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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VIVID ENTERTAINMENT, LLC;)	Case No. CV 13-00190 DDP (AGRx)
CALIFA PRODUCTIONS, INC.;)	
JANE DOE a/k/a KAYDEN KROSS,)	ORDER DENYING IN PART AND
)	GRANTING IN PART INTERVENERS'
Plaintiff,)	MOTION TO DISMISS; DENYING IN
)	PART AND GRANTING IN PART
v.)	PLAINTIFFS' MOTION FOR A
)	PRELIMINARY INJUNCTION; AND
JONATHAN FIELDING, DIRECTOR)	VACATING PLAINTIFFS' MOTION FOR
OF LOS ANGELES COUNTY)	JUDGMENT ON THE PLEADINGS
DEPARTMENT OF PUBLIC HEALTH;)	
JACKIE LACEY, LOS ANGELES)	[Docket Nos. 49, 55, 64]
COUNTY DISTRICT ATTORNEY,)	
and COUNTY OF LOS ANGELES,)	
)	
Defendants.)	
_____)	

I. Background

Plaintiffs Vivid Entertainment, LLC ("Vivid") and Califa Productions, Inc., produce adult films. (Compl. ¶¶ 8-9, Docket No. 1.) Plaintiffs Jane Doe, known professionally as Kayden Kross ("Ms. Kross"), and John Doe, known professionally as Logan Pierce ("Mr. Pierce"), are performers who appear in adult films. (Id. ¶¶ 10-11.)

The adult film industry regularly tests actors for sexually transmitted infections ("STIs"). (Id. ¶¶ 20-31.) During the

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1 November 2012 elections, Los Angeles County passed, via referendum,
2 The County of Los Angeles Safer Sex in the Adult Film Industry Act
3 ("Measure "B"). (Id. ¶ 36; Docket No. 58-1 Ex. B text of Measure
4 B); Los Angeles County Code § 11.39 ("§ 11.39"), et seq. (codifying
5 Measure B). Measure B forces producers of adult films, before any
6 production can occur, to pay a fee and obtain a permit from the
7 County Department of Public Health (the "Department"), which is
8 tasked with enforcing Measure B. (Id. ¶ 41-43.) The Department of
9 Public Health, set the permit fee in the range of \$2,000 to \$2,500
10 per year. (Compl. ¶ 48.) Once approved, the film producers must
11 display the permit at all times during filming. (Id. ¶ 41.) A
12 permit is valid for two years, but is, at all times, subject to
13 immediate revocation. (Id.) Once a permit is granted, Measure B
14 requires that performers engaging in anal or vaginal sexual
15 intercourse to use condoms during filming. (Compl. ¶ 42.)

16 Department inspectors are granted access to "any location
17 suspected of conducting any activity regulated by" Measure B,
18 without notice. § 11.39.130. Inspectors can look at personal
19 property or private documents from any person present at any
20 location if there is suspicion of a Measure B violation. See id.

21 Plaintiffs have sued various County officials for Declaratory
22 and Injunctive Relief. (See generally Compl.) Because Defendants
23 have declined to defend Measure B's constitutionality, this Court
24 has allowed Michael Weinstein, Marijane Jackson, Arlette De La
25 Cruz, Mark McGrath, Whitney Engeran, and the Campaign Committee Yes
26 on B, Major Funding by the AIDS Healthcare Foundation
27 ("Intervenors") to intervene. (See generally Order Granting Motion
28 to Intervene, Docket No. 44; Order Denying Plaintiffs' Motion for

1 Reconsideration, Docket No. 78.) Interveners were Measure B's
2 official proponents. (Id. at 2:19-20.) Presently before the Court
3 is Interveners' Motion to Dismiss and Plaintiffs' Motion for a
4 Preliminary Injunction. (Docket Nos. 49, 55.)¹

5 **II. Legal Standard**

6 **A. Motion to Dismiss**

7 A complaint will survive a motion to dismiss when it contains
8 "sufficient factual matter, accepted as true, to state a claim to
9 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
10 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
11 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
12 "accept as true all allegations of material fact and must construe
13 those facts in the light most favorable to the plaintiff." Resnick
14 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
15 need not include "detailed factual allegations," it must offer
16 "more than an unadorned, the-defendant-unlawfully-harmed-me
17 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
18 allegations that are no more than a statement of a legal conclusion
19 "are not entitled to the assumption of truth." Id. at 679. In
20 other words, a pleading that merely offers "labels and
21 conclusions," a "formulaic recitation of the elements," or "naked
22 assertions" will not be sufficient to state a claim upon which

23
24 ¹Plaintiffs argue the motion to dismiss is untimely because
25 the County has already filed an answer in this case. Generally,
26 motions to dismiss must be filed before an answer. United States
27 v. Real Prop. Located at 41430 De Portola Rd., Rancho California,
28 959 F.2d 243 (9th Cir. 1992). It is unclear, though, how this rule
is applied in the intervener context. Regardless, should the rule
apply to Interveners, the Court uses its discretion to convert the
motion to dismiss into a motion for judgment on the pleadings,
which is analogous to a motion to dismiss except that it may be
filed after an answer. See id.

1 relief can be granted. Id. at 678 (citations and internal
2 quotation marks omitted). "When there are well-pleaded factual
3 allegations, a court should assume their veracity and then
4 determine whether they plausibly give rise to an entitlement of
5 relief." Id. at 679.

6 **B. Motion for Preliminary Injunction**

7 "[P]laintiffs seeking a preliminary injunction must establish
8 that (1) they are likely to succeed on the merits; (2) they are
9 likely to suffer irreparable harm in the absence of preliminary
10 relief; (3) the balance of equities tips in their favor; and (4) a
11 preliminary injunction is in the public interest." Sierra Forest
12 Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing Winter
13 v. Natural Resources Defense Council, Inc., 555 U.S. 7, 29 (2008)).

14 **III. Motion to Dismiss Analysis**

15 After reviewing Interveners' motion to dismiss, the Court
16 GRANTS dismissal of Plaintiffs' claim that ballot initiatives
17 cannot, as a matter of law, implicate First Amendment rights, that
18 state law preempts Measure B, and that Measure B violates
19 Plaintiffs' due process rights (with the exception of Plaintiffs'
20 Fourth Amendment claim). The Court DENIES dismissal on the
21 remaining claims.

22 **A. Standing**

23 Interveners claim that Plaintiffs do not have standing.
24 Standing is a "threshold question." Nat'l Org. for Women, Inc. v.
25 Scheidler, 510 U.S. 249, 255 (1994). The doctrine "is founded in
26 concern about the proper-and properly limited role-of the courts in
27 a democratic society." Wart v. Seldin, 422 U.S. 490, 498 (1975).
28 The constitutional requirements of standing are:

1 (1) injury in fact, by which we mean an invasion of a
2 legally protected interest that is (a) concrete and
3 particularized, and (b) actual or imminent, not
4 conjectural or hypothetical; (2) a causal relationship
5 between the injury and the challenged conduct, by which
6 we mean that the injury fairly can be traced to the
7 challenged action of the defendant, and has not resulted
8 from the independent action of some third party not
9 before the court; and (3) a likelihood that the injury
10 will be redressed by a favorable decision, by which we
11 mean that the prospect of obtaining relief from the
12 injury as a result of a favorable ruling is not too
13 speculative.

8 Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of
9 Jacksonville, 508 U.S. 656, 663-664 (1993). Plaintiffs have the
10 burden of showing they have standing. Lujan v. Defenders of
11 Wildlife, 504 U.S. 555, 562 (1992). "[I]t is sufficient for
12 standing purposes that the plaintiff intends to engage in a course
13 of conduct arguably affected with a constitutional interest and
14 that there is a credible threat that the challenged provision will
15 be invoked against the plaintiff." Arizona Right to Life Political
16 Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003)
17 (internal quotation marks and citations omitted) (emphasis added).²
18 "Thus, when the threatened enforcement effort implicates First
19 Amendment rights, the inquiry tilts dramatically toward a finding
20 of standing." Id. Even outside the First Amendment context, pre-
21 enforcement standing is appropriate when the issue is a purely
22 legal one and it would be costly to comply with the challenged law
23 or regulation. See Abbott Labs v. Gardner, 387 U.S. 136, 149
24 (1967).

