "goggles" requirement before the Cal/OSHA Appeals Board."¹¹¹ The industry

107. Dale Debber, *Adult Film Regulation Proposed*, CAL-OSHA REPORTER (2015), <http://www.cal-oshareporter.com/Adult-Film-Regulation-Proposed.aspx>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

continues to support the assertion that the self-regulating testing scheme in place and performer autonomy are effective ways of combatting bloodborne pathogen transmission, and AHF continues to promote its assimilationist politics.

The industry always wanted to work with Cal/OSHA or the Department of Public Health and has done its best to work within their structure and attempted to have constructive conversations. Unfortunately, AHF's political agenda has not only wasted state resources but also diverted millions of dollars that should have gone into care for and prevention of HIV to a witch-hunt for problems that don't exist.

In 2016, yet another hearing was held concerning the issue with no victory for the AHF.¹¹²

B. Attempts to Regulate Through City Ordinance

Although the AHF has failed to promote its agenda through Cal/OSHA regulation, it has succeeded in Los Angeles County. In its fight to sway the general population in favor of its assimilation politics, the AHF campaigned for Measure B in Los Angeles County to require the use of condoms for all adult film production. Vivid Entertainment, Kayden Kross, and Logan Pierce, producers of adult content sued the Los Angeles County Department of Public Health after receiving a letter from the department stating its intention to enforce Measure B, L.A.'s Safer Sex in the Adult Film Industry Act (2012).¹¹³

The plaintiffs alleged that Measure B was facially unconstitutional under the First Amendment and moved for declaratory and injunctive relief.¹¹⁴ "The text of the ordinance declared that it was passed in response to documentation by the Los Angeles County Department of Public Health of the widespread transmission of sexually transmitted infections among workers in the adult film industry."¹¹⁵ However, Los Angeles County stated that although it intended to enforce the measure, "it did not intend to defend Measure B [in court] because it took a 'position of neutrality' with respect to the ordinance's constitutionality."¹¹⁶ Because of this, the AIDS Healthcare Foundation, the public face and official proponent of Measure B, once again delved into politics and intervened over plaintiffs' objection

112. Brendan Smialowski, *Cal-OSHA Rejects Condom Requirement for Porn Films*, CBS NEWS (Feb. 18, 2016), <http://sanfrancisco.cbslocal.com/2016/02/18/cal-osha-rejects-condom-requirement-for-porn-films/>.

113. *Vivid Ent., LLC v. Fielding*, 774 F.3d 566, 572 (9th Cir. 2014); This act, commonly known as Measure B, was initiated by voters and later codified at Los Angeles County, CAL. COD. tit. 11, div.1, ch.11.39, and amending tit. 22 div. 1, ch. 22.56.1925.

114. *Vivid Ent., LLC*, 774 F.3d at 572.

115. *Id.* at 571.

116. *Id.*

as a party to the lawsuit.¹¹⁷ This case highlights the conflict between AHF's duty to the HIV community and its actions of favoring a singular method of HIV prevention, which research proves time and time again to be inferior.

In addition to imposing a permit system and harsher production obligations for the producers of adult film content, Measure B also required that performers wear condoms or other protective gear "to decrease the spread of sexually transmitted infections among performers within the adult industry, thereby stemming the transmission of sexually transmitted infections to the general population among whom the performers dwell."¹¹⁸

"The District Court preserved the requirements that producers of adult films in Los Angeles County obtain permits, train employees about the sexual transmission of disease, and require performers to wear condoms when engaged in vaginal or anal intercourse."¹¹⁹ The Supreme Court of California held the District Court did not abuse its discretion in granting preliminary injunctive relief with respect to only certain parts of Measure B, even in its decision to enjoin the enforcement of the condom mandate.¹²⁰ "The condom mandate survives intermediate scrutiny because it has only a de minimus effect on expression, is narrowly tailored to achieve the substantial government interest for reducing the rate of sexually transmitted infections, and leaves open adequate alternative means of expression."¹²¹

The Supreme Court has recognized that most laws regulating the adult entertainment industry would be classified as a content-based regulation on freedom of speech.¹²² Generally, regulations of speech that are content based receive "strict scrutiny," a high level of judicial review.¹²³ However, *Alameda Books*, a prior case regarding sexual expression, creates a loophole for the Court to conditionally apply intermediate scrutiny, leaving speech with less protection.¹²⁴ "First, the ordinance must regulate 'speech that is sexual or pornographic in nature.'"¹²⁵ In addition, "[t]he primary motivation behind the regulation [must be] to prevent secondary effects."¹²⁶ AHF veiled its agenda through reason of secondary effects of HIV and STI transmission to the general population using misguided information.

The Supreme Court of California held that Measure B fell within the ambit of the *Alameda Books* exception because the ordinance "regulates

117. *Vivid Ent., LLC*, 774 F.3d at 571.

118. *Id.* at 580.

119. *Id.* at 576.

120. *Id.* at 577.

