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Proposition 60:

Adult Films. Condoms. Health Requirements.

Initiative Statute

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I. EXECUTIVE SUMMARY

The purpose of “The California Safer Sex in the Adult Film Industry Act” (“Proposition 60”) is to protect the performers in the adult film industry, and also minimize the spread of STIs that are transmitted from adult films produced in California.¹ Proposition 60 would achieve this purpose by adding sections to the California Labor Code, addressing workplace health and safety standards and practices within the adult film industry.² Additionally, the proposed law would add and enforce existing rules and standards set by CAL/OSHA and the California Occupational Safety and Health Standards Board (“Board”).

A “YES” vote on Proposition 60 would mean there would be additional workplace health and safety requirements placed on adult film productions in California and additional ways to enforce those requirements.³

A “NO” vote on Proposition 60 would mean adult film productions in California would continue to be subject to current state and local workplace health and safety requirements that provides general regulations to protect workers against blood and other certain bodily fluids.⁴

II. HISTORY

Today, the Adult Film Industry in Los Angeles County is known as the “porn capital” of the world,⁵ which is a far departure from the prohibitive laws in the past. There are three specific foundational cases that have affected the law regarding pornography in California.⁶ In 1957, the U.S. Supreme Court decided *Roth v. United States*,⁷ which the Court held that obscenity was not protected by the First Amendment in the U.S. Constitution.⁸ The Court determined that a material’s obscenity was based on whether it would appeal to a lewd interest when taken as a whole by an average person applying contemporary community standards.⁹ At that time, pornography was taboo and its creation and distribution was done in a clandestine manner.¹⁰ In 1973, in *Miller v. California*, the U.S. Supreme Court reaffirmed the *Roth* decision, that obscene material was not protected under the First Amendment.¹¹ Sexual conduct could fall under protection of the First Amendment; however, it must have been of “serious literary, artistic,

¹ Cal. Proposition 60, §3(a)-(k) (2016).

² Cal. Proposition 60, §6720.8(a)(1) (defines “Adult Film” as “any recorded, streamed, or real time broadcast of any film, video, multimedia, or other representation of sexual intercourse in which performers actually engage in vaginal or anal penetration by a penis”).

³ CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA PRIMARY ELECTION, TUESDAY NOVEMBER 8, 2016, at 68, available at <http://voterguide.sos.ca.gov/en/propositions/60/title-summary.htm> [“NOVEMBER 2016 VOTER GUIDE”].

⁴ *Id.*

⁵ Chris Motyl, *Condom Sense: Regulating and Reforming Performer Health and Safety in the Adult Film Industry*, 32 HOFSTRA LAB. & EMPL. L.J. 217, 223 (2014).

⁶ *Id.*

⁷ *Roth v. U.S.*, 354 U.S. 485 (1957).

⁸ *Id.*

⁹ *Roth*, 354 U.S. at 490.

¹⁰ MOTYL, *supra* note 5.

¹¹ *Miller v. California*, 93 S. Ct. 2607, 2622 (1973).

political, or scientific value.”¹² A person who sold or displayed obscene materials would not be prosecuted, unless the obscene material was regulated by the state law as “patently offensive, hardcore sexual conduct.”¹³ Ultimately, the Court in *Miller* made pornography indistinguishable from prostitution.¹⁴

In the post-*Miller* era, law enforcement officials and prosecutors in California, created ways to prosecute people within the adult film industry under pandering and prostitution laws,¹⁵ “which made it illegal to hire a person for the purpose of prostitution.”¹⁶

In 1988, the California Supreme Court ruled in *People v. Freeman*,¹⁷ that the inclusion of pornography within the pandering and prostitution laws, unconstitutionally infringed upon individual First Amendment.¹⁸ The *Freeman* decision made California the first state to permit the production of pornography.¹⁹ This resulted in California becoming the “headquarters” for the industry.²⁰ San Fernando Valley became the first established foothold for adult film industry, which made Los Angeles County the “porn capital of the world” with some of the largest adult film industries.²¹ There are an estimated 200 adult film production companies in Los Angeles County, employing about 2,000 performers.²² San Fernando Valley provided the adult film industry with a prime location because it sits next to Hollywood, which has had an abundance of resources.²³ Location benefits included access to the local packaging and manufacturing companies, which help in distribution of the films.²⁴ Additionally, the adult film industry took advantage of big warehouses and studio spaces to film, as well as mansions.²⁵

III. Past Legislation on Adult Films—from County to the State

I. Measure B in Los Angeles County

a. Creation and Passage of Measure B

The Safer Sex in the Adult Film Industry Act (“Measure B”), was a response to the growing problem of HIV transmission amongst adult film performers in Los Angeles County.²⁶

¹² *Miller*, 93 S. Ct. at 2616.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ CAL. PENAL CODE § 266(i) (2016).

¹⁶ MOTYL, *supra* note 5 at 224.

¹⁷ *People v. Freeman*, 46 Cal. 3d 419 (1988).

¹⁸ *Freeman*, 46 Cal. 3d at 426.

¹⁹ MOTYL, *supra* note 5 at 225.

²⁰ *Id.*

²¹ *Id.*

²² Binh Y. Goldstein, et. al., *High Chlamydia and Gonorrhea Incidence and Reinfection Among Performers in the Adult Film Industry*, 38, SEXUALLY TRANSMITTED DISEASES, 644 (2011) available at <https://www.ncbi.nlm.nih.gov/pubmed/21844714> (on file with the *California Initiative Review*).

²³ MOTYL, *supra* note 5 at 225.

²⁴ *Id.*

²⁵ *Id.*

²⁶ MOTYL, *supra* note 5 at 218.