25

26

27 ²The word "arguably" is important because standing must be
28 decided before the merits are reached. George E. Warren Corp. v.
U.S. E.P.A., 164 F.3d 676 (D.C. Cir. 1999).

1 Here, standing is appropriate. Vivid and Califa,
2 collectively, make, produce, and distribute adult films, and their
3 principle place of business is Los Angeles. (Compl. ¶¶ 8-9.)
4 Plaintiffs Kross and Pierce perform in adult films produced Los
5 Angeles. (Id. ¶¶ 10-11.) On December 14, 2012, the Department
6 sent a letter to the "Producers of Adult Films in Los Angeles
7 County, indicating what steps the Department would take in
8 implementing and enforcing Measure B." (Docket No. 56 Ex. 1; see
9 also Compl. ¶¶ 55, 61, 76, 89, 97.) Vivid has presented evidence
10 that, as a result of Measure B's passage, it has stopped shooting
11 adult films in Los Angeles, and has thus lost the value of the non-
12 Measure B filming permits for which it has already paid. (Hirsch
13 Decl. ¶¶ 20-21.)³ Vivid has also presented evidence that filming
14 outside Los Angeles creates several difficulties: performers are
15 generally less available to film outside the County, fewer support
16 services are available outside the County, and fewer suitable
17 locations exist outside the County. (Id. ¶¶ 28-32.) Moreover,
18 Kross attests that she prefers to act with a partner not wearing a
19 condom, for reasons that range from comfort to the message she
20 wishes to portray, and she also attests that Measure B has reduced
21 the number of roles in which she has had the opportunity to act.

22

23 ³"In evaluating a plaintiff's standing at the motion to
24 dismiss stage, a court may consider not only the allegations in the
25 complaint, but also factual averments made by declaration or
26 affidavit." Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222,
27 1232 (D. Colo. 2012); Vildosola v. Hornbeak, No. CV 08-6590-VAP
28 JEM, 2010 WL 1507100, at *8 (C.D. Cal. Feb. 25, 2010) (looking to
29 declarations to determine standing at the motion to dismiss stage).
30 "[A] suit will not be dismissed for lack of standing if there are
31 sufficient allegations of fact—not proof—in the complaint or
32 supporting affidavits." Gwaltney of Smithfield, Ltd. v.
33 Chesapeake Bay, 484 U.S. 49, 65 (1987) (emphasis added).

1 (Kross Decl. ¶¶ 9-11, 15.) Pierce makes similar attestations.
2 (Pierce Decl. ¶¶ 7-11.) In light of the potential First Amendment
3 concerns that Measure B implicates, the costs and consequences of
4 complying with Measure B, and the County's expressed intent to
5 enforce Measure B, Plaintiffs have standing to challenge it.
6 Bayless, 320 F.3d at 1006; see also Abbott Labs, 387 U.S. at 149
7 (indicating that standing would be proper even outside the First
8 Amendment context).

9 **B. Plaintiffs' State Law Preemption Claim**

10 Plaintiffs contend that Cal. Labor Code § 144.7 and California
11 Code of Regulations Title 8 § 5193 preempt Measure B (Compl. ¶
12 101.) Diversity jurisdiction is not alleged, and, therefore,
13 supplemental jurisdiction, 28 U.S.C. § 1367, is the only means by
14 which this Court may preside over Plaintiffs' state law preemption
15 claim. However, 28 U.S.C. § 1367, grants courts the discretion to
16 "decline to exercise supplemental jurisdiction" over matters that
17 "raise[] a novel or complex issue of State law." Id.; Dream Palace
18 v. Cnty. of Maricopa, 384 F.3d 990, 1022 (9th Cir. 2004). The
19 Ninth Circuit has upheld a decision to decline supplemental
20 jurisdiction over a claim that state law preempted a county
21 ordinance governing adult entertainment sites. Dream Palace, 384
22 F.3d at 1022. The district court in that case explained that "the
23 remaining state-law claims raise delicate issues involving the
24 interpretation and application of Arizona law and the balance of
25 powers within Arizona between state and local government." Id.
26 Since similar concerns about the balance of power in California are
27 present in Plaintiffs' novel preemption claim, this Court declines
28 supplemental jurisdiction.

1 **C. Plaintiffs' First Amendment Claim**

2 Plaintiffs allege that requiring actors in adult films to wear
3 condoms violates their First Amendment rights. (Compl. ¶¶ 42, 51-
4 56.) Such a requirement is a restriction on conduct. However, not
5 all conduct receives First Amendment protection; only expressive
6 conduct is considered speech and implicates the First Amendment.
7 See Nordyke v. King, 319 F.3d 1185, 1189 (9th Cir. 2003). The
8 Supreme Court has applied the First Amendment to restrictions on
9 nude dancing, adult movie theaters, adult bookstores, and live
10 adult theater performances because the First Amendment protects
11 sexually explicit speech. FW/PBS, Inc. v. City of Dallas, 493 U.S.
12 215, 224 (1990) (citing cases). Presently at issue is whether
13 engaging in sexual intercourse for the purpose of making a
14 commercial adult film receives First Amendment protections. The
15 Court is aware of no case that has analyzed this issue. However,
16 given the multitude of cases that have analyzed restrictions on
17 adult entertainment under the First Amendment, this Court concludes
18 that sexual intercourse engaged in for the purpose of creating
19 commercial adult films is expressive conduct, is therefore speech,
20 and therefore any restriction on this expressive conduct requires
21 First Amendment scrutiny. See id.

22 Measure B's stated purpose "is to minimize the spread of
23 sexually transmitted infections resulting from the production of
24 adult films in Los Angeles." (Docket No. 58-1 Ex. B, Docket No.
25 58-1.) Because this purpose focuses on the secondary effects of
26 unprotected speech, rather than the message the speech conveys, it
27 will be reviewed under intermediate scrutiny. See Fly Fish, Inc.
28 v. City of Cocoa Beach, 337 F.3d 1301, 1306-09 (11th Cir.

1 2003)(evaluating an ordinance that prohibited "totally nude"
 2 dancing in "adult entertainment establishments" under the Renton
 3 intermediate scrutiny framework); Heideman v. S. Salt Lake City,
 4 348 F.3d 1182, 1196. (10th Cir. 2003) (evaluating a similar
 5 ordinance under intermediate scrutiny); see generally Renton v.
 6 Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (holding that
 7 an ordinance that treated "theaters that specialize in adult
 8 films" differently should be analyzed under a content neutral,
 9 intermediate scrutiny framework because the ordinance was aimed at
 10 the secondary effects of those theaters, not their content).⁴

11 _____
 12 ⁴Plaintiffs state that Measure B requires strict scrutiny
 13 review for three reasons. First, Measure B singles out adult
 14 films. But the Ordinance in Renton also involved a statute that
 15 singled out adult theaters. Renton, 475 U.S. at 47-48.
 16 Plaintiffs' first argument, thus, fails. Second, Plaintiffs argue
 17 that Renton's reasoning only applies in the context of zoning,
 18 because zoning does not prohibit what can be shown, only where
 19 something can be shown. Several Circuits have rejected that
 20 argument. See Fly Fish, 337 F.3d at 1306-09; Heideman, 348 F.3d at
 21 1196. The Tenth Circuit has reasoned:
 22 The fallacy in Plaintiffs' argument is to assume that the
 23 "adequate alternative avenues of expression" required
 24 under the Renton line of cases refers exclusively to
 25 location. Time, place, or manner regulations all are
 26 partial limitations, but each is partial in a different
 27 way. . . . "[M]anner" limitations require alternative
 28 ways in which a message may be communicated. A ban on
 nudity within sexually oriented businesses is a 'manner'
 regulation, and Plaintiffs have provided no reason to
 believe that there do not exist other ways to get their
 message across.
Heideman, 348 F.3d at 1196 (citations omitted). Third, Plaintiffs
 suggest that requiring condoms "so interferes with the message that
 it essentially bans the message." City of Erie v. Pap's A.M., 529
 U.S. 277, 293 (2000) (pl. op.). Plaintiffs' third argument is
 composed of two sub-arguments, one made at oral argument and the
 other made in briefing. During oral argument, Plaintiffs stated
 that Measure B prevents them from making adult films depicting sex
 during an historical period before condoms existed. The Court
 notes anachronisms need not detract from a story. Even assuming
 that condoms interfere with storylines, Plaintiffs' argument, if
 accepted, would require every manner restriction to be reviewed
 under strict scrutiny because any manner restriction inherently
 (continued...)