121. *Id.* at 578.

122. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 428 (2002).

123. *Id.*

124. *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1161, 1164–65 (9th Cir. 2003) (citing *Alameda Books*, 535 U.S. at 434).

125. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005), *modified* on denial of reh'g, 402 F.3d 875 (9th Cir. 2005)

126. *Id.*

sexual speech in order to prevent the *secondary effects* of sexually transmitted infections”¹²⁷ “The campaign literature promulgated by AHF asserts that ‘infections acquired within the industry are spread to the larger community,’ presumably alluding to unprotected sexual relations that porn performers have with non-performers in their personal lives, and giving voters a more tangible connection to the proposed law.”¹²⁸ However, this was later proven to be false; performers do not transmit STIs at a rate higher than the general population, calling into question the severity of the government’s interest in the regulation.¹²⁹ The plaintiffs argued that even though the exception may have been found to apply, the ordinance results in a complete ban of their protected expression, namely the depiction of condomless sex.¹³⁰ Several declarations were submitted to the court “stating that condomless sex differs from sex generally because condoms remind the audience about real-world concerns such as pregnancy and disease . . . condomless sex conveys a particular message about sex in a world without those risks.”¹³¹ It should be noted that while Vivid Entertainment purported to represent the entire adult industry, its arguments failed to include gay production.

In examining whether the plaintiff’s expression included the depiction of condomless sex, the court analyzed “not only whether someone intended to convey a particularized message through that conduct, but also whether there is a ‘great’ likelihood ‘that the message would be understood by those who viewed it.’”¹³² The court looked to both *City of Erie v. Pap’s A.M.*¹³³ and *Gammoh*¹³⁴ and determine that “simply to define what is being banned as the ‘message’ is to assume the conclusion.”¹³⁵ The Supreme Court of California asserted that “condomless sex is not the relevant

127. Vivid Ent., LLC, 774 F.3d at 578.

128. Langner, *supra* note 2.

129. Vivid Ent., LLC, 774 F.3d at 578.

130. *Id.*

131. *Id.*

132. *Id.* at 579 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

133. “In *Pap’s A.M.*, a plurality of the Supreme Court concluded that a general ban on public nudity, which required erotic dancers to wear at least pasties and a G-string while dancing, did not violate the First Amendment . . . [T]he opinion rejected the argument that the pasties-and-G-string requirement functioned as a complete ban on the dancers’ expression of ‘nude dancing’ . . . Instead, the opinion defined the relevant expression more broadly as “the dancer’s erotic message.” Vivid Ent., LLC, 774 F.3d at 578 (citing *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 280, 292–93, 301–02 (2000)).

134. A similar analysis to *Pap’s* in *Gammoh* “upheld an ordinance that required dancers to say at least two feet away from patrons during their performance . . . The plaintiffs there argued that the ordinance completely banned their expression, which they defined as ‘proximate dancing’ . . . In response, we stressed that ‘the ‘expression’ at issue could always be defined to include the contested restriction,’ but ‘virtually no ordinance would survive the analysis . . . We instead defined the relevant expression as ‘the dancer’s erotic message’ and upheld the ordinance.” Vivid Ent., LLC, 774 F.3d at 578 (citing *Gammoh v. City of La Habra*, 395 F.3d 1114, 1123, 1128 (9th Cir. 2005)).

135. Vivid Ent., LLC, 774 F.3d at 578 (citing *Pap’s A.M.*, 529 U.S. at 293).

expression . . . the relevant expression is more generally the adult film's erotic message."¹³⁶ "The requirement that actors in adult films wear condoms while engaging in sexual intercourse might have 'some minimal effect' on a film's erotic message, but that effect is no greater than the effect of pasties and G-strings on the erotic message of nude dancing."¹³⁷ Such restriction of mandating condoms only has a de minimus restriction on expression, "[a]nd a de minimus restriction on expression is, by definition, not a complete ban on expression."¹³⁸ Thus, "[w]ith plaintiffs' expression so defined, [the court] conclude[d] that strict scrutiny is inappropriate because the condom mandate does not ban the *relevant* expression completely"; instead, the mandate was subject to intermediate scrutiny.¹³⁹

C. Attempt to Regulate Through State Ballot Initiative—Proposition 60

Building on its victory in Los Angeles County, the AIDS Healthcare Foundation collected more than four hundred thousand signatures to qualify Proposition 60 for the November 2016 State Ballot that would "expand enforcement of condom use in all adult film production sets in California."¹⁴⁰ The State Ballot Initiative mirrors the Los Angeles legislation that was successfully passed in 2012 and upheld by the CA Supreme Court in *Vivid Entertainment*.¹⁴¹

At first, it seemed likely that this dangerous proposition would pass in the guise of protecting uneducated performers from HIV.¹⁴² However, a push for an educational campaign by the Free Speech Coalition and performers in the industry swayed the vote. Literature was disseminated and educational tours focused on the flaws of the legislation in protecting both performers and the public from misinformation promulgated by the AIDS Healthcare Foundation.

