

Comments

THIS IS HARDCORE:¹ WHY THE COURT SHOULD HAVE GRANTED A WRIT OF MANDAMUS COMPELLING MANDATORY CONDOM USE TO DECREASE TRANSMISSION OF HIV AND STDS IN THE ADULT FILM INDUSTRY

I. INTRODUCTION

On August 29, 2011, the Free Speech Coalition, the adult film industry's lobbying group, issued a moratorium on filming due to alarm that an adult film actor was infected with Human Immunodeficiency Virus ("HIV").² Shortly thereafter, the actor's HIV test produced a positive result, and authorities began tracing the path of exposure.³ Michael Weinstein, president of the AIDS Healthcare Foundation, issued a statement in reaction to this potential outbreak, condemning the unsafe sex practices of the adult film industry.⁴ According to Weinstein, "[t]he average American male has seven female sexual partners in a lifetime. But it's possible for a male to have seven sexual partners in a single day on [a] porn movie set Because this is a network that's kind of inbred, the spread of disease could be exponential."⁵ By August 31, 2011,

1. PULP, *THIS IS HARDCORE* (Island Records 1998).

2. See Susan Abram, *Possible HIV Case Halts Porn Industry*, L.A. DAILY NEWS (Aug. 29, 2011, 9:35 PM), http://www.dailynews.com/health/ci_18785006 (stating Free Speech Coalition halted production to trace possible spread of virus). The Free Speech Coalition speaks for the industry. *Id.* (noting Free Speech Coalition issued ban). See *Basic Information About HIV and AIDS*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/topics/basic/index.htm#hiv> (last modified Aug. 3, 2011) [hereinafter *Basic Information*] (discussing how HIV is transmitted and treatment methods).

3. See Katie Moisse, *HIV-Positive Performer Shuts Down L.A. Porn Industry*, ABC NEWS (Aug. 30, 2011), <http://abcnews.go.com/Health/Wellness/hiv-positive-performer-shuts-la-porn-industry/story?id=14412090> (noting other porn actors who have been infected with HIV and stating multiple actors' opinions that all porn actors should be tested for HIV).

4. See *id.* ("The idea that hurting these performers is a matter of freedom of expression is simply wrong."); *Mission & History*, AIDS HEALTHCARE FOUNDATION, <http://www.aidshealthcare.net/about/mission-history.html> (last visited Oct. 22, 2011) (describing Foundation's leading advocacy for HIV/AIDS patients).

5. Moisse, *supra* note 3 (quoting AIDS Healthcare Foundation president Michael Weinstein).

allegations circulated that likely more than thirteen people risked exposure from the one original actor.⁶

HIV and sexually transmitted diseases (“STDs”) are among the most prevalent health problems in the adult film industry.⁷ In December 2010, adult film actor Derrick Burts tested positive for HIV, which also brought filming to a standstill.⁸ The August 2011 episode is the most recent occurrence of industry HIV scares, and it signifies the danger that threatens the industry.⁹ Fortunately, crisis was averted in the 2011 scare because the potentially infected actor’s second HIV test results were negative, and no other actors reported infection.¹⁰ This incidence, however, is not unexpected within the adult film industry due to the nature of performing in adult films and lack of regulation.¹¹ Health issues in the industry

6. See Richard Abowitz, *Porn’s New HIV Problem*, DAILY BEAST (Sept. 2011, 6:33 PM), <http://www.thedailybeast.com/articles/2011/09/02/porn-hiv-scare-closes-down-industry-are-male-sex-performers-to-blame.html> (“The rumor is that between two HIV tests, a negative and a positive, a not-particularly well-known male performer in Florida managed to shoot scenes with as many as 13 women. A well-placed source in the industry told The Daily Beast that the actual number of women may, in fact, be as high as 20.”); *Porn Outbreak Could Have Exposed 13 Performers*, KTLA NEWS (Aug. 31, 2011, 3:45 PM), <http://www.fox40.com/news/headlines/ktla-porn-filmmaking-shut-down-after-hiv-scare,0,7379522.story> (describing shut-down of industry “in order to allow time for further testing”).

7. See, e.g., Moisse, *supra* note 3 (noting threat of spread of HIV stemming from porn industry).

8. See Abowitz, *supra* note 6 (referencing facts of earlier December 2010 scare); see also Richard Abowitz, *How Did Porn Star Derrick Burts Get HIV?*, DAILY BEAST (Dec. 10, 2010, 8:07 AM), <http://www.thedailybeast.com/articles/2010/12/10/hiv-positive-porn-star-derrick-burts-gay-for-pay.html> (discussing scare and interim industry shutdown for further investigation).

9. See Abowitz, *supra* note 6 (“second [time] in . . . [one] year” HIV scare occurred in industry).

10. See Corina Knoll, *HIV Scare that Led to Porn Industry Shutdown a False Alarm*, L.A. TIMES BLOG (Sept. 6, 2011, 8:50 AM), <http://latimesblogs.latimes.com/lanow/2011/09/hiv-scare-that-led-to-porn-industry-shutdown-a-false-alarm.html> (confirming ban on industry production revoked after secondary testing of performer showed performer not positive for HIV); *Porn Production to Resume After HIV False Alarm*, KTLA NEWS (Sept. 6, 2011, 2:20 P.M.), <http://www.fox40.com/news/headlines/ktla-porn-filmmaking-shut-down-after-hiv-scare,0,7379522.story> (verifying ban on filming lifted because actor did not test positive for HIV). *But see* Molly Hennessy-Fiske, *Porn Filming Still Suspended in Wake of HIV Scare*, L.A. TIMES BLOG (Aug. 30, 2011, 5:59 PM), <http://latimesblogs.latimes.com/lanow/2011/08/porn-filming-suspended-hiv.html> (stating unknown which production companies participated in production ban and that industry tests actors for HIV “[u]nder voluntary industry standards”).

11. See *Sexually Transmitted Diseases More Prevalent Among Adult Film Industry Performers*, NEWS MEDICAL (July 29, 2011, 2:10 AM), <http://www.news-medical.net/news/20110729/Sexually-transmitted-diseases-more-prevalent-among-adult-film-industry-performers.aspx> [hereinafter *Sexually Transmitted Diseases*] (citing study performed on STD transmission in porn industry that found greater instances of STD infections in industry).

were finally addressed in January 2012 when the Los Angeles City Council passed an ordinance mandating condom use in adult films.¹² While this is a triumph, the road to passing this ordinance was hard trod, and there is still more to be done.¹³

Historically, attempts at implementing regulatory health measures have had little impact on the industry as a whole.¹⁴ At the behest of the AIDS Healthcare Foundation and other AIDS activists, agencies like the Los Angeles County Department of Public Health and the California Division of Occupational Safety and Health (“Cal/OSHA”) increased their efforts to create more effective regulation.¹⁵ These agencies base their authority on the pre-existing “Bloodborne Pathogen” regulation, which dictates proper HIV precautionary measures in the workplace.¹⁶ While Cal/OSHA has asserted its authority to regulate the industry, including enforcement of mandatory condom use according to state safety standards, issues with its influence remain.¹⁷ There are discrepancies

12. See Rong-Gong Lin II, *Condoms Required for Porn Actors AIDS Healthcare Foundation Had Long Sought Action by L.A. City Council*, L.A. TIMES, Jan. 18, 2012, at 5 [hereinafter *L.A. City Council*] (“The 9-1 vote Tuesday marks a significant victory for the L.A.-based AIDS Healthcare Foundation, which has been rallying for years to protect the health of porn actors by asking agencies in California to mandate condom use during film shoots.”).

13. See *id.* (acknowledging long history of AIDS Healthcare Foundation’s unwavering advocacy despite widespread repeated disregard for issue).

14. See *Sexually Transmitted Diseases*, *supra* note 11, (quoting Michael Weinstein stating 2011 study on high STD transmission statistics “destroys the industry’s argument that regular STD and HIV testing is a replacement for condoms”).

15. See *Bloodborne Pathogens in the Adult Film Industry Cal/OSHA Advisory Meeting June 29, 2010, Minutes*, CAL. DEP’T OF INDUS. RELATIONS (June 29, 2010), <http://www.dir.ca.gov/dosh/doshreg/5193Meetings.htm> [hereinafter *Advisory Meeting Minutes*] (discussing purpose of holding multi-agency advisory meetings to discuss better regulations in industry); see also Lee Romney, *California Health Advocates, Porn Actors Meet*, L.A. TIMES, Oct. 26, 2010, at 3 (recounting advisory meetings held by Cal/OSHA to discuss greater protections).

16. See CAL. CODE REGS. tit. 8 § 5193 (2012) (referring to relevant code provision); *Petition to Cal/OSHA from AIDS Healthcare Foundation* (Dec. 17, 2009), <http://www.dir.ca.gov/oshsb/petition513.pdf> (stating AIDS Healthcare Foundation petition appealing Cal/OSHA for better workplace standards in accordance with regulation); *Advisory Meeting Minutes*, *supra* note 15, at *Questions and Comments* (citing Free Speech Coalition representative who stated increased health regulations will not be enacted by Los Angeles Department of Public Health but rather by Cal/OSHA).

17. See *Vital Information for Workers and Employers in the Adult Film Industry*, CAL. DEP’T OF INDUS. RELATIONS, <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Dec. 26, 2011, 4:46 PM) [hereinafter *Vital Information*] (describing “Bloodborne pathogens” precautions for adult film actors); see also Rong-Gong Lin II, *Condom Vote at Center of L.A. Clash*, L.A. TIMES, Dec. 19, 2011, at 3 [hereinafter *L.A. City Attorney*] (quoting Councilman Paul Koretz acknowledging “the California Division of Occupational Safety and Health has said the city does have the authority to require condom use”).

over how broadly Cal/OSHA can regulate actors and how much the industry will abide by its standards.¹⁸ Despite good faith attempts by Cal/OSHA to regulate health concerns in the industry, its jurisdiction rests on the actors' status as employees and whether the industry will abide by state health standards.¹⁹ Additionally, lawsuits are potentially another avenue to protect actors, but suits against production companies, producers, and directors are ineffectual to stop the transmission of disease during production.²⁰

Prior to passing the January 2012 ordinance, the AIDS Healthcare Foundation ("the Foundation") addressed the issue of necessary health regulations in the industry when it filed suit against the Los Angeles County Department of Public Health ("the Department") to implement regulatory condom usage and hepatitis B vaccinations for actors.²¹ This case, *AIDS Healthcare Foundation v. Los Angeles County Department of Public Health*, was a product of longtime efforts on behalf of AIDS activists to address the incessant lack of industry regulations.²² Due to the limits of Cal/OSHA and tort

18. See Romney, *supra* note 15 ("Condom use . . . is already required by law. The issue under consideration is whether an ordinance focusing explicitly on condom use . . . is needed to prompt greater employee understanding and compliance.") (quoting Cal/OSHA's chief counsel). For further discussion of Cal/OSHA's jurisdiction, see *infra* note 83 and accompanying text.

19. See Christina Jordan, Note, *The XXX-Files: CAL/OSHA's Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421, 443 (2005) (discussing CAL/OSHA's authority over adult film industry to determine whether actors have employee status, qualifying for protection under CAL/OSHA regulation). Following a 2004 HIV epidemic in adult film industry, CAL/OSHA issued a declaration on its website establishing its authority to determine employee status on a "case by case basis." *Id.* at 442-43 (noting Cal/OSHA's conclusion that majority of actors are likely employees).

20. See, e.g., Maria de Cesare, Note, *Rxxx: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 702 (2006) (discussing ineffectiveness of tort actions brought against industry); Francisco G. Torres, Note, *Lights, Camera, Actionable Negligence: Transmission of the Aids Virus During Adult Motion Picture Production*, 13 HASTINGS COMM. & ENT. L.J. 89, 106 (1990) (describing numerous factors actor must prove in suit against industry personnel). For further discussion of the ineffectiveness of tort action, see *infra* notes 122-150 and accompanying text.

21. See *AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health*, 128 Cal. Rptr. 3d 292, 293-94 (Cal. Ct. App. 2011) (describing case where petitioner filed petition for writ of mandamus to compel Los Angeles County Department of Public Health to mandate condom use and hepatitis B vaccinations in adult film industry). The court held that compelling mandatory condom use in adult film industry violates agency discretion to administer laws pertaining to sexual disease transmission. *Id.* (holding Department has discretion when abiding by Health & Safety Codes).

22. See *id.* at 292 (noting facts and holding of case); see also Molly Hennessy-Fiske, *Condom Requirement for Porn Actors to Be Voted on in California*, L.A. TIMES BLOG (Mar. 18, 2010, 6:49 AM), <http://latimesblogs.latimes.com/lanow/2010/03/condom-requirement-for-porn-film-actors-comes-to-vote-in-california.html> (detailing

suits, an alternate form of mandating health regulations in the industry was needed.²³ This was an opportunity to force the Department to act for the health and safety of the Los Angeles community through mandatory condom use despite previous resistance of legislators to address this situation.²⁴

This Comment will examine why other methods of regulation were inefficient, and why the court should have issued a writ of mandamus compelling condom use in the adult film industry in *AIDS Healthcare Foundation*.²⁵ Part II of this Comment provides background information about the adult film industry, the spate of HIV epidemics that have caused growing advocacy for condom regulation, the industry's discouragement of condom use in films, and the January 2012 ordinance.²⁶ Part III explains why Cal/OSHA falls short of full industry enforcement of mandatory condom use because of the difficulty in determining its own jurisdiction over actors as employees.²⁷ Part IV discusses how direct tort action, which actors may take against their producers after contracting HIV or an STD during filming, cannot remedy the spread of the threatening epidemic.²⁸ Part V investigates the recent case filed by the AIDS Healthcare Foundation in *AIDS Healthcare Foundation v. Los Angeles County Department of Public Health* and argues that a writ of mandamus to promulgate mandatory condom use is an antidote to effectively diminish of HIV and STD cases in the industry.²⁹ Part VI

AIDS Healthcare Foundation's efforts encouraging condom use in adult film industry beginning during 2004 HIV outbreak in adult film industry); LEGS McNEIL & JENNIFER OSBORNE, *THE OTHER HOLLYWOOD: THE UNCENSORED ORAL HISTORY OF THE PORN FILM INDUSTRY* 400 (2005) (quoting Bud Lee that condoms necessary in adult films).

23. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 292 (presenting claim that Department of Public Health should regulate). For further discussion of the shortcomings of Cal/OSHA authority and ineffective tort action, see *infra* notes 82-150 and accompanying text.

24. See *L.A. City Council*, *supra* note 12 ("This is the first legislative body to take up the issue, and the near-unanimous support is very gratifying.") (quoting Michael Weinstein in reference to finally passing mandatory condom ordinance).

25. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 292 (discussing case). For further discussion of why Cal/OSHA and tort action is ineffective and why courts should have intervened to compel effective regulation of the adult film industry, see *infra* notes 82-150 and accompanying text.

26. For a general discussion of the industry's history and background to current situation, see *infra* notes 32-81 and accompanying text.

27. For a general discussion of Cal/OSHA authority pertaining to the adult film industry, see *infra* notes 82-120 and accompanying text.

28. For a general discussion of the use of tort action in the adult film industry, see *infra* notes 122-150 and accompanying text.