1 Under intermediate scrutiny narrow tailoring, Interveners

2
3 ⁴(...continued)

4 interferes with a large number of storylines. It is settled law,
5 though, that manner restrictions only trigger intermediate
6 scrutiny. See Fly Fish, 337 F.3d at 1306-09; Heideman, 348 F.3d
7 at 1196; City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v.
8 Glen Theatre, Inc., 501 U.S. 560, 576 (1991). The condom
9 requirement is analogous to requirements that nude dancers wear
10 pasties and G-strings, both of which are de minimis restrictions on
11 a sexually explicit message that trigger intermediate scrutiny.
12 Pap's, 529 U.S. at 294 (pl. op.) ("Any effect on the overall
13 expression [on account of requiring dancers to wear pasties and
14 G-strings] is de minimis."); Schultz v. City of Cumberland, 228
15 F.3d 831, 847-48 (7th Cir. 2000) (noting that pasties and G-strings
16 are analyzed under intermediate scrutiny because they are de
17 minimis restrictions); Dream Palace, 384 F.3d at 1021 (favorably
18 discussing Schultz).

19 Plaintiffs' briefing argues and their declarations state that
20 not using a condom is intended to communicate a message. (See
21 Kross Decl. ¶¶ 12-13 (attesting that [c]ondoms are a reminder of
22 real-world concerns" such as "pregnancy and disease," and that
23 requiring condoms in adult films' hinders those films' aim to
24 "suspend . . . concerns [about pregnancy and disease] and allow
25 audience members to suspend their disbelief".)) If condomless sex
26 in adult films is inherently expressive, then requiring condoms
27 would completely block that expression, and strict scrutiny would
28 be required. Pap's, 529 U.S. at 293.

29 "[T]he Supreme Court has 'extended First Amendment protection
30 only to conduct that is inherently expressive.'" Wong v. Bush, 542
31 F.3d 732, 736 (9th Cir. 2008) (quoting Rumsfeld v. Forum for
32 Academic and Institutional Rights, Inc., 547 U.S. 47, 66 (2006)).
33 An act is inherently expressive if the "likelihood [is] great that
34 the message would be understood by those who viewed it." Spence,
35 418 U.S. at 410-11. The Supreme Court has cautioned that the
36 "inherently expressive" requirement means that words cannot be used
37 to explain the message that conduct is meant to communicate,
38 because "[i]f combining speech and conduct were enough to create
39 expressive conduct, a regulated party could always transform
40 conduct into 'speech' simply by talking about it." Rumsfeld, 547
41 U.S. at 66. Like nude dancing, sexual intercourse performed for
42 the production of adult films inherently expresses an erotic
43 message. See Pap's, 529 U.S. at 301 (pl. op.) (recognizing erotic
44 message of nude dancing); Dream Palace, 384 F.3d at 1021 (same).
45 But, without the explanatory declarations, it is unclear what
46 message condom-less sex conveys. Just as the requirement that nude
47 dancers wear pasties and G-strings is viewed as a restriction on
48 expressive conduct, so, too, is the requirement that adult film
49 actors wear condoms a restriction on expressive conduct. Put
50 differently, sexual intercourse performed for adult films and nude
51 dancing both are expressive conduct, but requiring condoms for the
52 former and pasties for the latter are only de minimis restrictions
53 on expressive conduct.

1 must "demonstrate that the recited harms" to the substantial
 2 governmental interest "are real, not merely conjectural, and that
 3 the regulation will in fact alleviate those harms in a direct and
 4 material way."⁵ Turner I, 512 U.S. at 664-65. While an ordinance
 5 is "not invalid simply because there is some imaginable
 6 alternative that might be less burdensome on speech," Turner II,
 7 520 U.S. at 217, the Interveners must prove that the statute does
 8 not "burden substantially more speech than is necessary to further
 9 the government's legitimate interests." Turner I, 512 U.S. at 665
 10 (internal quotations omitted). In light of the alleged effective,
 11 frequent, and universal testing in the adult film industry,
 12 Plaintiffs allege sufficient facts, which for purposes of this
 13 motion must be assumed true and construed in the light most
 14 favorable to Plaintiffs, to show that Measure B's condom
 15 requirement does not alleviate the spread of STIs in a "direct and
 16 material way." Turner I, 512 U.S. at 664-65; (Compl. ¶¶ 18-31.)⁶
 17 Thus, Interveners motion to dismiss Plaintiffs' First Amendment
 18 claim is DENIED.

19

20 ⁵Public health is a substantial government interest. Rubin v.
 21 Coors Brewing Co., 514 U.S. 476, 485 (1995).

22 ⁶Plaintiffs' over and under inclusive claims are also relevant
 23 to narrow tailoring. (Compl. ¶¶ 78-90.) Thus, these claims would
 24 be more appropriately combined with Plaintiffs' First Amendment
 25 claim, which for the reasons discussed above, survives dismissal.
 26 Cf. Sec'y of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S.
 27 947 n.13 (1984) ("Overbreadth has also been used to describe a
 28 challenge to a statute that in all its applications directly
 restricts protected First Amendment activity and does not employ
 means narrowly tailored to serve a compelling governmental
 interest. . . . Whether that challenge should be called
 'overbreadth' or simply a 'facial' challenge, the point is that
 there is no reason to limit challenges to case-by-case 'as applied'
 challenges when the statute on its face and therefore in all its
 applications falls short of constitutional demands.")

1 **D. Plaintiffs' Claim That Referendums May Not Implicate the**
2 **First Amendment**

3 Plaintiffs claim that referendums that implicate the First
4 Amendment are inherently invalid, because they do not have
5 legislative records and their findings deserve no deference. This
6 claim appears to focus on Measure B's condom requirement. (Compl.
7 ¶¶ 51-56 (emphasizing Measure B's condom-related findings).) As
8 one court stated, "no court has accorded legislative deference to
9 ballot drafters." Daggett v. Webster, No. 98-223-B-H, 1999 WL
10 33117158, at *1 (D. Me. May 18, 1999). Legislatures receive
11 deference because they are "better equipped than the judiciary to
12 'amass and evaluate the vast amounts of data' bearing upon ...
13 complex and dynamic" issues. Turner I, 512 U.S. at 665-66.
14 Because the referendum process does not invoke the same type of
15 searching fact finding, a referendum's fact finding does not
16 "justif[y] deference." California Prolife Council Political
17 Action Comm. v. Scully, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998),
18 aff'd, 164 F.3d 1189 (9th Cir. 1999).

19 However, an undeferential review of Measure B's findings does
20 not equate to an automatic resolution in Plaintiffs' favor. It
21 means that Interveners must have a record sufficient for Measure B
22 to withstand intermediate scrutiny, without the benefit of
23 deference. Yniquez v. Arizonans for Official English, 69 F.3d
24 920, 945 (9th Cir. 1995), vacated on other grounds, Arizonans for
25 Official English v. Arizona, 520 U.S. 43(1997)⁷ ("There is no basis

26 _____
27 ⁷"[A]t minimum, a vacated opinion still carries informational
28 and perhaps even persuasive or precedential value." DHX, Inc. v.
Allianz AGF MAT, Ltd., 425 F.3d 1169, 1176 (9th Cir. 2005).