In August 2013, two adult film performers announced they contracted the Human Immunodeficiency Virus (“HIV”) within two weeks of each other.²⁷ Two days later, a third actor announced his or her contraction of HIV.²⁸ This outbreak, in addition to the adult film industry’s failure to implement moratoriums to investigate whether HIV was transmitted to other adult film performers, initiated the debate about mandatory condom use in the industry.²⁹ In November 2012, Measure B was on the Los Angeles County voter ballot.³⁰ The purpose of Measure B was to protect the health and safety of adult film performers and the general public from contracting and transmitting STIs or HIV by requiring the use of condoms during filming of adult films.³¹ Measure B passed via a referendum vote, receiving 56% of the votes.³²

b. Opposition to and Litigation Concerning Measure B

The adult film industry’s producers, performers, and executives confronted Measure B with vehement opposition before and after it passed.³³ In 2013, the CEO of Vivid Entertainment, Califa Productions, and two performers filed a request in the United States District Court, Central District California, to reverse Measure B.³⁴ Vivid Entertainment argued that Measure B violated adult film performers’ and producers’ First Amendment rights because making pornography was an expressive conduct.³⁵ The court held that because the plaintiffs would unlikely succeed on the merits of their claims, the court denied the plaintiffs motion.³⁶

c. Inadequacies of Measure B

After the first year Measure B passed, county officials still had difficulty developing the methods to implement and enforce it.³⁷ In 2015, the AIDS Healthcare Foundation served subpoenas to three large STI testing and treatment facilities demanding the release of adult performer medical records with names redacted, dating back to 2007.³⁸ This information was subpoenaed in an effort to initiate lawsuits demanding compliance to Measure B.³⁹ However, the adult film industry and its producers found a way to avoid the impacts of Measure B, when they moved productions outside the county.⁴⁰

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 219.

³³ *Id.*

³⁴ *Vivid Entertainment LLC v. Fielding*, 965 F. Supp. 2d 1113 (C.D. Cal 2013).

³⁵ Elizabeth Sbardellati, *Skin Flicks without the Skin: Why Government Mandated Condom Use in Adult Films is Violation of the First Amendment*, 9 NW J. L. & SOC. POL’Y 138, 161 (2013).

³⁶ *Vivid Entertainment LLC*, 965 F. Supp. 2d at 1127.

³⁷ MOTYL, *supra* note 5 at 220.

³⁸ Katherine Koster, *Subpoenas and Community Condom Policing: The War on Condomless Porn*, HUFFINGTON POST (August 28, 2015), available at http://www.huffingtonpost.com/katherine-koster/subpoenas-and-community-c_b_8051334.html.

³⁹ *Id.*

⁴⁰ MOTYL, *supra* note 5 at 220.

2. *The Transition to Statewide Legislation*

The inadequacies of Measure B, especially the adult film industry’s attempts to move production to locations not governed by the measure, “prompted Assembly member Isadore Hall (D-Compton) attempt to expand Measure B to the entire State of California.⁴¹ Assembly member Hall did this by introducing legislation that created a new section in the State Labor Code regulating the adult film industry.”⁴² Assembly member Hall publically stated, “Enough is enough. Adult film actors placed their trust in an industry that has put porn profits above worker safety.”⁴³ In 2013, Assembly Members Hall and Richard Bloom co-authored and introduced AB 332, which died in the Assembly Appropriations Committee in 2014.⁴⁴ Additionally, in January 2014, Assembly Member Hall reintroduced AB 1576 legislation, which passed the Assembly but died in the Senate Appropriations Committee.⁴⁵

IV. THE LAW

1. *Existing Law*

a. *CAL/OSHA Authority*

In 1973, CAL/OSHA was created to ensure working women and men within the California are afforded “safe and healthful” workplace conditions.⁴⁶ The Act conferred authority to CAL/OSHA to oversee and regulate nearly all-private employers within the State, including employers within the adult film industry.⁴⁷ The Division of Labor Standards Enforcement (“DLSE”), a unit of California’s Department of Industrial Relations, determines an individual’s status as an employee or an independent contractor by considering whether the employer has control or the right to control the work and manner by the worker.⁴⁸ CAL/OSHA’s failure to enforce current state workplace regulations against the adult film industry regarding the employment status of adult film performers is largely responsible for the ambiguity of their employment status.⁴⁹

The current standard used to regulate performer health and safety conditions on adult film sets is known as the Bloodborne Pathogen Standard (“BBP”) in Title 8 of the California Code of Regulations, section 5193.⁵⁰ The BBP standard used by CAL/OSHA “requires employers to protect workers from serious diseases including HIV, hepatitis B and hepatitis C, which can be

⁴¹ *Id.*

⁴² *Id.* at 221.

⁴³ *Id.*

⁴⁴ Complete Bill History of AB 332, http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=ab_332&sess=PREV&house=B&author=hall_%3Chall%3E (last visited Sept. 6, 2016).

⁴⁵ California Bill History of AB 1576, <http://www.legislature.ca.gov/cgi-bin/port-postquery> (last visited Sept. 6, 2016).

⁴⁶ MOTYL, *supra* note 5 at 240.

⁴⁷ *Health and Safety in the Adult Film Industry*, CAL. DEPT. OF INDUSTRIAL RELATIONS, available at <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Sept. 6, 2016).

⁴⁸ MOTYL, *supra* note 5 at 243.