29. See *AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health*, 128 Cal. Rptr. 3d 292, 301 (Cal. Ct. App. 2011) ("The judgment of dismissal is affirmed."). For general discussion of case, see *infra* notes 151-255 and accompanying text.

describes the future issues regarding HIV and STD regulation.³⁰ As an administrative agency, the Department had a duty to propel effective safety regulations to protect the public from STD and HIV epidemics, and this Comment will present why enforcing mandatory condom use is the most viable option.³¹

II. BACKGROUND

The history of the adult film industry coupled with the prevalence of disease has led to the need for better industry health regulations.³² The adult film (“porn”) industry began in the 1970s in southern California’s San Fernando Valley where the vast majority of adult films continue to be produced.³³ While it was initially small, existing on the fringes of society, the industry’s expansion since the 1970s from the immense popularity of porn films has built the base for the prominent business it has become.³⁴ This development stemmed from both the genre’s growing popularity and the advent of the videocassette recorder (“VCR”).³⁵ The VCR made

30. For a general discussion of the current situation regarding industry regulation and the AIDS Healthcare Foundation’s advocacy, see *infra* notes 256-276 and accompanying text.

31. See Moisse, *supra* note 3 (“Testing [for HIV] is not a substitute for condom use, and it never will be”) (quoting Michael Weinstein). For a further discussion of the Department’s duty, based upon the recent case filed by the Foundation, see *infra* notes 151-255.

32. See de Cesare, *supra* note 20, at 668-70 (discussing porn industry’s history of HIV issues and calling for need for better regulation); see also Jordan, *supra* note 19, at 423-26 (laying background for industry); McNeil & Osborne, *supra* note 22, at 401 (“What happened to the sexual revolution? It caught AIDS and died.”) (quoting Humphrey Knife); Torres, *supra* note 20, at 90-91 (1990) (stating industry does not enforce health regulations during filming); *Vital Information*, *supra* note 17 (discussing measures adult film actors should take while filming).

33. See Andrew Gilden, Note, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 543 (2007) (describing evolution of industry in California, specifically in the San Fernando Valley); see also Jordan, *supra* note 19, at 423 (explaining that most of industry operates in California within the San Fernando Valley); Torres, *supra* note 20, at 95 (discussing progression of adult film industry from 1970s in California); *California To Create New Condoms in Porn Rules*, AIDS HEALTHCARE FOUNDATION (Mar. 21, 2011), available at <http://www.businesswire.com/news/home/20110321005625/en/AHF%C2%A0California-Create-Condoms-Porn-Rules> (noting AIDS Healthcare Foundation President’s, Michael Weinstein, reference to filming in San Fernando Valley).

34. See Torres, *supra* note 20, at 95-96 (discussing industry’s financial growth). Mr. Torres describes the beginning of the porn industry as “a small cottage industry.” *Id.* at 95 (noting industry’s beginnings).

35. See de Cesare, *supra* note 20, at 675 (“[T]he advent of VCR technology, which lessened the danger of social stigmatization for pornography consumer, allowing them to watch pornographic films in the privacy of their homes, rather than at ill-reputed adult theaters.”); see also Gilden, *supra* note 33, at 543-44 (discussing easier and widespread distribution of porn through VCR availability);

adult films easily available for private viewing outside of seedy movie theaters and eventually on the Internet.³⁶ The industry's popularity, if not notoriety, formed it into the flourishing business it is today.³⁷ Because it has grown into a prosperous powerhouse, the industry was capable of making its own rules and living outside the parameters of regulation.³⁸

The nature of performing in adult films means that the threat of contracting a serious disease is high, if not inevitable.³⁹ The largest concern for actors is the spread of HIV and STDs.⁴⁰ HIV systematically destroys a person's immune system, ultimately progressing to Acquired Immune Deficiency Syndrome ("AIDS").⁴¹ AIDS breaks down a person's immune system to such a degree that a person easily acquires illnesses and eventually dies.⁴² While medications help slow the progression of HIV into AIDS, AIDS is an incurable disease.⁴³ According to the Center for Disease Control

Torres, *supra* note 20, at 95-96 (discussing increasing recognition of pornographic films).

36. See de Cesare, *supra* note 20, at 675 (stating dramatic growth of industry due to VCR technology and video cameras); Gilden, *supra* note 33, at 543-44 (describing importance of VCR and impact of internet on pornography distribution); Torres, *supra* note 20, at 95-96 ("Consequently, erotic films may be viewed in the privacy of the home by many who otherwise would have forgone this form of entertainment.").

37. See, e.g., Torres, *supra* note 20, at 96-97 (explaining evolution of popularity of adult films). Mr. Torres notes the varying themes of adult films marketed to draw a variety of viewers. *Id.* at 97 (discussing variety of adult films available to wide array of viewers).

38. See Lisa Ling, *The Evolution of Porn and Erotica*, OPRAH WINFREY SHOW (Nov. 17, 2009), available at <http://www.oprah.com/relationships/Lisa-Ling-Reports-on-Adult-Films-Porn-and-Erotica/1> (analyzing popularity of adult film industry among women, stating "Americans spend up to \$10 billion a year on porn, and men aren't the only ones supporting this highly profitable industry."); see also de Cesare, *supra* note 32, at 675-76 (noting approximations that industry grosses multi-billion dollar earnings and it has authoritative presence in California); Gilden, *supra* note 33, at 543 (showing statistical industry profit "range of \$4-12 billion").

39. See McNeil & Osborne, *supra* note 22, at 399 ("[I]n straight movies they don't [use condoms]-and that shocks me because that's how you get AIDS, plain and simple.") (quoting John Waters); see also Leslie Miller, *Adult Film Industry Calls for STD Regulation*, ABC NEWS (Dec. 7, 2009), <http://www.aidshealth.org/news/in-the-media/adult-film-industry-calls-for.html> (discussing industry safe-guards and advocacy from health officials for better industry health standards).

40. See, e.g., *Basic Information*, *supra* note 2 (describing how HIV evolves into AIDS).

41. See, e.g., *id.* (providing facts about HIV and discussing two strains of HIV, HIV-1 and HIV-2). HIV-1 is the most common strain of HIV and destroys the immune system by killing CD4+ T cells. See *id.* (explaining data of strains of HIV).

42. See *id.* (discussing disease progression).

43. See, e.g., *HIV & AIDS*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/stds-hiv-safer-sex/hiv-aids-4264.htm> (last visited Mar. 13, 2012) ("There is no cure for AIDS, but treatment is available.").

(“CDC”), HIV cannot be spread through daily, casual conduct but rather through such actions as unprotected sex, “[h]aving multiple partners or the presence of other sexually transmitted diseases”⁴⁴

Another related concern is the spread of STDs.⁴⁵ STDs are transmitted through sexual contact and are greatly reduced through “safe sex practices,” which include using a condom while engaging in sexual activity.⁴⁶ According to the CDC, “[i]ndividuals who are infected with STDs are at least two to five times more likely than uninfected individuals to acquire HIV infection if they are exposed to the virus through sexual contact.”⁴⁷

The implications of spreading STDs and HIV are huge in the porn industry because condoms are rarely employed in filming.⁴⁸ HIV outbreaks are a common threat despite the implementation of other intra-industry safety measures.⁴⁹ In 2004, adult film star Darren James contracted HIV while filming a porn film in Brazil.⁵⁰ Al-

44. See *Basic Information*, *supra* note 2 (stating facts about HIV and listing multiple ways HIV is spread between people).

45. See, e.g., *Sexually Transmitted Diseases*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/stds-hiv-safer-sex-101.htm> (last visited Mar. 13, 2012) (stating STD’s acronym for sexually transmitted diseases).

46. See, e.g., *Safer Sex*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/stds-hiv-safer-sex/hiv-aids-4264.htm> (last visited Sept. 9, 2011) (listing condom use prescribed method for safer sex to reduce STD transmission); *Safer Sex (Safe Sex)*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/stds-hiv-safer-sex/safer-sex-4263.htm> (last visited Mar. 13, 2012) (describing condom use as effective measure of reducing disease transmission when practicing “safe sex”).

47. *The Role of STD Detection and Treatment in HIV Prevention-CDC Fact Sheet*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 1, 2010), <http://www.cdc.gov/std/hiv/STDFact-STD-HIV.htm> (stating statistic). *Id.* (citing Wasserheit, 1992) (“[I]f an HIV-infected individual is also infected with another STD, that person is more likely to transmit HIV through sexual contact than other HIV-infected persons.”); see also *Condom Fact Sheet In Brief*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 11, 2011), <http://www.cdc.gov/condomeffectiveness/brief.html> (stating studies show effectiveness of condoms, yet findings difficult to compute).

48. See de Cesare, *supra* note 20, at 683-84 (“[A]ctors and actresses are discouraged from wearing prophylactics [condoms] during filming because many adult film producers believe that consumers want to see unprotected sex.”).

49. See *id.* at 684 (stating in 2006 Law Review article that industry requires monthly testing); see also *Advisory Meeting Minutes*, *supra* note 15, *Minutes at Questions and Comments* (noting Los Angeles County Department of Public Health investigates outbreaks of disease in industry).

50. See de Cesare, *supra* note 20, at 685-86 (describing 2004 outbreak); see also Jordan, *supra* note 19, at 424 (discussing facts of 2004 HIV outbreak); see generally *Porn Star at Center of 2004 Outbreak Isn’t Surprised at New Problems*, L.A. TIMES (June 15, 2009, 9:29 AM), <http://latimesblogs.latimes.com/lanow/2009/06/porn-star-at-center-of-2004-hiv-scare-isnt-surprised-at-new-problems.html> [hereinafter *Porn Star*] (“Darren James . . . hopes that by getting his story out, the porn industry will be moved to require condom use to protect the health of its stars.”).

though film production was suspended industry-wide for a month in Los Angeles, three other actresses were still infected from performing with James.⁵¹ In light of the crisis, the Los Angeles County Department of Public Health asked Cal/OSHA to investigate the matter.⁵² As its jurisdiction only covers actors who are employees, Cal/OSHA's reach was limited to looking at employee actors, not actors who were independently contracted.⁵³ The investigation yielded only two citations issued to adult film companies that were disputed over Cal/OSHA's lack of authority.⁵⁴

The impact of the 2004 HIV outbreak, particularly in light of the recent August 2011 scare, illuminates a large scale problem: the lack of acknowledged and enforced health regulations in porn.⁵⁵ After the 2004 HIV outbreak, the CDC issued a report on their website, describing that the current situation in the industry "underscores the existence of serious risk for HIV infection in this industry and the need for fully informing workers of these risks and for employing all available safeguards to reduce transmission of HIV and STDs."⁵⁶ AIDS activists have led the fight to regulate the industry

51. See de Cesare, *supra* note 20, at 685-86 (describing outbreak); see also Jordan, *supra* note 32, at 424 (elaborating upon 2004 event); *Porn Star*, *supra* note 50 (discussing events of 2004 outbreak stemming from actor Darren James).

52. See Jordan, *supra* note 19, at 424 (stating Cal/OSHA only probed companies with adult film actor employees because they do not have jurisdiction over independently contracted adult film actors).

53. See *id.* at 425 (discussing Cal/OSHA restraints when investigating industry during 2004 scare). Jordan concludes that industry actors are employees under Cal/OSHA regulation. *Id.* at 444 (confirming Cal/OSHA's authority); see also *Vital Information*, *supra* note 17 (recommending implementation of Cal/OSHA mandates for adult film industry, including use of condoms and other "Personal Protective Equipment").

54. See de Cesare, *supra* note 20, at 687 (noting citations of porn companies for not using condoms during filming); see also Jordan, *supra* note 19, at 425 (describing citation to companies "TTB Productions and Evasive Angels"); *Cal/OSHA Issues Citations to Adult Film Companies for Failing to Protect Employees From Health Hazards*, CAL. DEP'T OF INDUS. RELATIONS (Sept. 16, 2004), <http://www.dir.ca.gov/dirnews/2004/ir2004-10.html> (discussing citations to companies for failing to comply with state "blood borne pathogens standard" and discussing Cal/OSHA's authority over employee safety).

55. See *Advisory Meeting Minutes*, *supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (discussing presentation by Department representative regarding risk of disease while filming and inadequate or ignored regulations); see also *California to Create New Condoms in Porn Rules*, *supra* note 33 ("As a global HIV and STD medical care provider, we've seen it as our duty to pursue action on this issue . . . unprotected sex acts taking place in albeit non-traditional workplaces-the porn sets located in the San Fernando Valley and throughout California.") (quoting AIDS Healthcare Foundation President, Michael Weinstein).

56. See H. Rotblatt et. al., *HIV Transmission in the Adult Film Industry-Los Angeles, California*, 2004, Editorial Note, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 23, 2005), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5437a3.htm> (providing report on 2004 HIV outbreak in industry and on prevalence of

through mandatory condom use, an argument industry heavyweights reject.⁵⁷ Media sources have reported that Larry Flynt opposes condoms in porn, evincing industry concern of the potential decrease in its commercial success.⁵⁸ To many, the commercial integrity of an industry grossing billions of dollars per year outweighs the threat of disease to its workers and the neighboring community.⁵⁹ Foregoing health regulations in favor of commercial popularity is a skewed priority that organizations such as the AIDS Healthcare Foundation fight against in the interest of those fatally impacted.⁶⁰

The AIDS Healthcare Foundation, and other AIDS activists including two well-known former actors, vigorously worked to put mandatory condom use as an initiative on the ballot for the June 2012 election.⁶¹ In December 2011, the Foundation stated that they had obtained ample signatures to get their “condoms-in-porn”

higher HIV and STD rates among adult film actors, including June 2000-December 2001 study of gonorrhea and chlamydia transmission among actors and non-actors showing transmission rates to be higher among performers).

57. See Miller, *supra* note 39 (“This is a fantasy business. People who watch adult movies don’t want to see the performers wear condoms. . . .”) (quoting adult film company Vivid Entertainment CEO, Steven Hirsch). But see de Cesare, *supra* note 20, at 684 (stating two porn producers require mandatory condom use).

58. See *AIDS Activists Target Larry Flynt*, HEALTH DAY, June 19, 2004, available at 2004 WLNR 14131442 (citing Larry Flynt’s opinion that “porn films containing condom use ‘don’t sell’” in Los Angeles Times article); see also Dennis Romero, *AIDS Activists Target Larry Flynt for his Condom-Free Porn*, L.A. WEEKLY BLOG (Aug. 26, 2010, 7:03 AM), http://blogs.laweekly.com/informer/2010/08/porn_condoms_larry_flynt.php (indicating Larry Flynt’s opposition to condoms in pornographic films).

59. See de Cesare, *supra* note 20, at 683-84 (discussing discouragement of condom use because porn “[C]onsumers want to see unprotected sex.”); see also *id.* at 676-77 (discussing value of adult film industry worth billions); *Advisory Meeting Minutes*, *supra* note 15, at *Current Health and Safety Measures in the Adult Film Industry* (quoting industry performer Traci Bryant discussing her unpopularity in industry because she uses condoms); Kim Yoshino, *Groups to File Complaints Against 16 Porn Companies*, L.A. TIMES (Aug. 20, 2009), <http://articles.latimes.com/2009/aug/20/local/me-porn-hiv20> (“We want fans to know what they’re contributing to They’re demanding harder and grosser porn. We want to educate them to exactly what they’re watching—diseased people”) (quoting former actor Shelley Lubben). Lubben told the Los Angeles Times half of her cervix was extracted after she contracted the Human Papilloma Virus (HPV) while working on a film without condoms because of industry deterrence. See *id.* (describing Lubben’s ordeal).