1 in the record to support the proponents' assertion that any of the
2 broad societal interests on which they rely are served by the
3 provisions of Article XXVIII. The absence of any evidence to this
4 effect is of particular significance given that . . . Article
5 XXVIII is a ballot initiative and thus was subjected to neither
6 extensive hearings nor considered legislative analysis before
7 passage.") Accordingly, the Court GRANTS dismissal of Plaintiffs'
8 claim that referendums may not implicate the First Amendment.

9 **E. Plaintiffs' Prior Restraint Claim**

10 "The term prior restraint is used to describe administrative
11 and judicial orders forbidding certain communications when issued
12 in advance of the time that such communications are to occur."
13 Alexander v. United States, 509 U.S. 544 (1993). "A permitting
14 requirement is a prior restraint on speech and therefore bears a
15 heavy presumption against its constitutionality." Berger v. City
16 of Seattle, 569 F.3d 1029, 1037 (9th Cir. 2009) (internal
17 quotation marks and citation omitted). Courts in this district
18 have found that a prior restraint exists when an individual must
19 obtain a permit to engage in nude dancing. Dease v. City of
20 Anaheim, 826 F. Supp. 336, 342 (C.D. Cal. 1993); Santa Fe Springs
21 Realty Corp. v. City of Westminster, 906 F. Supp. 1341, 1363 (C.D.
22 Cal. 1995) (citing Dease and applying that case's logic).

23 Interveners claim that Measure B is not a prior restraint
24 because it does not require a permit to show films, it only
25 requires a permit to film certain types of films. This
26 distinction is unhelpful. Prior restraints are presumptively
27 invalid because they chill speech from occurring. "The presumption
28 against prior restraints is heavier-and the degree of protection

1 broader-than that against limits on expression imposed by criminal
2 penalties. Behind the distinction is a theory deeply etched in
3 our law: a free society prefers to punish the few who abuse rights
4 of speech after they break the law than to throttle them and all
5 others beforehand." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546,
6 559 (1975). This policy concern would be upended if it were a
7 prior restraint to require a permit for a film to be shown, a book
8 to be published, or a painting to be displayed but not a prior
9 restraint to require a permit for a movie to be filmed, a book to
10 be written, or a painting to be painted. Therefore, Measure B,
11 which requires producers to obtain a permit before shooting "any
12 film, video, multimedia or other representation of sexual
13 intercourse" is a prior restraint.⁸

14 Plaintiffs argue that Measure B does not provide sufficient
15 procedural safeguards, does not have narrowly tailored
16 requirements, and gives the County unbridled discretion. The
17 Court generally agrees.⁹

18
19 ⁸Intervenors are incorrect in arguing that Plaintiffs must
20 allege that they have applied for a permit in order to challenge
21 Measure B. "Plaintiffs who challenge a permitting system are not
22 required to show that they have applied for, or have been denied, a
23 permit. . . . They must only have declined to speak, or have
24 modified their speech, in response to the permitting system."
25 Kaahumanu v. Hawaii, 682 F.3d 789, 796 (9th Cir. 2012); see id.
(striking down a broad revocation and suspension provision even
though "the record indicate[d] that permits . . . have been issued
as a matter of course, and that the discretionary power reserved in
[the revocation and suspension provisions] has never been
exercised.") As outlined in the "Background" section and
"Standing" subsection, Plaintiffs have modified their speech
because of Measure B.

26 ⁹ Plaintiffs' Opposition to the Motion to Dismiss makes a
27 broad, although conclusory, argument that requiring a permit itself
28 is an invalid prior restraint. Docket No. 53 at 13-14. This
argument, was not made in Plaintiffs' Preliminary Injunction brief.

(continued...)

1 **1. Procedural Safeguards**

2 Plaintiffs focus on the procedural safeguards relating to
3 revoking Measure B permits.¹⁰ Prior restraints that target adult
4 entertainment, as Measure B does, must provide the following
5 procedural safeguards: "the licensor must make the decision
6 whether to issue the license within a specified and reasonable
7 time period during which the status quo is maintained, and there
8 must be the possibility of prompt judicial review in the event
9 that the license is erroneously denied." FW/PBS, Inc. v. City of
10 Dallas, 493 U.S. 215, 228 (1990) modified on other grounds, City
11 of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 776
12 (2004) (a prior restraint targeting adult businesses must "assure
13 prompt judicial review of an administrative decision denying a
14 license"). "[T]hese considerations apply to license suspensions
15 and revocations as well as license denials." 4805 Convoy, Inc. v.
16 City of San Diego, 183 F.3d 1108, 1114 (9th Cir. 1999). License
17 suspensions and revocations differ from the denial of a license
18 application in that "preservation of the status quo means that the
19 suspension or revocation cannot be enforced, and the business is
20 allowed to continue to operate under its license," until there has
21 been a judicial determination. Id. Measure B allows for the
22 Department to revoke and suspend a permit, and once revocation or

23 _____

24 ⁹(...continued)

25 Docket No. 55 at 8-10. Because Plaintiffs state a valid prior
26 restraint claim without this argument, the Court need not analyze
27 it now.

28 ¹⁰ The procedural safeguards claims were raised in the
 complaint, and argued, though only with respect to revocations and
 suspensions, in Plaintiffs' preliminary injunction motion. (Compl.
 ¶ 96; Docket No. 55 at 9:7-14 (citing provision of Measure B
 regarding suspensions and revocations).

1 suspension has occurred, a permit holder must "cease filming any
2 adult film." § 11.39.110 (D), (H). These provisions of Measure B
3 are, thus, unconstitutional because they provide for suspensions
4 and revocations before a judicial determination.

5 **2. Unbridled Discretion**

6 Additionally, Government officials cannot have unbridled
7 discretion over permits that implicate First Amendment activity.
8 G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064, 1082 (9th
9 Cir. 2006). Here, in order to receive and keep a permit, the
10 following is required: pay for the permit, complete an
11 application, conduct blood-borne pathogen training, post the
12 permit on the worksite, and use condoms during anal and vaginal
13 sex. § 11.39.080-11.39.110; (see Compl. ¶ 58.) These criteria
14 are clear and do not leave much, if any, room for discretion.
15 Another Measure B provision, though, is more problematic. (Docket
16 No. 53 at 14:17-15:4.)¹¹

17
18 ¹¹Measure B states: "Upon successful completion of the permit
19 application process described in subsection A of this section, the
20 department shall issue an adult film production public health
21 permit to the applicant. The adult film production public health
22 permit will be valid for two years from the date of issuance,
23 unless revoked." § 11.39.080(B). In analyzing another statute
24 that singled out adult entertainment, the Supreme Court held that
25 "the licensor must make the decision whether to issue the license
26 within a specified and reasonable time period." FW/PBS, Inc. v.
27 City of Dallas, 493 U.S. 215, 228, 1990). Here, in light of the
28 obligation to, when possible, interpret an ordinance in a way that
maintains its constitutionality, the Court construes the word
"upon" to place sufficiently specific and reasonable time limit for
permit authorizations. See New York v. Ferber, 458 U.S. 747, 769
(1982) (discussing the importance of interpreting federal law to
preserve its constitutionality); see also Beaulieu v. City of
Alabaster, 454 F.3d 1219, 1232 (11th Cir. 2006) (essentially
applying the maxim to ordinances); Int'l Soc. for Krishna
Consciousness of Atlanta v. Eaves, 601 F.2d 809, 822 (5th Cir.
1979) (same). Because Webster's (available at
<http://www.merriam-webster.com/>) defines "upon" to mean "on,"
(continued...)

1 Measure B, also, provides that after an administrative
2 review, "[t]he Department may . . . modify, suspend, revoke or
3 continue all such action previously imposed upon a permittee
4 pursuant to this chapter or impose any fine imposed by law for
5 violations of this chapter or any other law or standards affecting
6 public health and safety, including but not limited to [certain
7 laws and regulations]." § 11.39.110(F). Thus, Measure B allows,
8 under some circumstances, for the denial of permits when adult
9 film makers violate unnamed, undescribed "standards affecting
10 public health." This is unbridled discretion.¹²

11 For similar reasons, portions of § 11.39.110(E) are
12 unconstitutional. If there is "any immediate danger to the public
13 health or safety is found or is reasonably suspected," that
14 provision allows the department to "immediately suspend . . . [a]
15 permit, initiate a criminal complaint and/or impose any fine
16

17 ¹¹(...continued)
18 Measure B indicates that applications will be immediately reviewed.