⁴⁹ *Id.*

⁵⁰ *Id.* at 244.

transmitted through exposure to blood and other potentially infectious materials.”⁵¹ The BBP standard requires: (1) employers to control workers in a way which prevents them from coming into direct contact with blood or other disease-carrying body fluids, including semen and vaginal fluid, (2) provide protective equipment for workers such as condoms, dental dams, gloves, and eye protection, (3) Hepatitis B vaccinations, (4) keeping medical records confidential, (5) following procedures for exposure incidents, including medical evaluation and follow ups at no cost to the employee, and (5) employers must provide training to employees on Bloodborne pathogens and how they can be protected from infection.⁵²

CAL/OSHA has specific requirements for the adult film industry, which includes the following:

“(1) Following a written safety and health program, known as an injury and illness prevention program (IPP), which identifies potential hazards specific to the workplace and ways to protect workers from those hazards, (2) Training employees in health and safety hazards, (3) Protecting employees from electrical hazards, such as those associated with special lighting, (4) Protecting employees from hazards associated with Bloodborne pathogens, (5) Providing sanitation facilities, and (6) Not discriminating against employees who complain about safety and health conditions.”⁵³

b. Adult Film Industry: Self-Regulation

CAL/OSHA’s reluctance to regulate the adult film industry, has resulted in the adult film industry adopting its own regulations regarding performer testing and screening.⁵⁴ The regulations require testing and screening on a biweekly basis for HIV and a limited number of other STIs.⁵⁵ The self-regulating system within the adult film industry is known as “Performer Availability Screening Services” (“P.A.S.S.”), which includes protocols and databases for STI testing and screenings; which are accessible to producers, directors, and agents.⁵⁶ Any person wanting to work in the industry must first be cleared of HIV, Syphilis, Hepatitis B and C, Chlamydia, Gonorrhea, and Trichomoniasis within 14 days of starting shoot date for a particular film.⁵⁷ If an adult film performer does not have recent records, or has an irregularity within his or her records, the adult film performer is supposed to be barred from performing in the film.⁵⁸ In the event a performer tests positive for HIV, the Free Speech Coalition, which implemented the

⁵¹ *Health and Safety in the Adult Film Industry*, CAL. DEPT. OF INDUSTRIAL RELATIONS, available at <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Sept. 6, 2016).

⁵² *Id.*

⁵³ *Health and Safety in the Adult Film Industry*, CAL. DEPT. OF INDUSTRIAL RELATIONS, available at <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Sept. 6, 2016).

⁵⁴ MOTYL, *supra* note 5 at 240.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 241.

⁵⁸ *Id.*

database system for testing, is alerted and will call for an industry-wide moratorium.⁵⁹ The calling for a moratorium means production is immediately halted for an investigation to determine if HIV was transmitted.⁶⁰

V. Proposed Law

1. *Health and Employment Requirements: Adult Film Industry*

a. *Required Use of Condoms During Filming*

Under Proposition 60, an adult film producer⁶¹ would control workplace practices, which are sufficient to protecting adult film performers⁶² from exposure of blood and any other infectious material.⁶³ Thus, an adult film producer must provide and require use of condoms during filming⁶⁴ of sexual intercourse.⁶⁵ The adult film producer would also be required to include any additional workplace practice controls that are required by the regulations of the Board.⁶⁶ Proposition 60 does not require visibility of condoms or other protective equipment in the final product of the film.⁶⁷ However, if condoms are not visible within an adult film that is distributed commercially in California by any means, it would be presumed the film was produced in violation of the proposed law.⁶⁸ Liability would not be applied to individuals who act within the scope of their employment in accordance with instructions by the adult film producer.⁶⁹ The individuals who would not be found liable include, adult film performers, individual's providing independent contracting services, production volunteers, or bona-fide employees, who act within the scope of their employment in accordance with instructions by the adult film producer, unless they are adult film producers and do not have a financial interest in the film.⁷⁰

b. *Offer and Payment of Adult Film Performers Testing and Vaccinations*

An adult film producer would be required to bear the costs of all STI and HIV testing, vaccinations, medical exams, and follow up exams, which are required in order for an individual to be an adult film performer.⁷¹ Additionally, an adult film producer would be required to keep

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Cal. Proposition 60, §6720.8(a)(3) (2016) (defines "Adult film producer" as "any person that makes, produces, finances, or directs one or more adult films filmed in California and that sells, offers to sell, or causes to be sold such adult film in exchange for commercial considerations").

⁶² Cal. Proposition 60, §6720.8(a)(2) (2016) (defines "Adult film performer" as "any individual whose penis penetrates a vagina or anus while being filmed, or whose vagina or anus is penetrated by a penis while being filmed in the proposition").

⁶³ Cal. Proposition 60, §6720(a) (2016).

⁶⁴ Cal. Proposition 60, §6720.8(a)(12) (2016) (defines "Filmed or filming" as "the recording, streaming, or real-time broadcast of any adult film as defined in the proposition").

⁶⁵ Cal. Proposition 60, §6720(a) (2016).

⁶⁶ Cal. Proposition 60, §6720(a)(1)-(3) (2016).

⁶⁷ Cal. Proposition 60, §6720(h) (2016).

⁶⁸ *Id.*

⁶⁹ Cal. Proposition 60, §6720(i) (2016).