60. See Miller, *supra* note 39 (“I really think we need to not listen to folks that are not interested in protecting those who get paid to have sex and then have people pay for that, and if they are not interested in protecting them, then we’ll have to do it for them.”) (quoting director of AIDS Healthcare Foundation, Whitney Engeran).

61. See Molly Hennessy-Fiske, *Condoms in Porn L.A. Ballot Initiative Petition Effort Underway*, L.A. TIMES BLOG (Aug. 15, 2011, 5:50 PM), <http://latimesblogs.latimes.com/lanow/2011/08/condoms-in-porn-la-ballot-initiative-petition-effort-underway.html> (discussing plans to get proposed regulation on ballot).

initiative on the ballot.⁶² The Los Angeles City Attorney's office filed an injunction to block the Foundation's initiative from the ballot based on concerns that the city did not have the authority to enforce condom use, and that this issue should be up to the state to regulate.⁶³ In addition to the city initiative, the Foundation also began petitioning for a mandatory condom use initiative for Los Angeles County for the June 2012 election.⁶⁴ The proposed county initiative addresses the responsibility of Los Angeles County to grant permits only to those pornography production companies who comply with the proposed rules.⁶⁵ When the L.A. Times asked Foundation president Michael Weinstein about the city initiatives parameters, Weinstein said, "[t]he county department of public health is responsible for controlling disease in the community, and the city has the ability to control zoning and issuing permits."⁶⁶ The initiative situation signifies the new effort to enforce mandatory condom use in the industry and exemplifies the need for increased action.⁶⁷ As Weinstein said, "[w]e [the Foundation] were naïve enough to believe the government has to do the work of protecting public health."⁶⁸

62. See L.A. City Attorney, *supra* note 17 (stating AIDS Healthcare Foundation collected "70,000 signatures" getting initiative on ballot); see also Hennesy-Fiske, *supra* note 61 (discussing initiative controversy); *Porn Film Condom Proposal Qualifies for Los Angeles Ballot, But City Objects*, FOX NEWS (Dec. 27, 2011), <http://www.foxnews.com/politics/2011/12/27/porn-film-condom-proposal-qualifies-for-los-angeles-ballot> (explaining initiative requires mandatory compliance with " 'required use of condoms'" to acquire filming permit).

63. See L.A. City Attorney, *supra* note 17 (quoting City Attorney spokesperson Frank Meteljan, "What we're trying to do is seek judicial clarification to see if the city of Los Angeles is preempted from regulating condoms in adult film shoots or whether those powers are relegated to other state agencies.").

64. See Rong-Gong Lin II, *Activists Collect Ballot Signatures for Condom Measure*, L.A. TIMES (Jan. 3, 2012), at 3 [hereinafter *Activists*] (detailing Foundation's actions and proposed initiative measure); see also Scott Weber, *Activists Announce County Initiative to Require Condoms in Adult Films*, NBC LOS ANGELES (Jan. 3, 2012), <http://www.nbclosangeles.com/news/local/Activist-Announce-County-Initiative-to-Require-Condoms-in-Adult-Films-136633273.html> (discussing L.A. County ballot proposal).

65. See *Activists*, *supra* note 64 (stating ballot measure parameters).

66. See Hennesy-Fiske, *supra* note 61 (quoting Foundation President Michael Weinstein).

67. See Hennesy-Fiske, *supra* note 61 (discussing newest efforts to impose mandatory condom use in industry since other regulation has failed).

68. See *id.* (answering whether Foundation attempted getting initiative on ballot before). When the L.A. Times asked Weinstein about state official response to these proposals, he replied:

I think that Cal-OSHA is doing a bang-up job. . . . The county said that the state should handle it and there should be a law passed by the state Legislature. We have been able to find one legislator in five years willing

In January 2012, the Los Angeles City Council passed an ordinance making condoms in pornographic films mandatory.⁶⁹ The main premise of the ordinance mandates permits for filming and “surprise inspections at film shoots” to ensure condoms are used.⁷⁰ The bill came as a result of the years of advocacy by the AIDS Healthcare Foundation and others.⁷¹ This is a major victory for AIDS activists, and good news for actors’ health and safety, yet this is also representative of the long road AIDS activists had to go to get this measure enforced.⁷²

The Los Angeles local government had been hesitant in stalwartly implementing mandatory condom use before, even when there was an opportunity to do so.⁷³ While the ordinance will be applied at the city level, the regulation must also be enforced throughout the county.⁷⁴ According to the Los Angeles County

to carry this legislation. The lack of spine by legislators and their unwillingness to treat these performers as people is incredible.

Id. (quoting Michael Weinstein).

69. See *L.A. City Council*, *supra* note 12 (explaining Council passing ordinance during “9-1 vote.”); see also *Los Angeles Council Requires Condoms in Porn Films*, CBS NEWS (Jan. 17, 2012, 3:45 AM), http://www.cbsnews.com/8301-501367_162-57359945/la-considers-requiring-porn-stars-use-condoms (“For years . . . film-makers have ignored state health laws mandating the use of condoms when workers are exposed to blood borne pathogens.”) (quoting AIDS Healthcare Foundation representative Ged Kenslea).

70. See Scott Hensley, *Porn Industry Faces Condom Requirement in Los Angeles*, NPR (Jan. 18, 2012, 2:53 PM), http://www.npr.org/blogs/health/2012/01/18/145392287/porn-industry-faces-condom-requirement-in-los-angeles?ps=sh_stcathdl (stating new requirements on adult film industry that permits be issued on conditional basis); see also *Some in Porn Business Consider Leaving Los Angeles After Vote to Require Condoms for Adult-Film Actors*, N.Y. DAILY NEWS (Jan. 18, 2012, 8:45 PM), <http://www.nydailynews.com/news/porn-business-leaving-los-angeles-vote-require-condoms-adult-film-actors-article-1.1008399> (discussing condition in ordinance of “surprise inspections”).

71. See *L.A. City Council*, *supra* note 12 (explaining hard-won battle to eventually get condoms mandatory). The Los Angeles Times implies that it was the AIDS Healthcare Foundation’s petition to get mandatory condoms on the June 2012 that convinced the City Council to pass this into law. See *id.* (noting advocacy of AIDS Healthcare Foundation through petitioning for regulation).

72. See Lizzie Crocker, *Condom Initiative by Anti-AIDS Group Threatens Porn Industry*, DAILY BEAST (Jan. 6, 2010, 4:45 AM), <http://www.thedailybeast.com/articles/2012/01/06/condom-initiative-by-anti-aids-group-threatens-porn-industry.html> (discussing AIDS Healthcare Foundation’s efforts in reaction to 2004 outbreak); see also *L.A. City Council*, *supra* note 12 (implying difficult history implementing regulation).

73. See Jennifer Medina, *Los Angeles Mandates Use of Condoms for Sex Films*, N.Y. TIMES, Jan. 17, 2012, at A10 (describing controversial regulation is “first kind in . . . country” and first time it was introduced as legislation). Legislators will not yet introduce the regulations at the county level. See *id.* (noting reluctance to pass county-wide mandate).

74. See *L.A. City Council*, *supra* note 12 (discussing petitioning efforts by AIDS Healthcare Foundation to get county initiative on ballot); see also Medina, *supra*

website, the county is comprised of eighty-eight cities.⁷⁵ If such an ordinance were adopted at the county level, it would increase safety regulation for actors by covering far more territory.⁷⁶ Unfortunately, county agencies, including the Los Angeles County Department of Public Health, as well as lawmakers, have refrained from tackling this issue.⁷⁷

Back in 2011, the AIDS Healthcare Foundation addressed the lack of county controls when they filed a claim in California District Court, asking for a writ of mandamus to compel the Los Angeles County Department of Public Health to enforce mandatory condom use and hepatitis B vaccinations for the adult film industry.⁷⁸ In the case, *Aids Healthcare Foundation. v. Los Angeles County Department of Public Health*, the court held that it could not force the Department to mandate condom use or hepatitis B vaccinations.⁷⁹ This decision took away a potential source of substantive supervision to address these health concerns.⁸⁰ When the case was filed, it had the potential to drastically change industry regulation since the remonstrations over Cal/OSHA's jurisdiction, lawsuit's ineffectiveness, and the Department's unwillingness to monitor left the industry without effective controls to stop disease transmission.⁸¹

note 73 (describing goal to get regulation implemented in Los Angeles County and discussing resistance to regulation at county level).

75. See *Cities*, L.A. COUNTY, <http://portal.lacounty.gov/wps/portal/lac/residents/cities> (last visited Mar. 14, 2012) (stating number of cities within Los Angeles County).

76. See Rong-Gong Lin II, *Condoms in Porn: AIDS Group Vows to Take Fight to L.A. County*, L.A. TIMES BLOG (Jan. 21, 2012, 7:00 AM), <http://latimesblogs.latimes.com/lanow/2012/01/condoms-porn-aids-la-county.html> [hereinafter *Condoms in Porn*] (detailing AIDS Healthcare Foundation's plan to get ordinance compelled at county level); John Rogers, *Measure Requiring Condoms in Porn Films Signed Into Law by LA Mayor*, HUFFINGTON POST (Jan. 24, 2012, 6:41 PM), http://www.huffingtonpost.com/2012/01/24/condoms-in-porn_n_1229859.html (referring to Foundation's goal to get measure applied throughout Los Angeles County).

77. See Medina, *supra* note 73 ("In the past, county health officials have said it would be too difficult to monitor the pornography industry through the Health Department and that the State Legislature should be the one to pass any laws regulating the industry. So far, advocates for the condom requirements have not been able to persuade a state legislator to sponsor such a bill."); see also *L.A. City Council*, *supra* note 12 (explaining initiative for Los Angeles County gives Department of Public Health responsibility to enforce ordinance).

78. *AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health*, 128 Cal. Rptr. 3d 292, 293 (Cal. Ct. App. 2011) (stating Foundation's petition claims).

79. See *id.* at 294 (discussing holding of case Foundation filed against County Department).

80. For a further discussion of lack of industry regulations, see *infra* notes 146-245 and accompanying text.

81. For a further discussion of argument for writ of mandamus for mandatory condom use in industry, see *infra* notes 151-255 and accompanying text. For a

III. DISPUTED CAL/OSHA ENFORCEMENT OF CONDOM USE IN THE ADULT FILM INDUSTRY

Cal/OSHA is responsible for regulating workplace safety but its authority is reduced and its regulations are ignored despite already compelling mandatory condom use in the industry as a “workplace safety precaution.”⁸² Safeguarding actors’ health in the industry falls within Cal/OSHA’s authority; however, this power is limited with regard to the actors who are classified as employees.⁸³ Implementing mandatory condom use and hepatitis B vaccinations is part of Cal/OSHA’s jurisdiction to regulate employment relationships and workplace safety.⁸⁴ It oversees employee safety in California through a variety of programs regulating workplace safety and providing benefits to workforce employees.⁸⁵ Cal/OSHA has said that industry actors are considered employees and are under its

further discussion of Cal/OSHA’s disputed authority over industry, see *infra* notes 82-120 and accompanying text. For a further discussion of lawsuit’s ineffectiveness in stopping disease transmission in industry, see *infra* notes 121-150, and accompanying text.

82. See de Cesare, *supra* note 20, at 694 (discussing resistance to Cal/OSHA jurisdiction); see also Jordan, *supra* note 19, at 444 (discussing determination of Cal/OSHA authority, yet pushback against regulation); Dennis Romero, *Porn and Condoms: California Workplace Safety Officials Get Earful on Move Towards Requiring Condoms on Adult Video*, L.A. WEEKLY BLOG (June 7, 2011, 3:02 PM), http://blogs.laweekly.com/informer/2011/06/porn_condom_cal_oshla_la.php (covering meeting between industry, Cal/OSHA advocates discussing regulations over industry including federal regulations implying condom use already mandatory according to “federal workplace safety laws . . .”); *Safe Sex on the Set*, L.A. TIMES, Oct. 25, 2010, at 14 (discussing laws promulgated by state law used by Cal/OSHA mandating condom use in porn and industry opposition claiming HIV testing every month should be satisfactory); *Vital Information*, *supra* note 17 (stating Cal/OSHA safety measures for those in adult film industry).

83. See Caitlin Liu, *Porn Industry Figures Clash Over Safety Issues*, L.A. TIMES, June 5, 2004, at 3 (explaining Cal/OSHA’s authority depends on actor’s employee position); see generally Jordan, *supra* note 19, at 427 (discussing limitations of Cal/OSHA’s reach).

84. See *Cal/OSHA Enforcement*, CAL. DEP’T OF INDUS. RELATIONS, <http://www.dir.ca.gov/dosh/Enforcementpage.htm> (last visited Mar. 14, 2012) (“The Cal/OSHA enforcement unit has jurisdiction over every employment and place of employment in California which is necessary to adequately enforce and administer all occupational safety and health standards and regulations.”).

85. See *Cal/OSHA*, CAL. DEP’T OF INDUS. RELATIONS, <http://www.dir.ca.gov/dosh/dosh1.html> (last visited Mar. 14, 2012) (“The Division of Occupational Safety and Health, better known as Cal/OSHA, protects workers and the public from safety hazards through its Occupational Safety and Health, elevator, amusement ride, aerial tramway, ski lift and pressure vessel inspection programs, and also provides consultative assistance to employers.”); see also Jordan, *supra* note 19, at 427 (discussing Cal/OSHA’s difficulty determining its regulatory authority over adult film industry).

protection; yet this assertion is contested and its regulations are disregarded.⁸⁶

Both before and after the city ordinance passed, Cal/OSHA compelled mandatory condom use in porn in accordance with state regulation of “Bloodborne Pathogens.”⁸⁷ On its website, Cal/OSHA states its measures implemented for workers in the adult film industry to minimize exposure to “bloodborne” pathogens.⁸⁸ These measures include “practical engineering and work practice controls” that are mandatory during film production.⁸⁹ Cal/OSHA also states that using “personal protective equipment” is necessary in the face of exposure to blood or “other potentially infectious material (“OPIM”)” which could carry HIV and STDs.⁹⁰ Cal/OSHA attempted to clarify the standard in order to apply to the entire industry.⁹¹ According to Cal/OSHA, the industry must abide by these standards in order to comply with the “Bloodborne Pathogens Standard,” and failing to comply will result in citations to the offending production company.⁹² This was a step in the right direction for better industry standards, yet these regulations do not seem

86. See *Vital Information*, *supra* note 17 (stating that Cal/OSHA considers most industry performers “employees”); see also Liu, *supra* note 83 (“Industry insiders say the majority of performers probably would be considered contractors because they are hired on a job-by-job basis.”); see generally Jordan, *supra* note 19, at 444 (concluding Cal/OSHA has determined actors are employees, which causes consternation in industry).

87. Bloodborne Pathogens, CAL. CODE REGS. tit. 8, § 5193 (2012) (stating precautionary measures taken when exposed to potentially infected HIV materials). Cal/OSHA cites regulation as main method of compelling condom use in industry. See *id.* (referring to terms of regulation).