Both the California Democratic and Republican parties banded together, along with several major news publications to publicly denounce Proposition 60. These organizations helped to shed light on the intricacies of the legislation and impact of a YES vote.

Any private citizen of California, suspecting that condoms are not being used in porn production, could file a claim against the performer,

136. *Vivid Ent., LLC*, 774 F.3d at 579.

137. *Id.* at 581.

138. *Id.* at 580.

139. *Id.* at 579–80.

140. Susan Abram, *Initiative Requiring Condoms on CA Adult Film Sets Eligible for 2016 Ballot*, L.A. DAILY NEWS (Nov. 4, 2015), <http://www.dailynews.com/government-and-politics/20151104/initiative-requiring-condoms-on-california-adult-film-sets-eligible-for-2016-ballot>.

141. *Vivid Ent., LLC*, 774 F.3d at 579.

142. Javier Panzar, *Most Californians Support Initiative to Require Adult-Film Actors to Use Condoms*, L.A. TIMES (Sept. 15, 2016), <http://www.latimes.com/politics/la-pol-ca-condom-initiative-prop-60-poll-20160915-snap-story.html>.

obtaining their personal information and a portion of sanctions awarded. The law would in effect criminalize and regulate the adult entertainment industry underground, where little to no protection to performers exist. While Proposition 60 purports to provide protection to performers from HIV, it works to dictate sexual expression, eliminate performer autonomy, and harasses an already marginalized group.

Again, Michael Weinstein, CEO of the AIDS Healthcare foundation, promotes a condoms-only approach to HIV-prevention. This approach silences the discussion surrounding modern HIV prevention strategy researched and promulgated by the scientific community, such as Treatment as Prevention, PrEP, and PEP. Proposition 60 specifically targets the LGBT adult entertainment industry primarily located in Northern California.

Most important, Proposition 60 is much more than a law requiring condom usage. A clause is built in to the proposition, granting Michael Weinstein power to protect and profit from its implementation. Should the California Attorney General fail to protect Proposition 60 against challenge or appeal, Mr. Weinstein, as proponent of the legislation, would have the unprecedented statutory standing to assert himself as an interested party with the potential for own financial gain.

The legislation also implicates several privacy concerns. Any citizen of California would be able to initiate a claim against a performer whom they believe to be having condomless sex on video. Condomless sex could both be defined as penetrative sex or merely oral sex without the use of a condom or dental dam. Sensitive information, such as the performers' legal name and address, could be made available to any person filing a claim, raising the potential abuse by stalkers or others. Moreover, the definition of an adult production is so broad that even a married couple having condomless sex on a webcam within their own bedroom falls within the proposition's authority. The legislation is deeply flawed and disproportionately affects LGBT adult entertainment production. When a major organization such as the AHF openly stigmatizes anything other than a condoms-only approach to HIV prevention, it is likely to assert control on the public's perception of HIV.

CONCLUSION

This past November, California's struck a major blow to the AIDS Healthcare Foundation, asserting a need for evidence based and peer reviewed medical information regarding HIV prevention. The public should not allow Michael Weinstein and The AIDS Healthcare Foundation to continue bully and harass performers to abide by assimilationist notions of sexual expression. While this strategy of promoting sex panic within the LGBT community may have been effective in the 1980s, there have been great strides taken to treat and prevent HIV/AIDS, such as preexposure

prophylactic treatment, post exposure prophylactic treatment, and treatment as prevention. Instilling fear and shame of both HIV infection and the HIV-positive individual is counterproductive to the efforts being made to educate the next generation. A generation that may live to see HIV eradicated through these new prevention methods if only given the opportunity to do so. However, AHF continues to silence the scientific community to perpetuate its own financial and assimilationist moral agenda.

Although the battle was won, the war against sexual expression continues. Michael Weinstein has already promised to hunt the adult entertainment industry “wherever they go” further spreading his own brand of fear and internalized HIV-phobia.¹⁴³ The bareback subculture liberates the gay community from “the politics of respectability” and frees the gay community from a duty of having to appear normal to its straight counterparts in order to appear deserving of equality.¹⁴⁴ Moreover, this culture distances the gay community from “the stigma and shame associated with HIV/AIDS” by allowing both the viewer and the performer to take pride and ownership of their sexual expression. I echo Gayle Rubin’s remarks regarding the closure of the San Francisco bathhouses. Another campaign to dismantle gay institutions, even in the well-motivated attempt to stop the spread of HIV, will only backfire . . . Instead of wasting its time defending its bathhouses, its bars, its pornography, and it’s very right to exist, the gay community must be allowed to devote all its resources toward promoting the research, health programs and modern safe sex educational measures that will save lives.¹⁴⁵

143. A “*Tragedy Waiting to Happen*”, *supra* note 75.

144. CAL. PROPOSITION 60, *supra* note 1.

145. Rubin, *supra* note 8.