⁷⁰ *Id.*

⁷¹ Cal. Proposition 60, §6720(b) (2016).

any adult film performer's health information strictly confidential.⁷² If an adult film producer fails to offer, provide, and pay for an adult film performer's STI or HIV testing, vaccinations, medical exams, or follow up exams, the result would entail a financial penalty against the adult film producer, that is equal to the costs the adult film producer failed to offer, provide, or pay on behalf of the adult film performer.⁷³ The financial penalty against the adult film producer would be paid to the State of California.⁷⁴

Proposition 60 would permit an adult film performer to seek civil remedies or damages, if the adult film producer failed to provide condoms or offer, provide and pay for the medical exams that are required for adult film performers.⁷⁵ If the adult film performer prevails, the adult film performer may receive up to \$50,000, subject to the yearly consumer price index increase.⁷⁶ To be awarded damages, a court must find the performer suffered economic or personal injury as a result of the producer's failure to comply with the law, the producer's failure to comply was negligent, reckless, or intentional, and the award would be appropriate.⁷⁷ If the adult film producer provides workers' compensation insurance that covers the performer's economic or personal injury damages, the performer may not seek civil damages.⁷⁸

2. *Notice and Disclosure*

a. *Required Information*

Under Proposition 60, adult film producers would be required to disclose information to CAL/OSHA in writing and signed under penalty of perjury by the adult film producer.⁷⁹ The required disclosure of information include: the location and date(s) of filming, the names and contact information of talent agencies that referred the adult film performer(s), the name and contact information of designated record custodian, and the adult film producer's name and contact information within 10 days after filming.⁸⁰ Any changes to the location or dates of filming must be disclosed within 72 hours.⁸¹

b. *Certification*

Under Proposition 60, an adult film producer must sign a certification, under penalty of perjury, that condoms would be used at all times during filming of vaginal or anal intercourse, and all medical exams, testing, and vaccinations were offered, provided, and paid for by the adult film producer prior to filming.⁸²

⁷² Cal. Proposition 60, §6720(c) (2016).

⁷³ Cal. Proposition 60, §6720(d) (2016).

⁷⁴ *Id.*

⁷⁵ Cal. Proposition 60, §6720(e) (2016).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Cal. Proposition 60, §6720.1(a) (2016).

⁸⁰ Cal. Proposition 60, §6720.1(a)(1)-(7) (2016).

⁸¹ Cal. Proposition 60, §6720.1(a)(1)-(3) (2016).

⁸² Cal. Proposition 60, §6720.1(a)(6) (2016).

c. Fees

Under Proposition 60, the adult film producer, upon submission of required disclosures to CAL/OSHA, would also be required to pay a fee set by CAL/OSHA for an amount sufficient to cover data security and storage and other administrative expenses associated with receiving, processing, and maintaining all provided information.⁸³ The fee will be set temporarily at \$100 dollars until CAL/OSHA sets the fee.⁸⁴ If there is more than one adult film producer for a particular production, only one producer needs to submit the information for all of the producers.⁸⁵

Failure to comply with notice, disclosure, or certification requirements would result in penalties of fines no less than \$1,000 and no more than \$7,000 per violation.⁸⁶ Each repeated violation would be punishable by a fine no less than \$7,000 and no more than \$15,000.⁸⁷ CAL/OSHA or a court in a civil action will determine the punishable violations.⁸⁸ Each individual piece of information that is missing and required by statute would constitute a separate violation.⁸⁹ If the adult film producer knowingly falsifies information that is required, the producer would be subject to a penalty of no more than \$70,000, as determined by CAL/OSHA or a court in a civil action.⁹⁰

d. Required Training and Display Sign

Under Proposition 60, adult film producers would be required to provide a training program to each adult film performer as required by the Board.⁹¹ Additionally, a sign must be displayed at all times at the filming location with text that is not smaller than 48-point font that states:

The State of California requires the use of condoms for all acts of vaginal or anal intercourse during the production of adult films to protect performers from sexually transmitted infections and diseases.

Any public health concerns regarding any activities occurring during the production of any adult films should be directed to: _____⁹²

⁸³ Cal. Proposition 60, §6720.1(7)(b) (2016).

⁸⁴ *Id.*

⁸⁵ Cal. Proposition 60, §6720.1(7)(c) (2016).

⁸⁶ Cal. Proposition 60, §6720.1(7)(d) (2016).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Cal. Proposition 60, §6720.1(7)(e)(2016).

⁹¹ Cal. Proposition 60, §6720.1(7)(f) (2016).

⁹² Cal. Proposition 60, §6720.1(7)(g) (2016).

The Board or CAL/OSHA shall determine the language to be inserted on the blank line on the sign, and make it available to the public and the adult film producers.⁹³

e. Designated Record Custodian

Under Proposition 60, an adult film producer is required to designate a custodian of records for no less than four years that would maintain copies of four items of proof or documentation: (1) each unedited and edited adult films made, produced, and financed, or directed by the adult film producer, (2) proof the adult film producer complied with the required training program for each adult film performer, and employee, (3) proof the required sign was displayed at filming locations, and (4) all the documents required under the proposal.⁹⁴

3. Adult Film Producers: Licenses

a. License Application and Fees

Under Proposition 60, within 10 days after the beginning of filming, an adult film producer must submit an application, pay the application fee, and obtain an Adult Film Production Health License (“License”), which would be issued by CAL/OSHA.⁹⁵ The application fee would be set at \$100 until CAL/OSHA determines an amount that would be sufficient to provide for the costs of administering licenses.⁹⁶

Once an adult film producer obtains a license, it would be immediately effective, so long as the application and fees were submitted within 10 days after the beginning of filming.⁹⁷ The license would be effective for two years, unless the license is suspended.⁹⁸

b. License Requirements

An adult film producer or licensee must not have been found to have violated the proposed law for the 12 months preceding the application of the license by either CAL/OSHA enforcement process or by a court.⁹⁹

c. Administrative Proceedings for Violations

If CAL/OSHA determines that an adult film producer is not in compliance with the adult film regulations,¹⁰⁰ it would provide a written notice.¹⁰¹ CAL/OSHA would issue a notice to the adult film producer if it determined the adult film producer failed to comply with the proposed

⁹³ Cal. Proposition 60, §6720.1(7)(h) (2016).