88. See *Bloodborne Pathogens*, CAL. DEP’T OF INDUS. RELATIONS, <http://www.dir.ca.gov/DOSH/AdultFilmIndustry.html#hh> (last visited Mar. 14, 2012) [hereinafter *Bloodborne Pathogens*] (noting procedures supposedly employed during filming to alleviate exposure to “bloodborne pathogens” including HIV, “human papilloma virus, herpes virus, bacterial vaginosis, chlamydia, gonorrhea, [and] hepatitis A”).

89. See *id.* (listing forms of “engineering and work practice controls” decreasing exposure to disease includes “[u]se of barriers”); see also Romero, *supra* note 82 (discussing Cal/OSHA declaration that condoms are mandatory already when filming porn in accordance with federal standard yet new regulations proposed to make standard enforceable).

90. See *Vital Information*, *supra* note 17 (stating “personal protective equipment” includes condoms guarding against “other potentially infectious material”).

91. See *Advisory Meeting Minutes*, *supra* note 15, at *Detailed Minutes* (discussing Cal/OSHA’s role creating stronger industry regulations); see also Romney, *supra* note 15 (discussing appeal for better restrictions on industry).

92. See *Vital Information*, *supra* note 17 (discussing penalties for failure to comply with regulations include that “[c]itations may be issued, which include a requirement to fix the problem (abatement)”); see also Romney, *supra* note 15 (reporting thirty inspections commenced following 2004 HIV scare with fines to companies). See *Bloodborne Pathogens*, *supra* note 88 (discussing parameters of regulation).

to be adequate enough to yield substantive compliance.⁹³ Moreover, there is controversy over how many industry actors Cal/OSHA may assert jurisdiction.⁹⁴

The initial problem with Cal/OSHA's involvement in the industry is that its authority rides on whether the industry actors are employees or are independently contracted to act.⁹⁵ Because Cal/OSHA only has authority to regulate workplace safety standards for employees, it may not regulate standards of workers that are independently contracted.⁹⁶ Cal/OSHA has set standards in the California Code of Regulations to protect workers from "bloodborne pathogens," including exposure to HIV from blood and "other potentially infectious materials."⁹⁷ Regulations such as these, however, are beneficial to actors only if they are held under Cal/OSHA authority.⁹⁸ Although Cal/OSHA stepped up to take responsibility for mandating condom use in the industry, its constrained authority and the controversy surrounding its jurisdiction potentially diminished its power of supervision.⁹⁹

93. See Romney, *supra* note 15 (showing opposition to use and industry infrequency of condom use during filming). Industry advocates voiced alternatives to condom use during meeting with Cal/OSHA though Cal/OSHA maintained its stance that condoms are already required. See *id.* (reiterating Cal/OSHA's stance on condoms in porn).

94. See *Independent Contractor Versus Employee*, CAL. DEP'T OF INDUS. RELATIONS, http://www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm (last visited Mar. 14, 2012) (discussing criteria for "employee" status determining Cal/OSHA jurisdiction over actors); see also Jordan, *supra* note 19, at 430 (examining Cal/OSHA regulation).

95. See Jordan, *supra* note 19, at 427 (discussing protection employees are entitled to under Cal/OSHA regulations of workplace safety, but are not entitled to if adult film actors are not employees but rather independent contractors).

96. See de Cesare, *supra* note 20, at 690-92 (discussing Cal/OSHA's authority to regulate workplace safety for employees). Independent contractors are not included within definitions of employee when collecting workers compensation. *Id.* at 691 (noting delineation between independent contractors and employees); see also Jordan, *supra* note 19, at 428-29 (discussing factors possibly designating actors hired as independent contractors in adult film industry); *Advisory Meeting Minutes*, *supra* note 15, at *Current Health and Safety Measures in the Adult Film Industry* (quoting industry performer saying "most performers are not employees . . ."). An AIDS Healthcare Foundation representative later stated that performers are considered employees. See *id.* (acknowledging representative's correction).

97. See, e.g., Bloodborne Pathogens, CAL. CODE REGS. tit. 8, § 5193(b) (2012) (stating protection regulations for exposure to bloodborne pathogens including HIV and covers exposure to "other potentially infectious materials. . . . semen, vaginal secretions. . . .") The purpose of regulation to control and regulate exposure to disease caused by contact to bloodborne pathogens including HIV. See *id.* (stating stipulations of regulation).

98. See Jordan, *supra* note 19, at 430 (discussing limited authority of Cal/OSHA over industry actors).

99. See *id.* at 431 (stating Cal/OSHA considers employee status of actors individually when determining employee status). But see Liu, *supra* note 83 (claiming

The two main standards for determining employee status under Cal/OSHA are the Right to Control Test, known as the Common Law Test, and the Economic Realities Test.¹⁰⁰ The Right to Control Test examines “whether the person to whom the service is rendered has the right to control the manner and means accomplishing the result desired”¹⁰¹ Under the Economic Realities Test a worker is an employee if economically dependent on the employer.¹⁰² Multiple sources, including advocates and law journal articles, have concluded that actors are employees under both of these tests and should be regulated under Cal/OSHA standards.¹⁰³ Under the Economic Realities Test, because actors are economically dependent on their producers, they should be employees for the sake of regulation.¹⁰⁴ Likewise, under the Right to Control Test, film producers control the actors throughout the duration of a particular filming, to the extent that the producer and the director are the actors’ employers.¹⁰⁵

at industry health regulation meeting between workers from industry, agencies, and legislators, that “Industry insiders say the majority of performers probably would be considered contractors because they are hired on a job-job-basis.”).

100. See *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989) (holding workers employees and not independent contractors under Workers Compensation Act as court applies “control-of-work” test to facts); see also de Cesare, *supra* note 20, at 694 (discussing factors of economic realities test where “a fact finder must consider the degree to which the performer is economically dependent on the [producers who hire them].”). Ms. de Cesare notes the “Rutherford Test” as the type of economic realities test used in California. *Id.* at 692-93 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-27 (1947) for “Rutherford test”); Jordan, *supra* note 19, at 427-29 (discussing right to control test and its factors compared to economic realities test).

101. *S.G. Borello & Sons, Inc.*, 769 P.2d at 404 (citing *Tieberg v. Unemployment Ins. Bd.*, 2 Cal.3d 943, 951 (1970)); see also Jordan, *supra* note 19, at 429 (citing *Borello*, 769 P.2d 399 (Cal. 1989) and discussing court’s holding in *Borello* that right to control test is effective test establishing employer-employee relationships but should be combined with economic realities test).

102. See, e.g., de Cesare, *supra* note 20, at 692-93 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-27 (1947)); see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-27 (1947) (indicating *Rutherford* applied economic realities test determining that employer-employee status is relevant when employer controls how work is executed and employer retains control over work operation).

103. See, e.g., de Cesare, *supra* note 20, at 696 (affirming actors are employees under tests); Jordan, *supra* note 19, at 444 (discussing Cal/OSHA’s determination of actors’ employee designation and future importance regarding health regulations).

104. See, e.g., de Cesare, *supra* note 20, at 692-94 (discussing “Economic Realities test,” “Rutherford test,” determining adult film actors’ employee statute where considered factors include financial dependency of employee on employer and employer’s management of production).

105. See, e.g., Jordan, *supra* note 19, at 431 (laying out components Cal/OSHA employed when determining amount of control employer has over employee, thus determining employment status, during 2004 HIV occurrence). Ms. Jordan re-

Various case precedent measures independent contractor status by examining the amount of control the employer has over the employee, specifically looking at whether the employer is mandating how the work is accomplished, or only interested in the end result.¹⁰⁶ In *Lujan v. Minager*, the Court used the Right to Control Test in determining whether a worker was an employee and could not be fired for filing a workplace safety claim with Cal/OSHA.¹⁰⁷ The California Court of Appeals applied the Right to Control Test but specified that:

[T]he person to whom service is rendered has the right to control the manner and means of accomplishing the desired results. That factor can be outweighed by others, however, including: the right to discharge at will; whether the person performing the services is engaged in a distinct occupation; the skill required in the occupation; whether the principal or the worker supplies the required tools, equipment and place of work; the length of time for which the services are to be performed; whether payment is by the job or based on time; whether or not the work is part of the principal's regular business; and whether the parties believe they are creating an employer-employee relationship.¹⁰⁸

While Cal/OSHA has used these employee tests in the past to argue for industry employee safety measures, its arguments have been met with resistance.¹⁰⁹ There is no clear litmus test to determine independent contractor status of a worker aside from examin-

ports that Cal/OSHA determined employee status for industry actors involved in the outbreak. *Id.* (noting conclusion).

106. *See* S.A. Gerrard Co. v. Indus. Acc. Comm'n, 110 P.2d 377, 413 (Cal. 1941) ("An independent contractor is 'one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not in the means whereby it is to be accomplished.'") (quoting *Moody v. Indus. Acc. Comm'n*, 269 P. 542, 543 (1928)).

107. *Lujan v. Minagar*, 21 Cal. Rptr. 3d 861, 868 (Cal. Ct. App. 2004) (discussing use of right to control test).

108. *Id.* (citing *Fireman's Fund Ins. Co. v. Davis*, 44 Cal. Rptr. 2d, 546 (1995)); *see also* *Jordan*, *supra* note 19, at 435-39 (discussing employee status for adult film stars under Right to Control test for each factor listed).

109. *See, e.g., de Cesare*, *supra* note 20, at 692 (describing controversy revolving around employee determination); *see also* *Jordan*, *supra* note 19, at 434-439 (discussing adult film actors employee status under Economic Realities and Right to Control tests thereby subject to Cal/OSHA regulation); *Liu*, *supra* note 83 ("Industry insiders say the majority of performers . . . would be considered contractors because they are hired on a job-by-job basis.").

ing each isolated case.¹¹⁰ Cal/OSHA believes that a majority of actors are employees under its jurisdiction but some people dispute this assumption.¹¹¹ As such, Cal/OSHA's jurisdiction will likely always be challenged because of its difficulty exercising far-reaching jurisdiction over actors.¹¹² For example, at an Advisory Committee meeting held by Cal/OSHA to discuss a proposal to enforce industry safety measures, one industry actor explicitly stated that many actors are independently contracted from movie to movie.¹¹³ Although Cal/OSHA clarified its determination that actors are generally employees, this instance exemplifies the ambiguity inherent in its enforcement.¹¹⁴ While it has attempted to regulate and enforce mandatory condom use, Cal/OSHA's power is stunted by industry opposition.¹¹⁵

In the past decade, Cal/OSHA has had some success in citing adult film companies and attempting to regulate the adult film industry by determining employee status of actors.¹¹⁶ It intensified its advocacy in response to the 2004 HIV epidemic, penalizing "TTB Productions and Evasive Angels" both \$30,000 for violating the

110. *See de Cesare, supra* note 20, at 692 (stating lack of "bright-line rule" to determine actors' status and remarking that only resolution is "case-by-case" analysis of situation).

111. *See id.* at 429-30 (stating actors not considered employees by industry because they are employed on "case-by-case basis"). Ms. Jordan notes that Cal/OSHA determined employee status for actors. *But see id.* at 430-31 (noting that Cal/OSHA determined that actors should be under their jurisdiction as employees under "economic realities test").

112. *See Jordan, supra* note 19, at 430 (noting problems Cal/OSHA faces when determining employee status of actors).

113. *See Advisory Meeting Minutes, supra* note 15, at *Current Health and Safety Measures in the Adult Film Industry* (acknowledging adult film actors statement at Advisory Meeting that many actors are independent contractors). An AIDS Healthcare Foundation representative rejected that allegation, stating industry actors held as employees. *Id.* (referring to representative's correction that actors are employees).

114. *See id.* at 12 (exemplifying ambiguity of Cal/OSHA's authority between industry workers and regulators when actor at Advisory Meeting claimed actors "are not employees").

115. *See id.* at 3 (describing Cal/OSHA-run advisory meetings with members of industry, Cal/OSHA, Dept. Public Health, actors, and legal counsel, to discuss better industry regulations and also how it illuminates current industry disregard for mandatory condom use); *see also Romney, supra* note 15 (discussing opposition to mandatory condom proposal).

116. *See Jordan, supra* note 19, at 425-26 (noting in response to Cal/OSHA's citation of two adult film production companies for violation of "Blood Borne Pathogen" regulation, the industry is challenging Cal/OSHA's authority to regulate and both companies "are challenging . . . citations."); *see also de Cesare, supra* note 20, at 687 (stating 2004 citations "marked the first time that the state agency had taken concrete regulatory action against the adult filmmaking industry . . .").

“Bloodborne Pathogens” regulation.¹¹⁷ While circumstances likely will show that many actors are employees entitled to state protections, there are still others who are independent contractors outside its jurisdiction.¹¹⁸ It is foreseeable that adult film companies will continue arguing that actors are independent contractors and thus not subject to Cal/OSHA regulation of condom use.¹¹⁹ Even though Cal/OSHA appears to have a majority of control over actors, the threat of disease transmission by those not under Cal/OSHA protection justifies the need for broader protection.¹²⁰

IV. LAWSUITS AS AN INEFFICIENT APPROACH TO DECREASE HIV AND STD TRANSMISSION

After contracting HIV or an STD, a possible recourse for actors is to sue for negligence.¹²¹ Negligence suits, however, have not been effective in forcing industry-wide condom regulations.¹²² Currently, California’s Health & Safety Statutes makes it an offense for a person not to disclose to his or her sexual partner if one is “af-

117. See generally Bloodborne Pathogens, CAL. CODE REGS. tit. 8, § 5193 (2012). See de Cesare, *supra* note 20, at 687 (explaining citations for \$30,000 were issued by Cal/OSHA to both companies for violating health regulations and were in response to 2004 HIV outbreak in adult film industry); see also Jordan, *supra* note 19, at 425 (discussing Cal/OSHA’s initial involvement inspecting industry beginning with 2004 incident). Ms. Jordan notes that the two companies, “TTB Productions and Evasive Angels” were fined for not abiding by “Blood Borne Pathogen Standard.” *Id.* at 426 (noting “TTB Productions and Evasive Angels” violations and penalties); see, e.g., *California: Adult Film Companies Fined*, N.Y. TIMES, Sept. 18, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9505EED61739F93BA2575AC0A9629C8B63> (stating \$30,000 fines to TTB Productions and Evasive Angels in 2004 Cal/OSHA citations by Cal/OSHA in accordance with law).

118. See de Cesare, *supra* note 20, at 694 (showing difficulty determining employee status of actors and noting arguments for their independent contractor status).

119. See *id.* (noting economic advantage for adult film companies to independently contract with actors, thus not holding them as employees). Ms. de Cesare suggests it is to the benefit of the industry to argue independent contractor status for adult film actors due to lighter or no regulation. See, e.g., *id.* (noting industry’s treatment of adult film actors as independent contractors).

120. See generally Jordan, *supra* note 19, at 444 (stating that Cal/OSHA is able to effectively regulate when it determines actors are employees, but various factors can impede determination).

121. See de Cesare, *supra* note 20, at 702 (noting lawsuits are difficult to pursue against industry); see also Torres, *supra* note 20, at 105-06 (explaining elements to be proven in negligence claim).