19 ¹²Plaintiffs also argue that the Department has unbridled
20 discretion in determining which blood-borne pathogen training class
21 meets Departmental approval. (Docket No. 53 at 15:5-11.) The
22 Court need not address this issue because Plaintiffs have otherwise
23 stated a valid prior restraint claim. (See Docket No. 55 at 8-10).
24 However, the proper issue is whether the Department has too much
25 discretion in terms of who receives a permit, not whether they have
26 too much discretion in selecting appropriate training classes.
27 G.K. Ltd., 436 F.3d at 1082 (9th Cir. 2006) ("The requirement of
28 sufficient direction for City officials seeks to alleviate the
threat of content-based, discriminatory enforcement that arises
where the licensing official enjoys unduly broad discretion in
determining whether to grant or deny a permit") (internal quotation
marks and citation omitted). The appropriate way to challenge the
training course requirement, or any other requirement (including
the requirement to get a permit), is to do so on narrow tailoring
grounds. Berger, 569 F.3d at 1041. Since Plaintiffs do not argue
that the blood training course fails a narrow tailoring analysis,
the Court will not analyze the issue.

1 permitted by [Measure B]." The provision also states: "Immediate
2 danger to the public health and/or safety shall include any
3 condition, based upon inspection findings or other evidence, that
4 can cause, or is reasonably suspected of causing, infection or
5 disease transmission, or any known or reasonably suspected
6 hazardous condition." This provision is too broad-it is not
7 limited to Measure B's requirements, and it applies to conditions
8 "reasonably suspected" to be "suspected of causing" the
9 transmission of unnamed diseases. The department is given no
10 guidance as what types or diseases or what types of transmission
11 methods § 11.39.110(E) applies. Indeed, § 11.39.110(E) would seem
12 to authorize revoking a permit if a cameraman were working with a
13 cold. The discussed portions of § 11.39.110(E), therefore, are
14 unconstitutional.

15 **3. Narrow Tailoring**

16 Pursuant to the most lenient scrutiny that Measure B could be
17 reviewed under, a prior restraint's provisions must be narrowly
18 tailored such that they do "not burden substantially more speech
19 than is necessary to achieve a substantial government interest."
20 Berger, 569 F.3d at 1041. Plaintiffs allege that "Measure B also
21 prohibits the production of any adult film by any entity that has
22 had a permit suspended or revoked." (Compl. ¶ 58.)¹³ Because
23 Interveners bear the burden of justifying a prior restraint's
24 restrictions, because an alternative to revoking the permit
25

26 ¹³A Measure B permit is issued to adult film producers. See
27 generally § 11.39.080(A). The permit extends for two years, and is
28 applicable to all films a producer makes. See § 11.39.080(B).
Thus, revocation or suspension means a permit holder cannot produce
any adult film.

1 completely would be revoking the permit only as to the offending
2 film, and because Interveners do not address Plaintiffs' claim
3 that a total revocation is improper, Plaintiffs' prior restraint
4 claim survives. Id. at 1035 (discussing the burden), 1041
5 (holding that "the existence of obvious, less burdensome
6 alternatives is a relevant consideration in determining whether
7 the 'fit' between ends and means is reasonable") (internal
8 quotation marks omitted); Docket No. 49 at 12-15 (ignoring
9 Plaintiffs' revocation argument).

10 Plaintiffs claim that Measure B is not narrowly tailored
11 because, although the condom requirement applies only to vaginal
12 and anal sex, a Measure B permit is required to film much more. A
13 permit is required for "adult films," which are defined as "any
14 film, video, multimedia or other representation of sexual
15 intercourse in which performers actually engage in oral, vaginal,
16 or anal penetration, including, but not limited to, penetration by
17 a penis, finger, or inanimate object; oral contact with the anus
18 or genitals of another performer; and/or any other sexual activity
19 that may result in the transmission of blood and/or any other
20 potentially infectious materials."¹⁴ The Court finds Plaintiffs
21 have stated a claim on this issue.

22
23 ¹⁴Although Plaintiffs have not raised the issue, the following
24 clause of the "adult films" definition is problematic: "and/or any
25 other sexual activity that may result in the transmission of blood
26 and/or any other potentially infectious materials." The use of
27 "or" indicates that filmed "sexual activity" that "results in the
28 transmission of . . . other potentially infectious materials"
requires a Measure B permit. Sexual activity could mean many
things. Potentially, kissing could qualify, as saliva may contain
infectious materials. Therefore, the portion of adult film's
definition discussed in this footnote is unconstitutionally
overbroad and vague.

1 As discussed, Measure B's purpose is to prevent the spread of
2 STIs, and requiring condoms is the means by which Measure B seeks
3 to prevent their spread. (See Docket No. 58 Ex. B § 2 (Measure
4 B's "findings and declarations"), § 3 ("purpose and intent").
5 Since Measure B only requires condoms for vaginal and anal sexual
6 intercourse, and since Measure B's purpose is condoms-focused,
7 Plaintiffs have stated a claim that the permit requirement is not
8 narrowly tailored because it applies to adult films without
9 vaginal or anal sexual intercourse.¹⁵

10 **F. Plaintiffs' Fees Claim**

11 Prior restraints may only impose permit fees if they are
12 revenue neutral, because the Government may not charge for the
13 privilege of exercising a constitutional right. See Murdock v.
14 Pennsylvania, 319 U.S. 105, 113-14 (1943); Cox v. New Hampshire,
15 312 U.S. 569, 577 (1941). The Sixth and Eleventh Circuits have
16 applied this revenue-neutral rule to permit fees on adult
17 entertainment businesses. Fly Fish, 337 F.3d at 1314; 729, Inc.
18 v. Kenton Cnty. Fiscal Court, 515 F.3d 485, 510 (6th Cir. 2008).
19 The Eighth Circuit, though, declined to do so. Jakes, Ltd., Inc.
20 v. City of Coates, 284 F.3d 884, 890-891 (8th Cir. 2002). In
21 analyzing the contrary Eighth Circuit authority, the Eleventh

22
23 ¹⁵The Court rejects Plaintiffs' argument in its preliminary
24 injunction brief that Measure B's criminal and civil penalties are
25 not narrowly tailored, and, therefore, constitute an invalid prior
26 restraint. Prior restraint analysis looks to the requirements of
27 and processes associated with obtaining and keeping a permit, not
28 criminal penalties. Cf. Conrad, 420 U.S. at 559 ("The presumption
against prior restraints is heavier-and the degree of protection
broader-than that against limits on expression imposed by criminal
penalties. Behind the distinction is a theory deeply etched in our
law: a free society prefers to punish the few who abuse rights of
speech after they break the law than to throttle them and all
others beforehand.")

1 Circuit noted that even though nude dancing was at the "outer
2 perimeters of the First Amendment," because the government could
3 not completely ban erotic dancing, the government cannot tax it
4 without limit. Fly Fish, 337 F.3d at 1315. The Court agrees with
5 the Eleventh Circuit's logic and finds it applies to Measure B's
6 fees.

7 Courts applying the revenue-neutral rule to adult
8 entertainment require the government to prove that revenues merely
9 cover "the costs of administering [the] licensing program." Id.
10 at 1314-15; 729, 515 F.3d at 510. Even though the permit fee in
11 this case, \$2,000-\$2,500, is relatively minimal, the Court will
12 not assume that it is constitutionally permissible. See Fly Fish,
13 337 F.3d at 1315 (holding as unconstitutional a \$1,250 fee per
14 adult business because the "City . . . conducted no real
15 accounting of the costs of administering its licensing program").
16 Since the Complaint does not allege facts suggesting that the fees
17 are revenue neutral, the fees' claim survives the motion to
18 dismiss. The Court notes, for reasons that will be relevant
19 later, that Interveners provide no evidence of revenue neutrality.
20 (See Docket No. 57 at 15:14-18.)