⁹⁴ *Id.*

⁹⁵ Cal. Proposition 60, §6720.2(a) and (c) (2016).

⁹⁶ *Id.*

⁹⁷ Cal. Proposition 60, §6720.2(b) (2016).

⁹⁸ Cal. Proposition 60, §6720.2(e) (2016).

⁹⁹ Cal. Proposition 60, §6720.2(f)(1) (2016).

¹⁰⁰ Cal. Proposition 60, §6720.8(a)(4) (2016) (defines “Adult film regulations” as “all regulations adopted by the board in accordance with the rulemaking provisions of the Administrative Procedure Act that are reasonably germane to the purposes and intent of the proposition”).

¹⁰¹ Cal. Proposition 60, §6720.2(g) (2016).

law.¹⁰² The written notice would include: the deficiencies CAL/OSHA found, any corrective measures that could be taken, and any penalties it would enforce.¹⁰³ An adult film producer would have 15 calendar days from the issuance of the notice to comply to provide a written request for review.¹⁰⁴ If an adult film producer does not provide a written request within the 15 day period, review of the notice would be considered waived.¹⁰⁵ Within 10 days after the administrative review or waiver, CAL/OSHA would issue a written notice of decision to the adult film producer.¹⁰⁶

d. Suspension of Licenses

In order for CAL/OSHA to suspend the license of an adult film producer, violations must be determined through an administrative hearing, judicial process, or stipulation by the adult film producer.¹⁰⁷ If CAL/OSHA issues a written notice of decision with a penalty resulting in a license suspension, the notice of decision must specify the acts or omissions found in violation of the proposed law, the length and extent of suspension, as well as the terms, if any, for a license to be reinstated or reissued.¹⁰⁸ A suspended license could be reinstated if the conditions that resulted in the suspension no longer exist and the imposed penalties are satisfied.¹⁰⁹ CAL/OSHA must inform the adult film producer of license reinstatement, following the last day of suspension.¹¹⁰

4. Penalties for Producing Films without a License

Under Proposition 60, a penalty of fines would result from the adult film producer's failure to obtain a license.¹¹¹ If an adult film producer was previously found to have violated Proposition 60, and continued to produce adult films without a license, the adult film producer must pay a fine of up to \$50 per day.¹¹² If an adult film producer that failed to register as an adult film producer within 10 days after qualifying as an adult film producer, must pay a fine of up to \$25 per day.¹¹³

5. Statute of Limitations

Under Proposition 60, a statute of limitations would be added to the California Labor Code in cases of action against an adult film producer for violations of the regulations both current and enacted.¹¹⁴ Any action against the adult film producer must commence one year after

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Cal. Proposition 60, §6720.2(h) (2016).

¹⁰⁵ *Id.*

¹⁰⁶ Cal. Proposition 60, §2072.2(i) (2016).

¹⁰⁷ Cal. Proposition 60, §6720.2(c) (2016).

¹⁰⁸ Cal. Proposition 60, §6720.2(i) (2016).

¹⁰⁹ Cal. Proposition 60, §6720.2(j) (2016).

¹¹⁰ Cal. Proposition 60, §6720.2(e) (2016).

¹¹¹ Cal. Proposition 60, §6720.2(k) (2016).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Cal. Proposition 60, §6720.3(a) (2016).

the violation was discovered or should have been discovered through the use of reasonable diligence.¹¹⁵

6. *Liabilities and Penalties*

a. *Agency with Adult Film Producers in Violation of Regulations*

Under Proposition 60, an adult film producer is responsible for liabilities and penalties when violations occur; however, additional people may be held responsible as well.¹¹⁶ Any person¹¹⁷ that is in an agency relationship with the adult producer, would be liable if he or she negligently, knowingly, or repeatedly violated Proposition 60, and would be subject for administrative or civil action penalties.¹¹⁸ Additionally, individuals that fail, refuse to comply, or aid and abet¹¹⁹ others to violate Proposition 60, would be subject to financial penalties.¹²⁰

Under Proposition 60, fines would be no less than \$1,000 and no more than \$5,000.¹²¹ If the individual knowingly and repeatedly fails, and refuses to comply with the regulations, the penalty will be no less than \$5,000 and no more than \$70,000.¹²² If the individual aids and abets another person in violation of the regulations, the penalties would be no less than \$1,000 and no more than \$35,000.¹²³

b. *Adult Film Producer Violations of the Health and Employment Requirements*

If an adult film producer willfully violated Proposition 60, which resulted in the cause of death, or permanent or prolonged bodily impairment to the adult film performer, the adult film producer would be subject to a fine not more than \$100,000, through administrative proceedings or a civil action.¹²⁴ If the adult film producer was a corporation, then it would be subject to fines not more than \$1,500,000, through administrative proceedings or a civil action.¹²⁵

¹¹⁵ *Id.*

¹¹⁶ Cal. Proposition 60, §6720.4 (2016).

¹¹⁷ Cal. Proposition 60, §6720.8(a)(16) (2016) (defines “Person” as “any individual, partnership, firm, association, corporation, limited liability company, or other legal entity”).

¹¹⁸ Cal. Proposition 60, §6720.4(a) and (b)(1)-(4) (2016).

¹¹⁹ Cal. Proposition 60, §6720.8(a)(5) (2016) (defines “Aids or Abets” or “Aided and Abetted” as “knowingly or recklessly giving substantial assistance to a person”).

¹²⁰ Cal. Proposition 60, §6720.4(b) (2016).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Cal. Proposition 60, §6720.4(4)(c) (2016).