122. See de Cesare, *supra* note 20, at 702 (discussing ineffectiveness of actors suing industry); see also Torres, *supra* note 20, at 91-2 (discussing increasing prevalence of civil lawsuits seeking damages for negligent HIV transmission); Nikita Williams, Note, *HIV as an Occupational Disease: Expanding Traditional Workers’ Compensation Coverage*, 59 VAND. L. REV. 937, 962 (2006) (discussing shortcomings of negligence suits in workplace for negligent infliction of HIV).

flicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person”¹²³ California punishes violations by imprisonment for three to eight years for an HIV positive person willfully engaging in “unprotected sexual activity” with another with the intent to inflict that person with HIV.¹²⁴ These statutes stem from policy initiatives to protect people from unwanted sexual diseases.¹²⁵ While these laws give firepower to actors who wish to pursue private claims against both negligent producers and other actors who knowingly transmit HIV, they do little to stem the health crisis facing the industry.¹²⁶ Lawsuits are an unsatisfactory answer to the problem of helping and protecting actors because lawsuits only provide damages after infection.¹²⁷

123. CAL. HEALTH & SAFETY CODE § 120290 (West 2006) (“[A]ny person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.”) (amended 1998).

124. *See* CAL. HEALTH & SAFETY CODE § 120291(a)-(b)(2) (West 2006) (stating provisions of code). Section (b)(1)-(2) of the California Health & Safety Code stipulates:

Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years.

See id. at §(b)(1)-(2). The California Health and Safety Code clarifies:

‘Sexual activity’ means insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner ‘Unprotected sexual activity’ means sexual activity without the use of a condom.

See id. at §(b)(1)-(2) (citing California Health and Safety Code).

125. *See Doe v. Roe*, 267 Cal. Rptr. 564, 566 (Cal.1d 1990) (citing Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 996-97 (1984)) (discussing strong policy decisions underlying legislation criminalizing intentional transmission of STD’s and HIV).

126. *See, e.g.*, Jeffrey D. Klausner, M.D., M.P.H. & Kenneth A. Katz, M.D., M.S.C., M.S.C.E., Editorial, *Occupational Health and the Adult Film Industry: Time for a Happy Ending*, 38 J. OF THE AM. SEXUALLY TRANSMITTED DISEASES ASS’N 649 (2011), available at <http://www.shelleylubben.com/sites/default/files/Occupational%20Health%20and%20the%20Adult%20Film%20Industry%202011.pdf> (showing health crisis facing industry when citing statistics in 2004-2008 that cases of “chlamydia and gonorrhea” in industry “were 34 and 64 times higher than rates in the general population in Los Angeles . . .”).

127. *See de Cesare, supra* note 20, at 702 (discussing deterrence measures dissuading actors from seeking damages in civil litigation); *see also* Williams, *supra* note 122, at 961-62 (explaining general difficulty of negligence suits for HIV transmission).

Actors must overcome numerous impediments when pursuing a tort claim for disease transmission.¹²⁸ Where STD or HIV transmission is involved, California has mandated a strong duty to disclose, and a foreseeability of transmission is almost presumed if the proper precautions are not taken.¹²⁹ The foreseeable risk of transmission is a lower standard when strong policy decisions ride on preventing the injury.¹³⁰ The duty to disclose information of an STD or HIV is mandated by the California Health & Safety Code.¹³¹ In *Doe v. Roe*, the California Court of Appeals held the defendant liable when he knowingly transmitted genital herpes to his partner, the plaintiff, even though they never had intercourse during an outbreak because he believed he was not contagious when not suffering symptoms.¹³²

An inflictor is also liable to the person he or she infected if the inflictor had “reason to know” that he or she should have been aware he or she could transmit the disease.¹³³ “Constructive knowledge” is “knowledge that one using reasonable care or diligence should have, and therefore is attributed by law to a given person”¹³⁴ In *John B. v. Superior Court of Los Angeles*, the court held that constructive knowledge of a disease was enough to prove negligence and hold the petitioner liable when he transmitted HIV to

128. See Torres, *supra* note 20, at 106 (listing factors claimant must petition in negligence suit against producer under workers’ compensation claim including: “producer owed a duty to the employee, the producer breached that duty, the breach caused injury, and actual injury occurred.”); de Cesare, *supra* note 20, at 701-02 (stating problems of both tort claims and in receiving workers’ compensation benefits); Williams, *supra* note 122, at 962-63 (discussing factors plaintiff must prove in workers’ compensation lawsuit for negligent exposure to HIV). These factors are applied generally to workers compensation for HIV infection, not just adult industry specific. See *id.* at 962 (noting factors for workers’ compensation claim are not adult industry specific).

129. See *Doe v. Roe*, 267 Cal. Rptr. 564, 566-67 (Cal. Ct. App. 1990) (noting California’s policy consideration demanding duty to disclose sexually transmitted disease if it could foreseeably be transmitted).

130. See *id.* at 567 (citing *Isaacs V. Huntington Mem’l Hosp.*, 695 P. 2d 653 (1985)) (explaining where degree of foreseeability is lower in favor of strong policy decisions).

131. For discussion of the provisions of the California Health & Safety Codes, see *infra* notes 176, 178.

132. See *Doe*, 267 Cal. Rptr. at 564 (holding defendant liable because spread of herpes was foreseeable, even though he thought he could not pass herpes to plaintiff when not suffering outbreak).

133. See *John B. v. Super. Ct.*, 45 Cal. Rptr. 3d 316, 326 (2006) (holding petitioner liable for transmitting HIV to his wife under theory of constructive knowledge of HIV transmission because he had “*reason to know*” of transmission) (emphasis in original).

134. *Id.* at 325 (quoting BLACK’S LAW DICTIONARY 876 (7th ed. 2009)).

his wife after admitting to multiple extra-marital affairs with men.¹³⁵ The court elaborated that the constructive knowledge requirement “would extend at least to those situations where the actor, under the totality of the circumstances, has *reason to know* of the infection.”¹³⁶ The court explained that having constructive knowledge of transmission of the disease is enough to satisfy the condition that transmitting the disease would be “reasonably foreseeable.”¹³⁷

Though California policy aims to hold those accountable who negligently inflict others with an STD or HIV by making litigating such claims easier, these policy decisions will still fail to promote safer sex and decrease disease transmission.¹³⁸ First, any negligence claim would be filed after an actor has already contracted, and likely spread, HIV or a communicable STD.¹³⁹ Second, in light of the controversial debate over whether an actor is an employee protected by Cal/OSHA, those actors that are determined to be employees could be barred from suing the production companies for statutory or contractual reasons if they contract HIV or an STD.¹⁴⁰ Moreover, because adult actors’ occupations include daily interaction with multiple sexual partners, an actor could likely be infected with a disease before his or her partner would have knowledge to disclose any health condition.¹⁴¹ Any actor or producer

135. *See id.* at 318 (stating facts of case) (emphasis in original).

136. *See id.* at 326 (citing Restatement (Second) of Torts § 12 cmt. a (1965) (analyzing reason-to-know standard as “actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.”).

137. *Id.* at 327 (“[W]hen there is sufficient information to cause a reasonably intelligent actor to infer he or she is infected with the virus or that infection is so highly probable that his or her conduct would be predicated on that assumption—the potential harm through sexual transmission of the virus is reasonably foreseeable.”).

138. *See de Cesare, supra* note 20, at 702 (discussing ineffectiveness in tort claims against industry).

139. *See id.* at 701-02 (“[Lo]ng latency period of . . . diseases” make litigating claims more difficult).

140. *See id.* at 702 (discussing ineffectiveness of tort suits in adult entertainment industry due to preclusion under workers’ compensation statutes among other reasons); Gilden, *supra* note 33, at 546 (suggesting difficulty administering actors contracts); Torres, *supra* note 20, at 98 (indicating industry hiring practices are framed to bar actors from litigating). Mr. Torres suggests that actors lose many rights when signing contracts to work in a movie. *See id.* (noting how these contracts likely favor producers).

141. *See de Cesare, supra* note 20, at 702 (stating in litigation claims against adult film companies “[A]dditional factors that may deter [actors] from litigating claims . . . the difficulty of proving that their employers were negligent in the first place. . . .”); *see also* Torres, *supra* note 20, at 98-99, 102 (describing conditions of porn production where threat of contracting disease is high). Mr. Torres suggests

who knows of his or her HIV positive status, or knows he or she may have a communicable disease, is compelled to disclose it to another actor.¹⁴² However, even if these statutes allow actors to sue one another, these suits are likely ineffective and do little to remedy the overall threat of infection.¹⁴³

If one wants to sue a public health official for negligent enforcement of the law, the plaintiff must sue them as either public officials in their official duty or as private individuals.¹⁴⁴ In a case against a public official, regardless of which status is pursued, liability attaches to the defendant as long as he or she proves all the factors of negligence.¹⁴⁵ Agencies have great leeway, however, in determining courses of action because their decisions are usually discretionary.¹⁴⁶ An agency official will be held liable only if exercising discretion falls short of “exercising ordinary care.”¹⁴⁷ Because of the discrepancy in agencies’ duty to mandate specific regulation over the entire industry, it is indeterminable how successful actors will be in suing agencies.¹⁴⁸ The statute mandating the duty to disclose, thus, does not implicate administrative agencies in tort action.¹⁴⁹ Looking at both situations of either suing a production company or a public official, negligence lawsuits may provide damages to infected actors if they are able to successfully

that porn film production is a hazardous work setting. *See id.* at 99 (noting jeopardy of HIV infection on set).

142. *See* CAL. HEALTH & SAFETY CODE § 120291(a)-(b)(2) (West 2006) (imposing duty to disclose HIV positive status to sexual partner).

143. *See* Torres, *supra* note 20, at 110-111 (describing defenses available to industry if actor filed suit against them).

144. *See* Jones v. Czapkay, 6 Cal. Rptr. 182, 186 (Cal. Ct. App. 1960) (discussing suing public officials as either public officials or in private capacity).

145. *See id.* at 186 (stating public official could be held liable acting either outside their authority or “in a ministerial capacity.”)

146. *See* 73 C.J.S. *Public Administrative Law and Procedure* § 124 (2004) [hereinafter *Public Administrative Law*] (“Great flexibility will be tolerated in the exercise of discretion . . .”).

147. *See* Jones, 6 Cal. Rptr. at 186 (“Although an action will not generally lie against an officer if his powers are discretionary, if discretion is exercised and a course of conduct begun a failure to exercise ordinary care will give rise to liability.”).

148. *See* AIDS Healthcare Found. v. L.A. Cnty. Dep’t Pub. Health, 128 Cal. Rptr. 3d 292, 298 (Cal. Ct. App. 2011) (stating no duty found for public health official to act under aforementioned statutes).

149. *See* *Public Administrative Law*, *supra* note 146 (“Agencies to whom legislative power has been delegated are free within the ambit of their statutory authority to make the pragmatic adjustments. . .”).

litigate their claim, but does not negate the threat of HIV and STD transmission in the industry.¹⁵⁰

V. ADVOCATING FOR A WRIT OF MANDAMUS FOR MANDATORY INDUSTRY CONDOM USE

Because all other measures of industry health regulations fell short of umbrella protection for actors, health advocates resorted to judicial intervention through a writ of mandamus to command obligatory condom use and hepatitis B vaccinations in the porn industry.¹⁵¹ A court issues a writ of mandamus against an agency when the agency has a ministerial duty to act or the agency abused its discretion.¹⁵² In the 2011 case, *AIDS Healthcare Found. v. Los Angeles County Department of Public Health*, the Foundation filed for a writ of mandamus to the Los Angeles County Superior Court for the court to compel the Department to enforce mandatory condom use and hepatitis B vaccinations for adult film actors.¹⁵³ The Department was the best choice to enforce such a regulation because they have jurisdiction over Los Angeles County and already have authority to perform health inspections.¹⁵⁴ It had been supportive of mandatory condom use and in favor of Cal/OSHA strengthening standards on the industry in accordance with the “Bloodborne

150. See Torres, *supra* note 20, at 113-14 (emphasizing need for further steps to decrease transmission of HIV in industry in addition to lawsuits).

151. See 128 Cal. Rptr. 3d at 293 (discussing petitioner filing writ of mandamus forcing Los Angeles Department of Public Health to compel condom use and hepatitis B vaccinations in adult film industry); see also *Advisory Meeting Minutes, supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (citing to Department of Public Health official discussing current safety industry regulation, which only include HIV/STD testing, and that industry defies regulation through its testing practices and resistance to public health officials).

152. See *AIDS Healthcare Found. v. L.A. Cnty. Dep’t Pub. Health*, 128 Cal. Rptr. 3d 292, 297-98 (Cal.2d 2011) (citing *Santa Clara Cnty. Counsel Attys. Assn. v. Woodside*, 28 Cal. Rptr. 2d 617 (1994)) (stating writ of mandamus requirements).

153. See *id.* at 293-94 (discussing preliminary facts of mandamus charge).

154. See *Department of Public Health, Los Angeles County*, LACOUNTY.GOV, <http://www.lapublichealth.org/phcommon/public/aboutus/aboutdisplay.cfm?unit=ph&prog=ph&cou=ph> (last visited Mar. 14, 2012) (stating Los Angeles County Department of Public Health has jurisdiction over Los Angeles County, “epidemiologists investigate the sources of disease outbreaks”); *id.* (noting actions Department takes when outbreaks discovered).

Pathogen” standard.¹⁵⁵ The Department, however, was not promulgating the regulation itself.¹⁵⁶

The superior court dismissed the case filed by the Foundation and the Foundation entered an appeal.¹⁵⁷ The appellate court affirmed the district courts holding that because the Department is an agency it has discretion to administer regulations and the court could not compel the agency to enact specific regulation.¹⁵⁸ The Foundations petition claimed:

[A] cause of action for violation of (1) section 120575 (first cause of action) for failure to take ‘all measures reasonably necessary to prevent the transmission of infection’ within the adult film industry; (2) section 120175 (second cause of action) for failure to prevent the spread of sexually transmitted diseases within the adult film industry; and (3) for an abuse of discretion for failure to take any regulatory action.¹⁵⁹

Despite the court’s decision, the Foundation’s allegation of abuse of discretion holds merit because the Department is not acting to promulgate effective health regulations in the industry.¹⁶⁰ If the court found that the Department abused its discretion in this

155. See *Statement by the Los Angeles County Department of Public Health to the Occupational Safety and Health Standards Board on March 18 2010*, LACOUNTY.GOV, at 1 (Mar. 18, 2010), <http://publichealth.lacounty.gov/std/docs/afi/calosha31910.pdf> (noting proposed language for Cal/OSHA’s regulation clarifying health standards in industry and Department acknowledges effectiveness and importance of condom use); see also *supra* notes 90, 91 for further discussion of Cal/OSHA’s proposed regulations.

156. See *Statement by the Los Angeles County Department of Public Health (DPH) to the Occupational Safety and Health Standards Board on March 2010*, at 1 (March 2010), <http://publichealth.lacounty.gov/std/docs/afi/calosha31910.pdf> (declaring Department’s support for mandatory condom use through Cal/OSHA jurisdiction). The Department has stated its support for mandatory condom use, but has not promulgated such parameters themselves and assigns such matters instead to other agencies. See *Advisory Meeting Minutes*, *supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (explaining why Department supports mandatory condom use, but still only investigates HIV outbreaks).

157. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 296 (stating “The trial court sustained the demurrer to the petition . . . The Department’s motion to dismiss the petition was granted, and judgment of dismissal was entered on January 27, 2010. This appeal followed.”)

158. See *id.* at 298-99 (explaining court cannot compel agency discretion as Legislature’s intention when they enacted health statutes to allow health officials discretion to implement health regulations).

159. *Id.* at 295-96.

160. See *id.* at 300 (stating Foundation’s allegations of non-action against Department); see also *Advisory Meeting Minutes*, *supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (stating Department’s current action when investigating outbreaks in porn industry).

case, then they could issue a writ of mandamus compelling mandatory regulation.¹⁶¹ Had the court done so, the regulation could have provided the blanket protection of HIV and STD transmission and safety for the actors that the industry so desperately needed.¹⁶² Writs of mandamus are issued by a court to compel agency performance.¹⁶³ A writ:

[M]ay be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such an inferior tribunal, corporation, board, or person.¹⁶⁴

The court in *Palma v. Prudential Insurance Co.* explained that a writ of mandamus “compel[s] the performance of a clear . . . ministerial duty where the petitioner has a beneficial right to performance of that duty.”¹⁶⁵ The two-pronged test to determine if a writ of mandamus should be granted is, (1) “a clear, present and usually ministerial duty on the part of the respondent” and, (2) “a clear, present and beneficial right in the petitioner to the performance of that duty.”¹⁶⁶ Additionally, the court may also issue a writ of mandamus if the court finds an agency abused its discretion by acting “arbitrarily or capriciously.”¹⁶⁷ The court will issue a writ of manda-

161. See *AIDS Healthcare Found.* 128 Cal. Rptr. 3d at 298, (discussing writ of mandamus for abuse of discretion).

162. See *id.* at 300 (discussing how mandamus will apply if found that Department abused its discretion by not adopting proposed regulations to diminish HIV and STD transmission in adult film industry).

163. See, e.g., *Palma v. Prudential Ins. Co.*, 792 F. Supp. 2d 790, 796 (N.D. Cal. 2011) (discussing how mandamus compels agency performance in certain circumstances).

164. CAL. CIV. PROC. CODE § 1085 (West 2007).

165. *Palma*, 791 F. Supp. 2d at 795 (quoting *Schwartz v. Poizner*, 187 Cal. App. 4th 592, 596 (Cal. Ct. App. 2010)).

166. *Doe v. Albany Unified Sch. Dist.*, 118 Cal. Rptr. 3d 507, 518 (2010) (citing *City of Dinuba v. Cnty. of Tulare*, 161 P. 3d 1168, 1173 (2007)) (holding petitioners had beneficial interest in enforcing mandatory physical education requirement and stating two-prong test for writ of mandamus).

167. See *Palma*, 791 F. Supp. 2d at 796 (citing *Common Cause v. Bd. of Supervisors*, 261 Cal. Rptr. 574 (1989)) (“[M]andamus lies to correct an abuse of discretion by an official acting in an administrative capacity.”); see also *id.* (citing *Schwartz*, 187 Cal. Rptr. 3d at 615-16) (“[A]buse of discretion . . . claimant must allege that the decision was arbitrary, capricious. . .”).

mus if the “ministerial role/beneficial interest” test is satisfied or if an agency has abused its discretion.¹⁶⁸

In *AIDS Healthcare Foundation*, the court should have found that the Department has a ministerial role to regulate somehow for the actors’ interest, and by not acting effectively, they are abusing their discretion.¹⁶⁹ As such, the court should have issued a writ of mandamus compelling an effective regulation, like mandatory condom use, because of the present factors: the Department has a ministerial duty to act; industry actors have a beneficial right to regulation; and the Department abused its discretion by not taking adequate measures to promulgate effective health regulation.¹⁷⁰

A. Ministerial Role

In the case of *AIDS Healthcare Foundation*, the Foundation claimed that the Department had a ministerial role to enforce measures that would substantially decrease the spread of HIV and STDs in the adult film industry.¹⁷¹ The court held that the Department did not have a mandatory ministerial duty to promulgate mandatory condom use.¹⁷² The court, however, should have found the Department does have a ministerial role to effectively regulate.¹⁷³ Public officers have ministerial roles if they are “required to

168. *See id.* at 795 (citing *Carrancho v. California Air Res. Bd.*, 4 Cal. Rptr. 3d 536 (Cal. Ct. App. 2003)) (“A mandamus court may ‘compel the performance of a clear, present and ministerial duty where the petitioner has a beneficial right to performance of that duty. Mandamus may also issue to correct the exercise of quasi-legislative discretionary power, but only if the action taken is so unreasonable and arbitrary that abuse of discretion is shown as a matter of law.”) (citation omitted).

169. *See id.* (explaining court may compel agency discretion through writ of mandamus).

170. *AIDS Healthcare Found. v. L.A. Cnty. Dep’t Pub. Health*, 128 Cal. Rptr. 3d 292, 295 (Cal. Ct. App. 2011) (stating Foundation’s claim for Department to effectively regulate the industry for the protection of its actors). For an argument of public health official’s ministerial duty, see *infra* notes 170-203 and accompanying text. For an argument for beneficial interest of mandatory condom use, see *infra* notes 204-221 and accompanying text. For an argument of abuse of discretion, see *infra* notes 222-255 and accompanying text.

171. *See AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 297 (“The Foundation contends that sections 120175 and 120575 [of California Health & Safety Code] impose a mandatory duty to act to control the spread of sexually transmitted diseases. The Foundations seeks to compel the Department to exercise its mandatory duty by issuing a regulatory order that adult film performers must wear condoms . . . and must obtain hepatitis B vaccinations.”).

172. *See id.* at 298-99 (discussing courts holding Department has discretionary, not ministerial, duty to promulgate regulation).

173. *See Palma*, 791 F. Supp. 2d at 795-96 (explaining ministerial duty must be performed by official to which is designated). *But see AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 293 (holding rejecting mandamus was proper).

perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion.”¹⁷⁴ The Foundation based its argument on two statutes in the California Health & Safety Code describing public health officials’ duty when regulating STDs and HIV.¹⁷⁵ The first statute is section 120175 of the California Health & Safety Code, which states:

Each health officer knowing or having reason to believe that any case of the disease made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.¹⁷⁶

Additionally, the Foundation argued that section 120575 of the California Health & Safety Code also imposed a mandatory, ministerial duty on the part of the Department of Public Health.¹⁷⁷ Section 120575 reads:

It is the duty of the local health officers to use every available means to ascertain the existence of cases of infectious venereal diseases within their respective jurisdictions, to investigate all cases that are not, or probably are not, subject to proper control measures approved by the board, to ascertain so far as possible all sources of infection, and to take all measures reasonably necessary to prevent the transmission of infection.¹⁷⁸

174. See, e.g., *Rodriguez v. Solis*, 2 Cal. Rptr. 2d 50, 53 (Cal. Ct. App. 5d 1991) (citing *State of California v. Superior Court*, 115 Cal. Rptr. 623 (1974) (“Generally, Code of Civil Procedure section 1085 may only be employed to compel the performance of a duty which is purely ministerial in character.”)).

175. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 296 (discussing Cal. Health & Safety Code 120175 and 120575 as imposing mandatory duty on public health official).

176. CAL. HEALTH & SAFETY CODE § 120175 (West 1995) (mandating public health officials’ duties regarding monitoring prevention of spread of communicable disease).

177. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 297 (citations omitted) (discussing Foundation’s petition and stating court’s holding that “sections 120175 and 120575 impose a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation.”).

178. Local Health Officers; Investigation and Preventative Measures, CAL. HEALTH & SAFETY CODE § 120575 (West 1995) (describing duty of public health officials in addressing venereal diseases specifically).

In *AIDS Healthcare Foundation*, both the District Court and the Court of Appeals decided that there was no ministerial role on the part of the Department to enforce mandatory condom use or the hepatitis B vaccinations for adult film workers.¹⁷⁹ The court in *AIDS Healthcare Foundation* reasoned that the Department did not have a ministerial duty to act within a prescribed method mandated by another, private establishment.¹⁸⁰

Conversely, a ministerial duty does exist when required by statute.¹⁸¹ In *Doe v. Albany Unified School District*, the court held a writ of mandamus was proper to compel school officials to act in accordance with the Education Code.¹⁸² The Education Code section 51210 says, “the adopted course of study for grades 1 to 6, inclusive, shall include . . . [p]hysical education.”¹⁸³ The court analyzed the intent of the legislature in enacting this statute to discern whether there was a mandatory, ministerial duty on the part of the school officials.¹⁸⁴ Because school officials were required to enforce mandatory physical education from the Education Code, the court found there was a ministerial duty by school officials to act.¹⁸⁵ Similarly, in *Entezampour v. North Orange County Community College District*, the court held that there was a ministerial duty by college officials to reassign the petitioner to a different administrative position as mandated in the District’s policy.¹⁸⁶ The Education Code section 87458 stated that “an administrator has the right to reassignment to a first-year probationary faculty member position if the administrator (1) is employed in an administrative position”¹⁸⁷ The court relied on this statute to hold that the district had a ministerial duty to reassign the petitioner because he had held an administrative

179. *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 299 (holding court cannot issue writ of mandamus forcing Department to enforce condom use).

180. *Id.* at 300 (holding that court “[C]annot compel another branch of the government to exercise its discretion in a particular manner.”).

181. *See, e.g., id.* at 299 (holding court cannot force Department to make definite regulation); *see also Doe v. Albany Unified Sch. Dist.*, 118 Cal. Rptr. 3d 507, 515 (Cal. Ct. App. 3d 2010) (discussing statute required “mandatory duty” according to language and legislative intent behind statute).

182. *Doe*, 118 Cal. Rptr. 3d at 515 (holding compulsory for school districts to offer physical education according to Education Code, California Education Code § 51210) (emphasis in original).

183. *Id.* at 513 (quoting California Education Code § 51210).

184. *See id.* (discussing legislative intent behind statute).

185. *See id.* at 515 (maintaining holding required by CAL. EDUC. CODE § 51210).

186. *Entezampour v. N. Orange Cnty. Cmty. Coll. Dist.*, 118 Cal. Rptr. 3d 585, 586 (Cal. Ct. App. 4d 2010) (“The trial court sustained the District’s demurrer to the petition, without leave to amend, and Entezampour appeals. We reverse.”).

187. *Id.* at 589 (quoting Education Code).

position in the college.¹⁸⁸ These cases affirm that ministerial duties are applied through the language of the applicable statutes.¹⁸⁹

The court in *AIDS Healthcare Foundation* should have found a ministerial duty by public health officials to enforce all needed measures to stop the transmission of HIV and STDs in the adult film industry.¹⁹⁰ The court denied that the Department had a duty to enforce mandatory condom use; yet examining case law and the California Health & Safety Codes suggests the Department must take effective action.¹⁹¹ Under sections 120575 and 120175, a public health official has a mandatory duty to take action to stop the transmission of infectious and venereal diseases when aware of their existence.¹⁹² The Department must attempt to regulate the industry because it has a statutory duty to “take measures as may be necessary to prevent the spread of disease of additional cases.”¹⁹³

In light of the ministerial duty argument, mandating condom use would be the clear answer to the health official’s duty to investigate and diminish STD and HIV transmission.¹⁹⁴ The Department has a stated mission to “[T]he prevention and control of sexually transmitted diseases in partnership with the communities of Los

188. *See id.* at 588 (arguing court’s holding that District must comply with Board Policy and trial court should not have denied writ of mandamus compelling compliance).

189. *See id.* at 593 (discussing holding under statute); *see also Doe*, 118 Cal. Rptr. 3d at 519 (stating plaintiffs interest in “[D]istrict’s compliance with” statute).

190. For discussion of Foundation’s claim, *see supra* note 177 and accompanying text for discussion. *But see AIDS Healthcare Found. v. L.A. Cnty. Dep’t of Pub. Health*, 128 Cal. Rptr. 3d 292, 300-01 (Cal. Ct. App. 2d 2011) (holding Department’s decisions cannot be ruled by writ of mandamus because its duties are discretionary).

191. *See AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 298-99 (stating court’s holding of no ministerial duty).

192. *See id.* at 298 (discussing petitioner’s allegations of ministerial duty of public health officials mandated by statutes); *see also supra* notes 176, 178, and accompanying text for discussion of Health and Safety Codes and Foundation’s petition.

193. Prevention of Spread of Disease, CAL. HEALTH & SAFETY CODE § 120175 (West 1995); *see also Advisory Meeting Minutes, supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (citing Department representative’s presentation at Cal/OSHA advisory meeting that Department investigates incidents of HIV outbreak but investigations limited in effectiveness).

194. *See Doe*, 118 Cal. Rptr. 3d at 513 (finding ministerial duties by administration to carry out duties specified in school policies); *Entzampour*, 118 Cal. Rptr. 3d at 586-87 (finding administration had ministerial duty to re-employ plaintiff as faculty member according to administrative policy). *But see AIDS Healthcare Found.* 128 Cal. Rptr. 3d at 292 (holding no ministerial duty by health official because duties are discretionary according to Health and Safety Codes).

Angeles.”¹⁹⁵ Moreover, the Department apparently admitted that the ‘epidemic of sexually transmitted diseases in the hardcore pornography industry [is attributed] to a lack of protective equipment for performers, including condoms’ and that using condoms would be “highly effective in preventing HIV and other sexually transmitted diseases”¹⁹⁶ Like *Entzampour* and *Doe*, the California Health & Safety Code imposed a mandatory duty on public health officials to take essential steps to stem the transmission of infectious and venereal diseases through necessary means.¹⁹⁷

The Department has acknowledged the effectiveness of using condoms in alleviating the transmission of STDs and HIV.¹⁹⁸ Additionally, hepatitis B vaccinations, as stated in the Foundation’s request, would predominately halt the transmission of that potentially deadly disease.¹⁹⁹ The Department currently investigates outbreaks of HIV, as they stated during a Cal/OSHA Advisory Committee meeting discussing better regulations in the porn industry.²⁰⁰ But without mandating such effective regulation, HIV and STD transmission persists as a large problem for the industry.²⁰¹ The Department has stated its favor for condom use in the adult film industry,

195. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 294 (citation omitted) (proposing public health official has “a duty to take steps to stem any known outbreak of communicable diseases.”) (citation omitted).

196. *Id.* at 295 (internal quotations omitted) (noting Department’s concessions regarding need for prophylactics in industry).

197. See CAL. HEALTH & SAFETY CODE §§ 120175, 120575 (West 1995) (asserting “duty” to investigate and protect against STD transmission). For a further discussion of the public health officials’ statutory duties, see *supra* notes 176, 178, and accompanying text; see also *supra* note 193 and accompanying text.

198. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 295 (acknowledging Department concedes effectiveness of condoms and hepatitis B vaccinations in industry).

199. See *Vaccines and Preventable Diseases: Hepatitis B Vaccination*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 25, 2011), <http://www.cdc.gov/vaccines/vpd-vac/hepb/default.htm> (discussing hepatitis B “can cause lifelong infection, cirrhosis (scarring) of the liver, liver cancer, liver failure, and death. Hepatitis B vaccine is available for all age groups to prevent HBV [hepatitis B virus] infection.”).