21 **G. Plaintiffs' Vagueness Claim**

22 Under the void-for-vagueness doctrine, "legislatures [are
23 required] to set reasonably clear guidelines for law enforcement
24 officials and triers of fact in order to prevent arbitrary and
25 discriminatory enforcement." Smith v. Goguen, 415 U.S. 566,
26 572-73 (1974). "Where a statute's literal scope, unaided by a
27 narrowing state court interpretation, is capable of reaching
28 expression sheltered by the First Amendment, the doctrine demands

1 a greater degree of specificity than in other contexts." Id. at
2 573. All that is required is that there be "reasonably clear
3 lines" such that "men of common intelligence [are] not forced to
4 guess at the meaning of the criminal law." Id. at 574 (internal
5 quotation marks and citations omitted).

6 Plaintiffs' opposition brief and complaint conclusorily state
7 that some of the terms in Measure B are unconstitutionally vague.
8 (Docket No. 53 at 16:14-17; Compl. ¶¶ 71-77.) This is a
9 sufficient reason to dismiss the claim. See Iqbal, 556 U.S. at
10 678-79.

11 Measure B defines three of Plaintiffs' challenged terms:
12 "adult film," "exposure control plan," and "producer of adult
13 film."¹⁶ Several other terms are not defined. When statutory
14 terms are undefined, they are given their "ordinary and natural
15 meaning," and courts employ "general usage dictionaries to
16 determine" that meaning. Castro v. Terhune, 712 F.3d 1304, 1312
17 (9th Cir. 2013). Measure B requires that "principal and
18 management-level employees" complete blood borne pathogen
19 training. § 11.39.080. Plaintiffs claim that the terms
20 "principal" and "management-level employees" are unclear. Webster

21
22 ¹⁶For reasons discussed in the prior restraint analysis,
23 "adult film" must be narrowed in scope. After striking the
24 offending portions of that term's statutory definition, and adding
25 no new terms, it would be defined as "any film, video, multimedia
26 or other representation of sexual intercourse in which performers
27 actually engage in vaginal or anal penetration by a penis." §
28 11.39.010.

25 "Exposure control plan" is defined as: "a written plan that
26 meets all requirements of Title 8 California Code of Regulations
27 sections 3203 and 5193, to minimize employees' risk of exposure to
28 blood or potentially infectious material." § 11.39.050.

27 "Producer of adult film" is defined as: "any person or entity
28 that produces, finances, or directs, adult films for commercial
purposes." § 11.39.075.

1 defines "principal," in relevant part, as "a person who has
2 controlling authority or is in a leading position." Management is
3 defined as "the collective body of those who manage or direct an
4 enterprise," and manage is defined as "to exercise executive,
5 administrative, and supervisory direction of <manage a business>."
6 These terms are sufficiently clear.¹⁷

7 Plaintiffs also challenge the following terms: "commercial
8 purposes," "reasonably suspected," "hazardous condition," and
9 "interference." (Docket No. 53 at 16:15-16.) Because Plaintiffs
10 do not analyze these terms' meaning or their potential for
11 confusion, for purposes of this Motion the Court finds that they
12 are not vague.

13 **I. Plaintiffs' Due Process Claim**

14 Plaintiffs assert that Measure B violates their due process
15 rights. The Fourteenth Amendment prohibits the deprivation "of
16 life, liberty, or property without due process of law." Due
17 process requires "some form of hearing before an individual is
18 finally deprived of [a protected] interest." Matthews v.
19 Eldridge, 424 U.S. 319, 333 (1976). Due process claims should be
20 analyzed under the Mathews v. Eldridge weighing test. See id. at
21 335. However, Plaintiffs do not engage in such a weighing, and
22 their due process claims generally dismiss the review procedures
23 to which license holders and applicants are entitled under Measure
24 B. (Compl. ¶¶ 91-98); § 11.39.110(B),(D),(E)(2); see also Cent.
25 Dist. L.R. 7-5 (moving papers must provide "a brief but complete
26 memorandum in support thereof and the points and authorities upon

27
28 ¹⁷All definitions are available at
<http://www.merriam-webster.com/>.

1 which the moving party will rely."). The Court, therefore, GRANTS
2 dismissal of Plaintiffs' due process claims, with one exception
3 discussed below. Regardless, Plaintiffs' due process arguments
4 largely duplicate of their prior restraint arguments.

5 However, Plaintiffs make a Fourth Amendment challenge in the
6 due process section of the Complaint that warrants further
7 consideration. (Compl. ¶ 95.)¹⁸ Plaintiffs claim that Measure B
8 authorizes an unconstitutional system of warrantless searches and
9 seizures. In a closely regulated industry, administrative
10 warrantless searches are permitted so long as the following
11 conditions are met: (1) "[t]here is [a] 'substantial' government
12 interest that informs the regulatory scheme pursuant to which
13 inspection is made," (2) "warrantless inspection is necessary to

15 ¹⁸It is an open question whether a facial challenge of an
16 administrative search scheme on Fourth Amendment grounds is
17 permissible. 832 Corp. v. Gloucester Twp., 404 F. Supp. 2d 614,
18 620 (D.N.J. 2005) (noting the issue is unresolved, but assuming
19 that such a challenge is allowable). In preliminarily enjoining an
20 ordinance that permitted warrantless administrative searches of
21 "Adult-Oriented Businesses," a district court in this circuit
22 noted:

23 There is arguably a question as to whether a party can
24 assert a facial challenge to a statute permitting
25 warrantless administrative searches. See, e.g., S & S.
26 Pawn Shop Inc. v. City of Del City, 947 F.2d 432, 439-40
27 (10th Cir.1991) (identifying the issue, but declining to
28 decide it). Despite some hesitation, the court
entertains such a challenge here because the ordinances
vest too much discretion in City officials conducting the
inspection to qualify as a valid administrative
inspection scheme. See City of Chicago v. Morales, 119
S.Ct. 1849, 1999 WL 373152 *15 (June 10, 1999) (Breyer,
J., Concurring) ("The ordinance is unconstitutional, not
because a policeman applied this discretion wisely or
poorly in a particular case, but rather because the
policeman enjoys too much discretion in every case").
Le v. City of Citrus Heights, No. CIV.S-98-2305WBS/DAD, 1999 WL
420158, at *6 n.6 (E.D. Cal. June 15, 1999). Finding Le's facts
sufficiently analogous and its reasoning persuasive, this Court
concludes a facial challenge is permissible.

1 further the regulatory scheme," and (3) the "inspection program,
2 in terms of certainty and regularity of its application, must
3 provide a constitutionally adequate substitute for a warrant"
4 (i.e. "it must advise the owner of the commercial premises that
5 the search is being made pursuant to the law and has a properly
6 defined scope, and it must limit the discretion of the inspecting
7 officers"). New York v. Burger, 482 U.S. 691, 703 (1987)
8 (citations omitted). "In addition, in defining how a statute
9 limits the discretion of the inspectors, we have observed that it
10 must be carefully limited in time, place, and scope." Id.
11 (internal quotation marks and citation omitted).

12 Plaintiffs' Fourth Amendment allegations and briefing focus
13 on Burger's requirement that administrative searches be limited in
14 time, place, and scope. (Compl. ¶ 95.) Specifically, Measure B
15 states:

16 The county health officer may enter and inspect any
17 location suspected of conducting any activity regulated
18 by this chapter, and, for purposes of enforcing this
19 chapter, the county health officer may issue notices and
20 impose fines therein and take possession of any sample,
21 photograph, record or other evidence, including any
22 documents bearing upon adult film producer's compliance
23 with the provision of the chapter. Such inspections may
24 be conducted as often as necessary to ensure compliance
25 with the provisions of this chapter.