¹²⁵ *Id.*

7. *Agents of Control; Aiding and Abetting; Multiple Violations*

a. *Agents of Control in the Adult Film Industry*

Under Proposition 60, every person who possessed the rights of one or more adult film(s) produced in California and intentionally distributed¹²⁶ such films for commercial purposes,¹²⁷ would be found in violation of the Proposition 60.¹²⁸ The penalty for violations would be determined by the total amount of commercial considerations¹²⁹ exchanged for any rights in the adult film(s) or production of the adult film(s).¹³⁰

Proposition 60 also provides that a person who possessed rights of one or more adult film(s), who had been found liable two or more times for violations of Proposition 60, would be subject to a penalty in the amount of commercial consideration exchanged for any rights in the adult film or production of the adult film(s).¹³¹

b. *Entities and Activities Excluded from the Proposition*

Under Proposition 60, regulations would not apply to the following entities or activities: (1) legitimate medical, educational, and scientific activities; (2) telecommunication companies that transmit or carry adult films; (3) criminal law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses; and (4) to any film rated by the Motion Picture Association of America unless such film is an adult film.¹³²

8. *Enforcements; Whistleblowers; Private Rights of Action*

a. *Written Requests for Administrative Enforcement Action*

Under Proposition 60, CAL/OSHA or its designee, a civil prosecutor, an adult film performer, or a resident in the State of California, could bring a civil action or administrative enforcement process against any person who would be liable for any violation of the Proposition 60.¹³³

An adult film performer or California resident must first file a written request to CAL/OSHA to pursue the violator(s) through the administrative enforcement process or civil

¹²⁶ Cal. Proposition 60, §6720.8(a)(10) (2016) (defines “Distribute” or “Distributed” as the “transfer possession of in exchange for commercial consideration”).

¹²⁷ Cal. Proposition 60, §6720.8(a)(9) (2016) (defines “Commercial Purposes” as “to sell, offer to sell, or cause to be sold, in exchange for commercial consideration”).

¹²⁸ Cal. Proposition 60, §6720.5(a) (2016).

¹²⁹ Cal. Proposition 60, §6720.8(a)(8) (2016) (defines “Commercial Consideration” as “anything of value, including but not limited to, real or digital currency, or contingent or vest rights in any current or future revenue”).

¹³⁰ Cal. Proposition 60, §6720.5(a) (2016).

¹³¹ Cal. Proposition 60, §6720.5(d) (2016).

¹³² Cal. Proposition 60, §6720.5(e) (2016).

¹³³ Cal. Proposition 60, §6720.6(a) (2016).

action.¹³⁴ The written request must include a statement of reasons why the individual believed Proposition 60 was violated.¹³⁵

b. CAL/OSHA and its Response to Requests

CAL/OSHA would respond to requests from pursuance of administrative enforcement, a civil action, or do no action at all.¹³⁶ No other action may be brought if CAL/OSHA initiated enforcement through its own enforcement proceedings or a civil action, unless CAL/OSHA abandoned its action or the action was dismissed by a court without prejudice.¹³⁷ An adult film performer or California resident could file a civil action if CAL/OSHA either declined to pursue action or failed to respond within 21 days of receiving the request.¹³⁸

c. Civil Action Brought by an Individual

Under Proposition 60, once an adult film performer or California resident were able to bring a civil action, the time period would be tolled from the date CAL/OSHA received the request to the date CAL/OSHA abandoned enforcement action or a civil action was dismissed without prejudice.¹³⁹ The only person who could commence with the civil suit would be the individual who filed the request to CAL/OSHA.¹⁴⁰

An adult film performer or California resident cannot file a civil action against a violator(s), if CAL/OSHA issued an order or collected penalties against the adult film producer for the same violations.¹⁴¹ If a criminal prosecutor maintained criminal action against a violator(s), an adult film performer or California resident would not be able to file a civil action against the same violator(s) on the same transactions or occurrences.¹⁴² This means there could not be more than one judgment against the violator(s) with respect to any particular violation.¹⁴³

d. Distribution of Awarded Penalties

If a judgment was entered against one or more defendants in a civil action initiated by an adult film performer or California resident, the State of California would receive 75% of the awarded penalties and the adult film performer or California resident would receive the other 25%.¹⁴⁴

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Cal. Proposition 60, §6720.6(b) (2016).

¹⁴⁰ *Id.*

¹⁴¹ Cal. Proposition 60, §6720.6(c) (2016).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Cal. Proposition 60, §6720.6(d) (2016).

The court could award costs of litigation to a party, other than a government agency, that prevailed in a civil action.¹⁴⁵ A defendant could be awarded attorneys' fees from a plaintiff, however, the court must first find that the plaintiff's pursuit of the litigation was frivolous.¹⁴⁶

9. *Talent Agent Liability*

a. *Talent Agency Violations and Liability*

Under Proposition 60, it would be unlawful for any talent agency to knowingly refer any adult film performer to any adult film producer or agent of an adult film producer, not limited to casting directors of adult films, that do not comply with the Proposition 60.¹⁴⁷ If a talent agency were found in violation, it would be liable to an adult film performer in the amount of the monetary consideration for the referral and reasonable attorney's fees, if the action taken by an adult film performer prevailed.¹⁴⁸

b. *Excluded Liability of Adult Film Producer Perjury of Compliance*

If an adult film producer provided and signed a written confirmation to a talent agency, prior to the beginning of filming, under penalty of perjury that an adult film producer would be in compliance, and continue to be in compliance with Proposition 60, a talent agency would not be subject to liability for violations of Proposition 60.¹⁴⁹

c. *Liability and Penalties*

A talent agency's license could be revoked or suspended if violations of Proposition 60 are found.¹⁵⁰ CAL/OSHA and DLSE would maintain concurrent jurisdiction over the enforcement of the regulations that pertain to talent agencies.¹⁵¹ If a violation by a talent agency were found, CAL/OSHA would transfer its contact information to the Department of Industrial Relations, DLSE, or any successor agency.¹⁵²

VI. UNINTENDED CONSEQUENCES AND DRAFTING ISSUES

1. *Recently Resolved*

On August 10, 2016, petitioner Derrick Burts, who is also a proponent of Proposition 60, petitioned for a writ of mandate asking for the Secretary of State to amend or delete certain allegedly false and misleading statements in the arguments against Proposition 60 section of

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Cal. Proposition 60, §6720.7(a) (2016).