200. See *Advisory Meeting Minutes*, *supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (citing Department representative stating current duty of Department officials to investigate sites of outbreaks in industry). The Department has said it has trouble when investigating industry due to resistance amongst industry members. See *id.* (explaining Department representative reported at Cal/OSHA advisory meeting that industry resists health investigations when outbreaks are reported).

201. See Kim Yoshino, *Complaints Will Target 16 Porn Firms: Two Groups Plan to File Actions with State Alleging Workplace Safety Violations. The Industry Says It Can Police Itself*, L.A. TIMES, Aug. 20, 2009, at 7 (discussing Foundation filing complaint against porn producers for violation of “workplace safety laws” in effort to get mandatory condom use enacted in industry).

yet it is not compelling these regulations itself.²⁰² In sum, the Department has a ministerial duty to regulate the industry through effective means and must act to prevent disease transmission as required by its mandatory and ministerial duty to protect the population from the transmission of HIV and STD's.²⁰³

B. Beneficial Interest

In addition to an agency ministerial duty, there must also be a beneficial interest in issuing a writ of mandamus.²⁰⁴ A “beneficial interest” is established when a “petitioner must show he or she has some special interest to be served or some particular right to be preserved or protected though the issuance of a writ.”²⁰⁵ In *Doe*, the court elaborated that a beneficial interest is shown when “[o]ne who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable.”²⁰⁶ Case law generally bases beneficial interests on mandatory duties outlined in statutes.²⁰⁷

Applied to this case, porn industry actors have a beneficial interest in working in a safe environment and for their health interests to be protected by the Department's regulations.²⁰⁸ According

202. For further discussion of Department's support for better regulations, see *supra* notes 155-156 and accompanying text.

203. See *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 294 (examining Department's claim of public health officials' ministerial duty to regulate disease transmission in industry). See *generally* *Rodriguez v. Solis*, 1 Cal. Rptr. 2d 50, 53 (Cal. Ct. App. 1991) (defining “ministerial duty.”) See *Yoshino*, *supra* note 201 (stating complaint in Foundation's suit that “[t]he foundation sued Los Angeles County last month alleging that public health officials had failed to prevent the spread of sexually transmitted diseases and to enforce laws requiring employers to protect workers against exposure to bodily fluids.”) See *generally* *Doe v. Albany Unified Sch. Dist.*, 118 Cal. Rptr. 3d 507, 518 (Cal. Ct. App. 2010) (deciding ministerial duty to enforce statute, discussing requirements for ministerial duty). See CAL. HEALTH & SAFETY CODE §§ 120175, 120575 (West 1995) (stating language where mandatory ministerial duty for Department of Public Health officials stems from). But see *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 299 (holding no ministerial duty imposing mandatory regulation for enforcing Foundation's proposed health regulations).

204. See *Palma v. Prudential Ins. Co.*, 792 F. Supp. 2d 790, 795-96 (N.D. Cal. 2011) (stating factors for writ of mandamus are “ministerial duty” and “beneficial interest”).

205. *Doe*, 118 Cal. Rptr. 3d at 519 (citing *Carsten v. Psychology Examining Comm. Bd. Med. Quality Assurance*, 166 Cal. Rptr. 844 (1980) (detailing parameters when claiming “beneficial interest”).

206. *Id.* (noting purpose behind such claim) (citation omitted).

207. See *id.* at 519-20 (describing rights of beneficial party based upon applicable statute).

208. See *Safe Sex Sells: Why the Adult Film Industry Needs to Better Protect Its Performers*, AIDS HEALTHCARE FOUNDATION (Dec. 30, 2009), <http://www.aidshealth.org/news/in-the-media/safe-sex-sells.html> (“As concerned citizens who are appalled by

to the CDC website, in 2009, 6,237 people between ages of twenty and twenty-four and 5,951 people between twenty-five and twenty-nine were diagnosed with HIV.²⁰⁹ These statistics show the danger of transmission among the general public and that the threat is greatly increased in the industry.²¹⁰ Despite the high-risk environment adult film actors engage in, there is a lack of successful precautions controlling their health standard.²¹¹ Additionally, the backlash against requiring mandatory condom use in the adult film industry forces actors to proceed at their own risk when acting in a movie.²¹² Despite the high exposure to HIV and STDs, actors are isolated from effective regulations, perhaps due to the notoriety of their occupation.²¹³ Industry actors have a definite interest in having their health protected and the surrounding community has an interest in regulating disease transmission.²¹⁴

the epidemic rates of STDs within the adult film industry, we [AIDS activists] believe it is unethical for industry executives and consumers to continue to enjoy the profits, tax revenues and gratification of adult film without ensuring the safety of performers.”); *see Doe*, 118 Cal. Rptr. 3d at 519 (discussing beneficial right); *see, e.g., de Cesare, supra* note 20, at 683-84 (discussing need for regulations due to rapid spread of disease). Ms. de Cesare quotes statistic from head of the “Adult Industry Medical Foundation,” Sharon Mitchell, that “An average popular male in the industry, through partner-to-partner-to-partner transmission, reaches approximately 198 people in three days. Those are epidemic proportions.” *See id.* at 683 (quoting Sharon Mitchell).

209. *HIV AIDS Statistics/Surveillance*, CTRS. FOR DISEASE CONTROL AND PREVENTION (modified Aug. 11, 2011), <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#hivaidsage> (showing figures).

210. *See id.* (showing HIV contraction statistics); *see also Sexually Transmitted Diseases, supra* note 11 (showing higher disease transmission rates among actors).

211. *See Rong Gong Lin II & Kimi Yoshino, Questions Raised over County’s HIV Response*, L.A. TIMES, June 19, 2009, at 9 (“L.A. County public health officials have been asleep at the switch with regard to monitoring HIV and STD prevention and testing in the region’s porn industry. . . . It really seems very, very clear that they do have the authority. Why aren’t they doing anything?”) (quoting AIDS Healthcare Foundation president Michael Weinstein).

212. *See Torres, supra* note 20, at 99 (discussing unsafe state when working on adult films); *see also de Cesare, supra* note 20, at 669 (examining current unresolvability of health problem in adult film industry).

213. *See John Stagliano, How Harmful is Porn*, L.A. TIMES, Opinion (July 3, 2011), <http://www.latimes.com/news/opinion/la-op-mcdonald-stagliano3-2008jul03,0,1018875.story> (addressing stigmas associated with porn industry). The health and safety of adult film actors, like in any industry, needs to be addressed and regulated. *See, e.g., Alex Dobuzinskis, Porn Film Shoots Voluntarily Halted After HIV Case*, REUTERS (Aug. 30, 2011, 8:12 PM), <http://www.reuters.com/article/2011/08/31/us-porn-hiv-idUSTRE77U01520110831> (discussing industry conducting business without regulations due to legal ambiguity or ignorance of law).

214. *See Doe v. Albany Unified Sch. Dist.*, 118 Cal. Rptr. 3d 507, 519 (Cal. Ct. App. 2010) (discussing who has a “beneficial interest.”); *see also Advisory Meeting Minutes, supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (“Some diseases have serious and significant consequences, and STDs also increase the rate of HIV transmission. Performers are not isolated and have sexual

Applying these considerations to the second prong of the writ of mandamus test, it is clear that actors have a beneficial interest in effective health regulations like mandatory condom use and hepatitis B vaccinations.²¹⁵ Currently, actors are affected by the Department's non-action in regulating such diseases.²¹⁶ As shown, the Department has a mandatory duty to abide by California Health & Safety Codes sections 120175 and 120575 and the actor community has a beneficial right to government protection of their health and safety when there are no other potentially effective options to enforce protection for them.²¹⁷ The court should have enforced a writ of mandamus compelling the Department to act, with mandatory condom use being the logical option.²¹⁸ Condoms are the most effective method of disease protection and would be the most favorable choice for effective regulation.²¹⁹ The court should have issued the writ to enforce mandatory condom use because the discretionary duty of the Department was not being utilized to protect the safety of adult film actors.²²⁰ Thus, the Department has a ministerial duty to enforce these regulations and the industry community has a beneficial interest in mandatory condom use.²²¹

partners outside of work.”) (quoting Los Angeles Department Public Health representative).

215. *See Doe*, 118 Cal. Rptr. 3d at 519 (discussing who and why one is entitled to beneficial interest); *see also AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health*, 128 Cal. Rptr. 3d 292, 296 (Cal. Ct. App. 2011) (presenting reasons why Department should compel mandatory condom use and hepatitis B vaccinations).

216. *See Doe*, 118 Cal. Rptr. 3d at 518 (describing writ of mandamus test).

217. *See id.* (defining writ of mandamus test). *See generally* Torres, *supra* note 20, at 98-99 (describing isolated filming sets leading to underground and unsafe sex practices); *See* CAL. HEALTH & SAFETY CODE §§ 120175, 120575 (West 1995) (outlining duty of public health official).

218. *See AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 296 (stating claim for relief); *see also Condoms and STDs: Fact Sheet for Public Health Personnel*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Sept. 13, 2011), <http://www.cdc.gov/condomeffectiveness/latex.htm> (discussing condom effectiveness).

219. *See Condoms and STDs: Fact Sheet for Public Health Personnel*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 13, 2011), <http://www.cdc.gov/condomeffectiveness/latex.htm> (stating “Laboratory studies have demonstrated that latex condoms provide an essentially impermeable barrier to particles the size of STD pathogens.”).

220. *See Doe*, 118 Cal. Rptr. 3d at 519 (explaining beneficial interest as one who “has some special interest to be served or some right preserved. . . .”) (citation omitted); *see also AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 295 (arguing beneficial interest protected by mandating mandatory condom use in adult film industry because Department allegedly has not made adequate progress to reduce health threats).

221. *See Doe*, 118 Cal. Rptr. 3d at 520 (holding plaintiff had beneficial interest in having physical education statute enforced). *But see AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 293 (confirming dismissal of Department's mandamus claim).

C. Agency Discretion: Abuse of Discretion

The final argument for judicial enforcement of a writ of mandamus for condom use in the adult film industry is through agency abuse of discretion.²²² The Department abused its discretion by not using its power to protect actors and their partners, thus putting lives at risk.²²³ Discretion of an agency is broad and an agency's judgment receives deference regarding its decision-making powers.²²⁴ Agency discretion, however, is not a license for the agency to do whatever it chooses.²²⁵ There are limits directing the agency to use its discretion appropriately:

Administrative discretion must be exercised in accordance with the law The discretion must be exercised in accordance with the established principles of justice. Their actions must be both legal and reasonable, and fair toward those with whom they deal. Administrative tribunals may not act arbitrarily or capriciously, or without factual basis, and their discretion may not be abused. An administrative agency empowered to exercise discretion must exercise that discretion. Where power is conferred on an administrative agency and by statute its exercise is made mandatory, there is no discretion as to whether it shall be exercised, although the manner of its exercise may be discretionary [A]gencies' exercise of discretion is generally subject to judicial review.²²⁶

222. See *Public Administrative Law*, *supra* note 146 (describing duty of discretionary agencies). "Where power is conferred on an administrative agency and by statute its exercise is made mandatory, there is no discretion as to whether it shall be exercised, although the manner of its exercise may be discretionary." *Id.* (noting variation in agency duty to exercise discretion); see also *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 300 (stating Foundation's claim that Department of Public Health worked with Cal/OSHA to regulate disease transmission in adult film industry but that steps are inadequate and Department knows better precautions are available).

223. See *Public Administrative Law*, *supra* note 146 ("Administrative discretion must be exercised in accordance with the law . . . and those of statutes and regulations. . . . Their actions must be both legal and reasonable") But see *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 300 ("We cannot compel the Department to implement the Foundation's agenda.")

224. See, e.g., *Public Administrative Law*, *supra* note 146 (describing large leeway for agency discretion and deference to that discretion).

225. See *id.* ("Generally, the discretion vested in administrative officers and agencies is not absolute or unlimited.")

226. See *id.* (describing parameters of agency discretion).

When an agency does not exercise its discretion appropriately, a court can issue a writ of mandamus for abuse of discretion.²²⁷

The test for abuse of discretion is whether an agency's actions or decisions are "arbitrary, capricious, lacking in evidentiary support, or was made without due regard for the petitioner's rights."²²⁸ Additionally, in determining abuse of discretion, courts must weigh the factors to "ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purpose of the enabling statute."²²⁹ When a statute requires that an agency have discretion to carry out a function, generally a court will defer to the agency's discretion unless there is a clear abuse of discretion.²³⁰ But courts do find an abuse of discretion when an agency has a statutory duty to act.²³¹ In cases of discretionary abuse, the court looks to the relevance between the agency's discretion and the choices they made to determine whether it is "arbitrary, capricious, lacking in evidentiary support."²³² In deciding whether an agency has abused its discretion, some courts have found that agency non-action could be an abuse of discretion.²³³

A court, weighing these factors collectively, could compel a writ of mandamus against the Department for abusing its discretion in not enforcing adequate industry regulatory measures.²³⁴ The Foun-

227. See, e.g., *Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.*, 30 Cal. Rptr. 3d 648, 659 (Cal. Ct. App. 2005) (citing *Sequoia Union High School Dist. v. Aurora Charter High School*, 5 Cal. Rptr. 3d 86 (Cal. Ct. App. 2003)) (stating terms of abuse of discretion).

228. See, e.g., *id.* (citing *Sequoia*, 5 Cal. Rptr. 3d at 86) (presenting test for abuse of discretion).

229. *Id.* (citing *Sequoia Union High School Dist. v. Aurora Charter High School*, 5 Cal. Rptr. 3d 86 (Cal. Ct. App. 2003)).

230. See *AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health*, 128 Cal. Rptr. 3d 292, 301 (Cal. Ct. App. 2011) (holding no cause of action for abuse of discretion); see also *Public Administrative Law*, *supra* note 146 ("Where power is conferred on an administrative agency and by statute its exercise is made mandatory, there is no discretion as to whether it shall be exercised, although the manner of its exercise may be discretionary.")

231. See *Ridgecrest Charter Sch.*, 30 Cal. Rptr. 3d at 662 (holding abuse of discretion when school district did not provide adequate "equivalent" school facilities for charter school mandated by statute).

232. See *id.* at 659-62 (discussing facts of case and stating courts exception in their deference to agency decisions).

233. See *Morris v. Harper*, 114 Cal. Rptr. 2d 62, 69 (Cal. Ct. App. 2001) ("[B]etween the definitions of ministerial and discretionary act lies the following pertinent rule: A refusal to exercise discretion is itself an abuse of discretion.")

234. See *Public Administrative Law*, *supra* note 146 ("An administrative agency empowered to exercise discretion must exercise that discretion."); see also *supra* note 222 and accompanying text for discussion of Foundation's claim. But see *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 294 (holding court could not issue writ of

dation alleged the Department abused its discretion when the agency refused to enforce mandatory condom use and hepatitis B vaccinations in the adult film industry.²³⁵ The court held that the Foundation's allegations against the Department did not amount to abuse of discretion because the Foundation only alleged the Department failed to act in a specific manner.²³⁶ But the Foundation's argument is meritorious in claiming that the Department is not acting at all to effectively regulate the industry.²³⁷ For the Foundation to succeed in its plea for relief, the court must evaluate whether the Department abused its discretion by acting "arbitrarily, capriciously. . . [and] without due regard for petitioner's rights."²³⁸

Proving that the Department abused its discretion by not issuing mandatory condom use and hepatitis B vaccinations for actors is a multi-step process.²³⁹ The court must weigh agency discretion against the relatively vague abuse of discretion test.²⁴⁰ Courts may not be able to compel the Department to issue specific regulations but courts can compel the Department to act in some more effective manner.²⁴¹ If the agency failed to adequately consider the proposed provision and did not provide a sufficient basis for denying petitioners proposed regulation, then there are grounds for a court

mandamus compelling Los Angeles Department of Public Health to exercise discretion by mandating condom and hepatitis B vaccinations in adult film industry).