26 § 11.39.130. The "any location" language of § 11.39.130 violates
27 the Fourth Amendment. In upholding warrantless administrative
28 searches, courts emphasize the limited nature of what may be
29 searched. United States v. Delgado, 545 F.3d 1195, 1203 (9th Cir.
2008) (holding that a statute was constitutional in part because
30 it was "limited to commercial vehicles,"); Burger, 482 U.S. at 711
31 (emphasizing that the statute was limited to "vehicle dismantling

1 business[es]"). Given that adult filming could occur almost
2 anywhere, Measure B would seem to authorize a health officer to
3 enter and search any part of a private home in the middle of the
4 night, because he suspects violations are occurring. This is
5 unconstitutional because it is akin to a general warrant.
6 Therefore, the Court DENIES dismissal of Plaintiffs' Fourth
7 Amendment claim. See Rush v. Obledo, 756 F.2d 713, 717, 722 (9th
8 Cir. 1985) (holding that a statute "authoriz[ing] any officer,
9 employee, or agent of the Department to enter and inspect any
10 place providing personal care, supervision, and services at any
11 time, with or without notice, to secure compliance with, or to
12 prevent a violation of, any applicable statute" unconstitutional
13 because it "permitt[ed] general searches at any time of any place
14 providing care and supervision to children"); United States v.
15 4,432 Mastercases of Cigarettes, More Or Less, 448 F.3d 1168, 1180
16 (9th Cir. 2006) (stating that the procedural safeguards of
17 warrantless administrative searches that implicate homes must be
18 strong and citing Rush as "str[iking] down as unconstitutional a
19 regulation that enabled warrantless searches of family-home day
20 care facilities because it failed to place any limits on the time
21 of searches, the area that could be searched, or the regularity of
22 searches").¹⁹

23 **IV. Preliminary Injunction Analysis**

24 Because Plaintiffs' First Amendment claim regarding Measure
25 B's condom requirement is unlikely to succeed on the merits, the

26
27 ¹⁹Under very different circumstances, a narrow and constrained
28 warrantless administrative search of a home is permissible. See
Rush, 756 F.2d at 717 (upholding such a search when regulations
limited a statute's reach).

1 Court DENIES a preliminary injunction on that issue. As detailed
2 below, the Court GRANTS a preliminary injunction on Plaintiffs'
3 other claims that survived the motion to dismiss.

4 **A. Plaintiffs' First Amendment Claim**

5 The First Amendment claim, which focuses on narrow tailoring
6 (and specifically testing as an adequate alternative to condoms),
7 is unlikely to succeed on the merits. Plaintiffs focus their
8 First Amendment analysis on arguing that Measure B's condom
9 requirement should be reviewed under strict scrutiny. (Docket No.
10 55 at 7-8.) However, for the reasons discussed in the motion to
11 dismiss analysis, intermediate scrutiny should be employed.

12 Plaintiffs also make a narrow tailoring argument. Id. at
13 5:3-6. Interveners have presented evidence that the harms Measure
14 B targets "are real, not merely conjectural, and that [Measure B]
15 will in fact alleviate those harms in a direct and material way."
16 Turner I, 512 U.S. at 664-65. Jonathan Fielding, the Director and
17 Health Officer at the Los Angeles County Department of Public
18 Health, has stated:

19 Since 2004 DPH received reports of 2,396 cases of
20 Chlamydia (CT), 1389 cases of gonorrhea (GC), and five
21 syphilis cases among AFI performers; 20.2% of performers
22 diagnosed with STD had one or more repeat infections
23 within a one year period. Between 2004 and 2008, repeat
24 infections were reported for 25.5% of individuals. Due
25 to the failure to routinely screen for rectal and oral
26 pharyngeal infections, a sustained high level of endemic
27 disease among AFT workers persists. Furthermore, these
28 disease rates and reinfection rates are likely to be
significantly underestimated as rectal and oral
screening is not done routinely and these anatomic sites
are likely to be a reservoir for repeat reinfection.
Analyses of 2008 data also indicated that AFI performer
experience significantly higher rates of infection (20%)
than the general public (2.4%) or in the area of the
County (SPA 6) experiencing the highest rates of STDs
(4.5%).

1 Data is less clear for HIV since occupation is not
2 reported in HIV/AIDS reports. Since 2004, AIM has
3 reported 25 cases of HIV. However, it is difficult to
4 confirm the number of actual performers infected with
5 HIV/AIDS as not all those tested are current performers
6 and may have other roles in ttle AFI, or are partners of
7 an AFI performer, or may otherwise be referred to AIM
8 for testing. AIM claims that a minority of the 25 cases
9 are performers, but even if this is accurate, it is
10 reasonable to assume that some of the remaining 25
11 infected individuals were tested because they wished to
12 work in the AFI in Los Angeles or were partners of AFI
13 performers.

14 (Docket No. 58-1 Ex. A at 2.) Plaintiffs, by contrast, have
15 presented evidence from individuals in the adult film industry,
16 but not in the public health or medical profession, who claim
17 testing is so effective and universal that condoms are
18 unnecessary. (See, e.g., Hirsch Decl. ¶¶ 8-16). Plaintiffs' and
19 Interveners' evidence are in tension. However, the Court finds
20 the Department of Public Health's detailed explanation compelling,
21 especially in light of its unique role in protecting the
22 community's health.

23 Interveners' evidence also indicates that Measure B does not
24 "burden substantially more speech than is necessary to further the
25 government's legitimate interests." Turner I, 512 U.S. at 665.
26 Measure B "need not be the least restrictive or least intrusive
27 means available." Berger, 569 F.3d at 1041. Here, Interveners'
28 evidence indicates that testing for STIs has proven insufficient
to prevent their spread. (Docket No. 58-1 Ex. A at 2.) Because
testing is Plaintiffs' proffered alternative, and because evidence
indicates it may be ineffective, requiring condoms is a
permissible way (at least at this stage) to target and prevent the

1 spread of STIs. For these reasons, Plaintiffs' claim challenging
2 the condom requirement is not likely to succeed on the merits.²⁰

3 **B. Plaintiffs' Remaining Claims**

4 Plaintiffs' claims concerning the following Measure B
5 provisions are likely to succeed on the merits: the fees
6 provision, the administrative search provision, and the prior
7 restraint provisions explicitly found to have survived the motion
8 to dismiss. The fees provision and the prior restraint provision
9 concerning Measure B's broad revocation policy (i.e. that a
10 revoked permit means a producer cannot work on any adult films,
11 instead of simply the offending film) are likely to succeed on the
12 merits because Interveners' have offered no evidence that these
13 provisions are narrowly tailored. (See Docket No. 57 at 14-15
14 (not discussing the broad revocation policy), 15:14-18 (faulting
15 Plaintiffs for providing no evidence concerning the fee's

16
17 ²⁰Plaintiffs' over and under inclusive arguments also bear on
18 narrow tailoring. However, these arguments fail to show that
19 Plaintiffs are likely to succeed on the merits. Plaintiffs fault
20 Measure B for not applying generally to the entire population of
21 Los Angeles County. (Docket No. 55 at 13:14-16.) However, Measure
22 B would be patently unconstitutional if it applied to individuals
23 having sex in a private place for non-commercial purposes.
24 Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas,
25 539 U.S. at 562 (2003). Sex in public places appears to be already
26 prohibited by public decency laws. See Los Angeles County Code §
27 13.22.020. Plaintiffs' also claim that Measure B "applies only to
28 adult films produced for a commercial purpose, to the exclusion of
non-commercial films whose performers are exposed to risks
(accepting arguendo the Measure's assumptions) that are the same as
those for performers in commercial adult entertainment." (Docket
No. 55 at 13:14-16.) But Plaintiffs provide no evidence about
these "non-commercial" films, such as the percent of adult films
that are non-commercial and that could be regulated without
violating the type of privacy rights expressed in Griswold and
Lawrence. Besides, intermediate scrutiny does not require a
perfect fit, Berger, 569 F.3d at 1041, and at this stage
Interveners have provided evidence that the adult film industry is
uniquely problematic in the spread of STIs. (Docket No. 58-1 Ex.
A.)

1 reasonably, but providing no evidence that the fee is revenue
2 neutral)); Turner I, 512 U.S. at 664-65 (indicating that
3 Interveners bear the burden of proving narrow tailoring). The
4 remaining provisions are likely to succeed on the merits because,
5 as discussed previously, Measure B's text indicates they are
6 unconstitutional.