¹⁴⁸ *Id.*

¹⁴⁹ Cal. Proposition 60, §6720.7(b) (2016).

¹⁵⁰ Cal. Proposition 60, §6720.7(c)(2016).

¹⁵¹ *Id.*

¹⁵² Cal. Proposition 60, §6720.7(d) (2016).

official voter information and voter guides.¹⁵³ The court granted the petition in part, and denied the petition in part after finding that four out of seven statements were conclusively and objectively false or misleading.

First, the court found there was nothing in Proposition 60 that stated that safety measures would be weakened.¹⁵⁴ Opponents are free to argue that workplace safety could decrease but cannot falsely argue that standards would be weakened.¹⁵⁵ Second, it was also misleading to state that the proposition would create a new private right of action against adult film performers, on-set crew members, and married couples filming in their homes.¹⁵⁶ The court explained that the proposition would only create a private right of action against those who were specifically defined as producers, agents of adult film producers, talent agents, distributors, or persons who aid or abet unlawful distributions and violate the measure.¹⁵⁷ The measure specifically explains that performers, bona-fide employees, individuals providing independent contracting services, and production volunteers who are acting in accordance to instruction from a producer, are not considered producers and will not be liable.¹⁵⁸

Third, the court found it is false and misleading to state that the measure could apply to, “every film on cable today,” because the proposition will not be applied retroactively.¹⁵⁹ Fourth, and finally, the court found it is false and misleading to state that the main proponent of the measure will become a paid state employee who cannot be fired from the job because the measure simply makes the proponent an agent of the state for purposes of defending challenges to the measure in court. This is not a paid job that is created from which the proponent cannot be fired.¹⁶⁰ This argument was raised by the opposition under the belief that the proponent special interest group drafted proposition 60 in order to profit from it in various ways including the financial gain from the potential lawsuits they could file.¹⁶¹

2. *Not False and Misleading Statements*

The court found that it is not objectively false and misleading to state that Proposition 60 could violate the privacy of adult film performers because if the performer is also a producer and the filming takes place within their home, the measure could require disclosure of their name and home address.¹⁶²

The court also found it was not false or misleading to state that a special interest group could profit from the proposition and ultimately lead to an unprecedented “lawsuit bonanza.”¹⁶³ The

¹⁵³ *Derrick Burts v. Alex Padilla*, No. 34-2016-80002404-CU-Wm-GDS, slip op. at 2 (Sacramento Superior Court Aug. 10, 2016).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.* at 4-5.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.* at 5.

¹⁶¹ NOVEMBER 2016 VOTER GUIDE, at 70.

¹⁶² *Derrick Burts*, No. 34-2016-80002404-CU-Wm-GDS, slip op. at 5.

¹⁶³ NOVEMBER 2016 VOTER GUIDE, at 71.

court explained that while these statements were opinionated, they were not false and misleading based on the language of the proposition.¹⁶⁴

VII. CONSTITUTIONAL ANALYSIS

The *Burts v. Padilla* ruling clarified that this measure could potentially violate the privacy of an adult film performer if they are considered producers and obligated to disclose their name and home addresses where the films are produced.¹⁶⁵ The measure would require these disclosures to be made when individuals are seeking to sue producers for violations of the proposition requirements. There is a right to privacy argument to be made on behalf of some of the adult film performers at the state level due to a potential California Constitutional violation of article one's inalienable right to pursue and obtain privacy.¹⁶⁶ Nonetheless, the right to privacy is not an absolute power and there will be no violation if the invasion of privacy is justified by a competing interest which may include beneficial social or government activities.¹⁶⁷ Hence, it is likely that this will not result in a constitutional right to privacy claim because names and addresses need to be disclosed for all civil claim purposes, not just for the potential claims arising out of the passage of proposition 60.

There is more room for debate because the U.S. Constitution “protects against the compelled disclosure of political associations and beliefs.”¹⁶⁸ This protection is guaranteed by the First Amendment because disclosure of political associations and beliefs can, “seriously infringe on privacy of association.”¹⁶⁹ Those involved in the adult film industry could be an association for purposes of upholding their right to privacy due to the potential release of their information, including medical record information, which could leave them in a vulnerable position. This vulnerability that exposes adult film performers to harassment, physical, and emotional dangers could qualify them as an association and lead to a right of privacy issue which the Supreme Court has already acknowledged and recognized the, “vital relationship between freedom to associate and privacy in one's associations.”¹⁷⁰

VIII. PUBLIC POLICY CONSIDERATIONS

1. Supporting Arguments

a. Higher Risk to Non-Adult Film Performers

It is no secret that adult film performers are, by the very nature of their occupation, more vulnerable to contract HIV and STIs than non-adult film performers. A study from 2011, in Los

¹⁶⁴ *Derrick Burts*, No. 34-2016-80002404-CU-Wm-GDS, slip op. at 4.

¹⁶⁵ *Id.*

¹⁶⁶ Cal. Const. art. I, § 1.