235. *AIDS Healthcare Found.*, 128 Cal. Rptr. 3d at 294 (reiterating court's holding).

236. *Id.* at 300 (holding Department did not abuse discretion by not promulgating specific regulations). The court decided that the Foundation's claim that the Department failed to act in a prescribed manner is not the same as alleging no action for an abuse of discretion. *Id.* (holding petitioner did not "state cause of action"). The court said, "We do not read the allegations in the petition as alleging the Department failed to take any action in conformity with its statutory authority. Thus, the petition fails to state a cause of action." *Id.* (stating court's decision).

237. *See id.* at 301 ("We cannot compel the Department to implement the Foundation's agenda."); *see also id.* at 300 (stating Foundation's petition claims Department's work with Cal/OSHA following 2004 HIV formulated "'model Exposure Control Plan'" controlling HIV exposure, yet plans never came to fruition).

238. *See, e.g., Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.*, 30 Cal. Rptr. 3d 648, 659 (Cal. Ct. App. 2005) (citing Sequoia Union High Sch. Dist. v. Aurora Charter High Sch., 5 Cal. Rptr. 3d 86 (Cal. Ct. App. 2003)) (laying out test for abuse of discretion); *see generally AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health*, 128 Cal. Rptr. 3d 292, 300 (Cal. Ct. App. 2011) (stating test for abuse of discretion).

239. For a discussion of the Department's abuse of discretion, *see infra* notes 240-255 and accompanying text.

240. *See, e.g., Ridgecrest Charter Sch.*, 30 Cal. Rptr. 3d at 659 (noting standards of abuse of discretion).

241. *See Public Administrative Law, supra* note 146 (describing duty of agency discretion to effectively regulate).

to find that the agency acted “arbitrarily and capricious[ly].”²⁴² While the court cannot compel specific action on the part of the Department to issue mandatory condom use in the industry, it can compel the Department to act and use its discretion to regulate if the court finds that the Department is not taking necessary measures.²⁴³ In accordance with its discretion, an agency “must be both legal and reasonable, and fair toward those with whom they deal.”²⁴⁴ As an administrative agency, the Department is “empowered to exercise discretion [and] must exercise that discretion.”²⁴⁵

In this case, there is a long history of health violations along with a lack of regulation in the adult film industry.²⁴⁶ While adult films are increasing in popularity, the industry has escaped thorough regulation likely because of its stigma of notoriety.²⁴⁷ Asking the Department to issue a regulation that will significantly decrease the transmission of HIV and STDs and protect the health and safety of both actors and their sexual partners is a reasonable request.²⁴⁸ Failing to effectively act is an unreasonable and arbitrary use of agency discretion.²⁴⁹ The Department has not promulgated effective regulation although they have the authority to do so under the California Health & Safety Codes.²⁵⁰ Moreover, the Department is not adequately complying with sections 120125 and 120575 of the

242. See *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 103 S.Ct. 2856, 2867 (1983) (declining to extend by *F.C.C. v. Fox Tel. Stations Inc.*, 129 S.Ct. 1800 (2009)) (“[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency . . .”).

243. See *Public Administrative Law*, *supra* note 146 (“[A]n administrative board must exercise its authority . . . discretion includes the power to make a reasoned choice of the alternatives within a class of permissible actions, considering all the relevant factors.”).

244. See *id.* (explaining agency discretionary duty).

245. See *id.* (discussing agency abuse of discretion).

246. See, e.g., *Advisory Meeting Minutes*, *supra* note 15, at *Presentation by Los Angeles County Department of Public Health* (discussing health risks and disease transmissions statistics associated with industry and presented at Cal/OSHA meeting discussing better regulations). For a further discussion of health incidences, see *supra* notes 55-60 and accompanying text.

247. See Lisa Ling, *The Evolution of Porn and Erotica*, OPRAH WINFREY SHOW (Nov. 17, 2009), <http://www.oprah.com/relationships/Lisa-Ling-Reports-on-Adult-Films-Porn-and-Erotica/1> (discussing evolution of porn industry from “dirty little secret” to larger industry).

248. See *Public Administrative Law*, *supra* note 146 (“Their [administrative agencies] actions must be both legal and reasonable.”).

249. See *id.* (examining standards of arbitrariness in agency decision).

250. See *AIDS Healthcare Found. v. L.A. Cnty. Dep’t Pub. Health*, 128 Cal. Rptr. 3d 292, 297 (Cal. Ct. App. 2011) (describing duty of Department according to California Health and Safety Codes).

California Health & Safety Code.²⁵¹ These statutes create a statutory duty and compel the Department to regulate the transmission of infectious and venereal disease.²⁵²

The Department has a broader reach to regulate the adult film industry since Cal/OSHA's reach is limited and individual litigation is not a pragmatic solution to the epidemic.²⁵³ While Cal/OSHA has attempted to curtail the industry's dangerous practices and lack of regulation, the Department has circumvented the issue.²⁵⁴ If the court had found that the Department's limited actions were an abuse of discretion, it would have made implementing a county-wide condom regulation in the industry an increasingly feasible goal.²⁵⁵

VI. CONCLUSION

The January 2012 ordinance that the Los Angeles City Council passed states that condoms are mandatory in pornographic films.²⁵⁶ The ordinance enforces condom use by issuing permits exclusively for movies using condoms and also through inspections of movie sites in the city of Los Angeles.²⁵⁷ Condoms in the adult film industry officially became law in the state of California on January 23, 2012 when the Los Angeles Mayor, Antonio Villaraigosa, signed the

251. See CAL. HEALTH & SAFETY CODE §§ 120175, 120575 (West 1995) (stating requirements of duty for public health official).

252. For a general discussion of the Department's regulatory duty, see *supra* notes 222-251 and accompanying text. For a summary of the provisions of the California Health & Safety Codes, see *supra* notes 176 and 178.

253. For a discussion of Cal/OSHA's limited authority and the ineffectiveness of tort liability, see *supra* notes 83-149 and accompanying text.

254. See, e.g., de Cesare *supra* note 20, at 669 (discussing 2004 HIV outbreak and Cal/OSHA measures, which validity is "still pending."). The Los Angeles Department of Public Health has worked with Cal/OSHA to regulate the industry but because Cal/OSHA's reach is limited, there has been little fruition of success in implementing regulations. See Alex Dobuzinskis, *Los Angeles Mandates Porn Stars Wear Condoms*, REUTERS (Jan. 18, 2012, 12:03 PM), <http://www.reuters.com/article/2012/01/18/us-porn-stars-condoms-idUSTRE80H1JT20120118> (noting that Cal/OSHA's enforcement of condoms "has been a challenge for the state.").

255. See *Public Administrative Law*, *supra* note 146 (referring to standard of abuse of discretion where agencies must act to "exercise discretion."). *But see* AIDS Healthcare Found. v. L.A. Cnty. Dep't Pub. Health, 128 Cal. Rptr. 3d 292, 299-300 (Cal. Ct. App. 2011) (holding no cause of action for abuse of discretion and flaws in Department's argument stems from compelling specific regulation, not general agency abuse of discretion).

256. See, e.g., *L.A. City Council*, *supra* note 12 (stating Los Angeles City Council passed ordinance).

257. See *id.* (including parameters of "surprise inspections" to film sights, making sure there is compliance); see also Medina, *supra* note 73 (describing Los Angeles Police Department responsibility for performing investigations).

measure.²⁵⁸ This is a giant victory for AIDS activists in their advocacy for the sake of public health.²⁵⁹ In light of the court's decision in *AIDS Healthcare Foundation*, the new ordinance finally addresses a situation many refused to address.²⁶⁰

Mandating this regulation is the responsibility of the local government in order to protect the community.²⁶¹ Because a great majority of adult films are filmed and produced in Los Angeles County, it is the Department's duty to protect those actors, as mandated in the California Health & Safety Codes.²⁶² HIV transmission is a serious threat to both actors and their sexual partners outside the industry.²⁶³ Cal/OSHA has jurisdiction to compel mandatory condom use, but its power is limited because it can only regulate actors determined to be employees and is met with resistance.²⁶⁴ Negligence liability is one option to recover damages from the industry, but many actors are precluded from suing the industry due to a lack of funds, contractual agreements, and numerous other obstacles.²⁶⁵ And lawsuits only address the aftermath; it does nothing to stop the spread of the disease.²⁶⁶ The Court of Appeals should

258. See *Los Angeles Mayor Signs Porn Star Condom Requirement*, FOX NEWS (Jan. 25, 2012), <http://www.foxnews.com/health/2012/01/25/los-angeles-mayor-signs-porn-star-condom-requirement/> [hereinafter *Los Angeles Mayor*] (noting when Mayor signed bill).

259. See *L.A. City Council*, *supra* note 12 (explaining Los Angeles Mayor Villaraigosa support of regulation); see also *id.* ("The vote marks a significant victory for the AIDS Healthcare Foundation, which has been rallying for years to protect the health of porn actors"); Medina, *supra* note 73 (describing advocacy of AIDS Healthcare Foundation).

260. See Hennessy-Fiske, *supra* note 61 (noting governmental resistance to promoting regulations).

261. See *id.* ("[t]here's been a lot of squabbling about whose responsibility it is to enforce these laws.") (quoting Weinstein to L.A. Times).

262. See *supra* notes 176, 178 (stating provisions of California Health & Safety Codes).

263. See *Study Shows STD Rates Much Higher in Adult Film Performers*, BUSINESSWIRE (July 28, 2011), <http://www.businesswire.com/news/home/20110728006637/en/Study-Shows-STD-Rates-Higher-Adult-Film> ("Self-regulation in this industry has not sufficiently protected workers from serious health risks.").

264. See Jordan, *supra* note 19, at 429 (discussing Cal/OSHA's power over employee actors but not independent contractors). For a further discussion of Cal/OSHA's shortcomings regulating industry because of its lack of full jurisdiction over actors, see *supra* notes 82-120 and accompanying text.

265. See de Cesare, *supra* note 20, at 702 (noting difficulties of negligence litigation); Torres, *supra* note 20, at 98 (suggesting employment contracts actors must sign which diminish benefits to actors). For a further discussion of the ineffectiveness of tort action in promulgating effective health regulations in the industry, see *supra* notes 122-150 and accompanying text.

266. For a further discussion of why tort claims will not remedy the problem of HIV and STD transmission in the industry, see *supra* notes 139-142 and accompanying text.

have granted a writ of mandamus against the Department because: the Department has a mandatory and ministerial duty to act, as outlined in the California Health & Safety Codes; the people of Los Angeles, including adult film workers, do have a beneficial interest in having their risk of HIV regulated and diminished; and to not investigate more effective regulations is an abuse of its discretion.²⁶⁷

Time will tell whether this new ordinance will be effectively implemented.²⁶⁸ Even though there already was a pre-existing standard, it was ignored and ineffectively enforced in the industry.²⁶⁹ There will also likely be backlash against introducing the law at the county level as the Department and county legislators refuse to enforce the regulation.²⁷⁰ While adopting the regulation at the city level is a positive step, the county must also implement it to enforce its full effect.²⁷¹ The industry currently threatens to take its business elsewhere and either move from California or go “underground” to escape this regulation.²⁷² In addition, the Free Speech Coalition has also said they may sue to stop this regulation from

267. For a further discussion of the argument that the Department has a ministerial duty, actors have a beneficial interest and regarding the Department's abuse of discretion, see *supra* notes 151-255 and accompanying text.

268. See Rong-Gong Lin II, *Porn Firms Consider Leaving L.A. After Condom Vote*, L.A. TIMES BLOG (Jan. 18, 2012, 2:25 PM), <http://latimesblogs.latimes.com/lanow/2012/01/porn-firms-consider-leaving-la-following-mandatory-condom-vote.html> [hereinafter *Porn Firms*] (noting city agencies discussing how to effectively impose regulation); see also Medina, *supra* note 73 (explaining city agencies in negotiation over how to enforce ordinance); Dennis Romero, *The End of L.A.'s Porn Industry*, L.A. WEEKLY BLOG (Jan. 19, 2012, 7:05 AM), http://blogs.laweekly.com/informer/2012/01/porn_industry_pull_out_angeles_condoms.php [hereinafter *The End*] (noting lack of resources available to city, likely causing limited enforcement).

269. See Medina, *supra* note 73 (describing Cal/OSHA's limited enforcement of industry in accordance with pre-existing standard).

270. See *Condoms in Porn*, *supra* note 76 (noting lack of cooperation for regulation in Los Angeles County); see also Medina, *supra* note 73 (noting Department insistence they cannot police industry for condom use).

271. See *Porn Firms*, *supra* note 268 (explaining porn industry threatened to move from city of Los Angeles to escape ordinance's reach); see also Madison Gray, *L.A. Mayor Signs Law Requiring Condoms in Porn Films*, TIME (Jan. 25, 2012), <http://healthland.time.com/2012/01/25/la-mayor-signs-law-requiring-condoms-in-porn-films/> (pointing out skepticism over enforcing measure).

272. See *Porn Firms*, *supra* note 268 (discussing porn industry plans to retreat from city of Los Angeles to less policed areas in reaction to ordinance). The industry may face difficulty in leaving California since New Hampshire and California are the only states where making pornographic movies is legal. See Rong-Gong Lin II, *Condoms in Porn: Moving Industry Out Of State Could Be Difficult*, L.A. TIMES BLOG (Jan. 19, 2012, 7:12 AM), <http://latimesblogs.latimes.com/lanow/2012/01/condoms-in-porn-moving-industry-out-of-state-could-be-difficult.html> (noting anti-prostitution laws make filming in other states problematic).

going into effect.²⁷³ Los Angeles city officials, agencies, and AIDS advocates must work together to make this regulation effectively employed in pornographic films.²⁷⁴ Enforcing condom use could achieve much good for the fight against the AIDS epidemic if enforced.²⁷⁵ After all, “[a] little piece of latex has the ability to save lives.”²⁷⁶

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273. See Medina, *supra* note 73 (referencing statement made by Diane Duke of Free Speech Coalition that they “would consider filing a lawsuit.”); see also *Los Angeles Mayor*, *supra* note 258 (reporting Diane Duke said industry considers Florida and Nevada prime locations to move industry).

274. See Medina, *supra* note 73 (noting government discussing how to effectively administer rule); see also *The End*, *supra* note 268 (implying city’s debt could diminish actual power of monitoring adult film industry).

275. See *Condom Fact Sheet In Brief*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/condomeffectiveness/brief.html> (last updated Apr. 11, 2011) (describing effectiveness of condom use in disease prevention).

276. See Hennessy-Fiske, *supra* note 61 (quoting Michael Weinstein regarding beneficial use of condoms).

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