7 Once a Plaintiff shows that a constitutional rights claim is
8 likely to succeed, the remaining preliminary injunction factors
9 weigh in favor of granting an injunction. Melendres v. Arpaio,
10 695 F.3d 990, 1002 (9th Cir. 2012)([T]he deprivation of
11 constitutional rights unquestionably constitutes irreparable
12 injury. . . . [I]t is always in the public interest to prevent
13 the violation of a party's constitutional rights.") (internal
14 quotation marks and citations omitted); Klein v. City of San
15 Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009) ("The balance of
16 equities and the public interest thus tip sharply in favor of
17 enjoining the ordinance. As our caselaw clearly favors granting
18 preliminary injunctions to a plaintiff like Klein who is likely to
19 succeed on the merits of his First Amendment claim, we see no
20 reason to remand for further proceedings with respect to Klein's
21 motion in this case.")

22 **C. Severability**

23 Whether Measure B's offending provisions are severable is a
24 "a matter of state law." Leavitt v. Jane L., 518 U.S. 137, 139
25 (1996). "Invalid provisions of a statute should be severed
26 whenever possible to preserve the validity of the remainder of the
27 statute." Briseno v. City of Santa Ana, 6 Cal. App. 4th 1378,
28 1384 (1992). "The California Supreme Court has held that there

1 are three criteria for severability under California law: the
2 provision must be grammatically, functionally, and volitionally
3 separable." Valley Outdoor, Inc. v. Cnty. of Riverside, 337 F.3d
4 1111, 1114 (9th Cir. 2003). However, "[t]he final determination
5 depends on whether the remainder . . . is complete in itself and
6 would have been adopted by the legislative body had the latter
7 foreseen the partial invalidity of the statute . . . or
8 constitutes a completely operative expression of the legislative
9 intent . . . [and is not] so connected with the rest of the
10 statute as to be inseparable." Id. (quoting Calfarm Ins. Co. v.
11 Deukmejian, 48 Cal.3d 805, 821 (1989)).

12 As an initial matter, Measure B contains an unambiguous
13 severability clause: "If any provision of this Act, or part
14 thereof, is for any reason held to be invalid or unconstitutional,
15 the remaining provisions shall not be affected, but shall remain
16 in full force and effect, and to this end the provisions of the
17 Act are severable." Docket No. 58 Ex. B § 8.²¹ This clause
18 establishes that the voters wanted Measure B, even if portions
19 were found unconstitutional, to survive, if at all possible.
20 "Although not conclusive, a severability clause normally calls for
21 sustaining the valid part of the enactment."

22 Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 821 (1989)

23 "An enactment passes the grammatical test where the language
24 of the statute is mechanically severable, that is where the valid
25 and invalid parts can be separated by paragraph, sentence, clause,
26 phrase or even single words." Barlow v. Davis, 72 Cal. App. 4th

27
28 ²¹It is unclear where this severability clause was codified
within the Los Angeles County Code.

1 1258 (1999). The permit fee requirement is easily separable from
2 its relevant provisions. The same is true of the provisions
3 concerning revoking and suspending Measure B permits.²²

4 The provision authorizing administrative searches is self
5 contained, so enjoining it creates no grammatical issues. §
6 11.39.130.

7 In § 11.39.110(F), which concerns the Department's authority
8 to revoke a permit and levy other penalties against a permittee
9 after an administrative review, the following words can be
10 stricken without any grammatical problems: "modify, suspend,
11 revoke or any other laws or standards affecting public health and
12 safety, including but not limited to the Los Angeles County Code,
13 the California Health and Safety Code, the blood borne pathogen
14 standard, California Code of Regulations Title 8, section 5193 or
15 the exposure control plan of the permittee, or any combination
16 thereof, or for interference with a county health officer's
17 performance of duty."²³ The provision requiring permits for

18 _____
19 ²²Had the Court only enjoined the revocation and suspension
20 provisions of Measure B on grounds that the status quo is disrupted
21 before judicial review, the Court would have only enjoined the
22 County from "enforcing a license suspension or revocation for
ninety days after an administrative appeal becomes final, the time
allowed for filing a writ of administrative mandamus under the
California statutory scheme." Convoy, 183 F.3d at 1116.

23 ²³That is to say, § 11.39.110(F) paragraph makes grammatical
24 sense when read as follows: "The department may, after an
25 administrative review or waiver thereof continue all such action
26 previously imposed upon a permittee pursuant to this chapter or
27 impose any fine imposed by law for violations of this chapter."
28 Thus, what remains of § 11.39.110(F) is the Department's authority
to initiate fines or criminal charges, as provided for in Measure B
for Measure B violations only, against Measure B violators. Of
course, this order affects no other provision of law outside of
Measure B. Although the term "modify" has not previously been
discussed, it is also unconstitutional as its vagueness permits

(continued...)

1 anything other than vaginal or anal sexual intercourse can be
2 similarly successfully edited.²⁴ The provision concerning
3 emergency fines and revocations, § 11.39.110(E), is not completely
4 self contained, as it continues to § 11.39.110(E)(1)-(2).
5 Therefore, subsections (1) and (2) of § 11.39.110(E) are also be
6 enjoined.

7 Under the functionality test, the Court must decide whether
8 Measure B remains "operational" without the offending language.
9 Valley Outdoor, 337 F.3d at 1114. Here, adult film actors must
10 still use condoms. A permit is still required. Although the
11 permit may not be modified, suspended, or revoked, fines and
12 criminal charges may still be brought against offenders, as
13 described in footnote 23.

14 While administrative searches cannot occur, nothing prevents
15 law enforcement from obtaining a warrant to enforce Measure B.

16 Regarding fees, since there is no evidence that Measure B's
17 fees are revenue neutral, there is no reason to believe the
18 Department's Measure B duties cannot be performed without fees-or
19 performed at least until the fees' defect is cured, either by
20 enacting a new, constitutional ordinance or providing this Court
21 with evidence of revenue neutrality. See Wal Juice Bar, Inc. v.
22 City of Oak Grove, No. CIV.A. 5:02CV-252-R, 2005 WL 2333636, at

23
24 ²³(...continued)
25 unbridled discretion, and, given its undefined scope, allows the
26 Department to effectively suspend or revoke a license. See G.K.
Ltd., 436 F.3d 1082 (discussing unbridled discretion).

27 ²⁴ § 11.39.010 then reads: "An 'adult film' is defined as any
28 film, video, multimedia or other representation of sexual
intercourse in which performers actually engage in vaginal, or anal
penetration by a penis."

1 *5-6 (W.D. Ky. Sept. 22, 2005) (deciding that a license fee for
2 sexually-oriented businesses was unconstitutional, but stating
3 that the fee was severable in part because the ordinance remained
4 functional without the fee provision). For these reasons, Measure
5 B remains operational.

6 The volitional test asks "whether it can be said with
7 confidence that the electorate's attention was sufficiently
8 focused upon the parts to be severed so that it would have
9 separately considered and adopted them in the absence of the
10 invalid portions." Gerken v. Fair Political Practices Com., 6
11 Cal. 4th 707, 714-15 (1993). A ballot initiative passes the
12 volitional test when "it seems eminently reasonable to
13 suppose that those who favored the proposition would be happy
14 to achieve at least some substantial portion of their
15 purpose." Id. at 715. Here, in light of Measure B's stated
16 purpose of preventing the spread of STIs and for the reasons
17 discussed above in the operational analysis, it seems that those
18 who "favored [Measure B] would be happy to achieve" what
19 remains of it." Id.

20 **V. Conclusion**

21 As set forth above, this Court GRANTS in part and DENIES in
22 part Interveners' Motion to Dismiss, and GRANTS in part and DENIES
23 on part Plaintiffs' Motion for a Preliminary Injunction.

24 In light of this Order, Plaintiffs' motion for judgment on
25 the pleadings is vacated. (Docket No. 64.)

26 IT IS SO ORDERED.

27 Dated: August 16, 2013


28 DEAN D. PREGERSON
United States District Judge