¹⁶⁷ *Hill v. Natl. Collegiate Athletic Assn.*, 7 Cal. 4th 1, 36-38 (1994).

¹⁶⁸ *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982).

¹⁶⁹ *Id.*

¹⁷⁰ *Natl. Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958)

Angeles County, demonstrated that in regard to chlamydia, an adult film performer was 8.5 times more likely than a Los Angeles County resident aged 18 through 29 to contract the disease and 34 times more likely than the general population.¹⁷¹ Gonorrhea incidences were 18 times higher for adult film performers than Los Angeles County residents aged 18 to 29, and 64 times higher than the general population.¹⁷² Even when performers want to wear condoms to protect themselves and their partners from such diseases, producers may refuse to hire them if they insist on practicing safe sex.¹⁷³ Other non-performing employees are also at risk of becoming infected if their jobs require cleaning up after scenes or those who assist in developing the scenes. Some of the tools used within scenes can be particularly hazardous because they impose an even greater risk for spreading infections by puncturing the skin; such as razor blades, wires, or any sharp tool.¹⁷⁴ An additional concern includes STIs that are not commonly considered blood borne pathogens, such as chlamydia, gonorrhea, and syphilis, but can be transmitted through contact with mucous membranes, semen, vaginal fluids, and some may be present in blood.¹⁷⁵

b. Sexual Transmission of Diseases is Spreading among the Performers

The World Health Organization declared that the male latex condom is, “the single, most efficient, available technology to reduce the sexual transmission of HIV and other STIs.”¹⁷⁶ This becomes problematic when it is not widely accepted among producers for their performers to wear condoms when filming. Screening for HIV and other STIs is considered a reactive measure that is effective to prevent new potential performers already infected from entering the industry but screening alone does not prevent the spread of infection among the pool of performers that have already been established within the industry. Thus, condom-wearing becomes vital to truly assure performers are not being exposed to contracting these diseases.¹⁷⁷

There are additional problems with simply testing performers yet not requiring them to wear condoms. Testing alone is not sufficient because the results may not be accurate and while it may accurately detect disease, it still does not prevent it. Most STIs are what is called asymptomatic which means that they may go undetected during a testing period and will not be discoverable until an unknown date or at times will not be discoverable at all by urine-testing.¹⁷⁸ An example of this comes from a study done in 2012 which found that 47 performers from their sample population tested positive for chlamydia and/or gonorrhea but 11 of those cases would not have been detected through urine-based testing alone.¹⁷⁹ Finally, it is also a concern that performers could contract a disease from their personal sexual lives while waiting for the next

¹⁷¹ *Study Shows STD Rates Much Higher in Adult Film Performers*, BUSINESS WIRE, (July 28, 2011) available at <http://www.businesswire.com/news/home/20110728006637/en/Study-Shows-STD-Rates-Higher-Adult-Film>.

¹⁷² *Id.*

¹⁷³ Caitlin Liu and Eric Malnic, *2 Porn Producers Get Safety Violations*, L.A. TIMES, (Sept. 17, 2004), available at <http://articles.latimes.com/2004/sep/17/local/me-porn17>.

¹⁷⁴ *Health and Safety in the Adult Film Industry*, CAL. DEPT. OF INDUSTRIAL RELATIONS,, <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Sept. 6, 2016).

¹⁷⁵ MOTYL, *supra* note 5 at 244.

¹⁷⁶ *Id.* at 241 (citing World Health Organization’s statement).

¹⁷⁷ *Id.* at 241-242.

¹⁷⁸ Christina Rodriguez Hart, *Sexually Transmitted Testing of Adult Film Performers: Is Disease Being Missed?* 39 American Sexually Transmitted Diseases Association, 989, 987 (2012) (on file with the *California Initiative Review*).

¹⁷⁹ *Id.*

round of testing and unknowingly transmit the disease in the workplace. In order to avoid these concerns, proponents argue that using condoms is the safest practice to avoid transmitting the disease to other performers.¹⁸⁰

c. HIV and STI Outbreaks Demonstrate the Need to Enforce Protection in the Industry

Based on a number of studies that recorded outbreaks of HIV and STIs within the adult film industry, proponents argue outbreaks are continuous and therefore must be regulated.¹⁸¹ Within the Los Angeles County, health officials reported 14 cases of HIV within the industry from 1998 to 2003.¹⁸² From 2004 to 2009, 22 cases were documented.¹⁸³ In regards to STIs, between January 2003 and March 2005 approximately 976 performers were reported with 1,153 positive STI test results.¹⁸⁴

A more recent study in 2011 revealed reinfection rates among adult film performers to be as high as 26.1% within a single year, while 28% of the participants in the study had at least one infection within one year.¹⁸⁵ Reinfections may not be commonly studied, yet they are still an important concern because pre-existing infections along with one or more STI can put an individual at a greater risk of contracting HIV.¹⁸⁶ A study from UCLA found that roughly one in every four adult film performers has contracted gonorrhea or chlamydia and that out of the 366 performers in the study, 69% of them never wore condoms while performing on set.¹⁸⁷

d. Need to Create Accountability for Producers

The vast majority of producers within the film industry are currently operating in direct violation of workplace safety regulations as well as regulations imposed by OSHA.¹⁸⁸ Condoms are currently required yet studies show that the use of condoms is rarely enforced.¹⁸⁹ There are low compliance percentages which include one study that found a compliance rate of only 3% in regards to requiring performers to wear condoms.¹⁹⁰ There are some examples where OSHA has investigated and fined producers for lack of compliance. The first regulatory action taken by OSHA was in 2004 after a month-long investigation. Evasive Angles and TTB Productions were fined for failure to comply with the blood borne pathogen standard. The producers in this case did not notify authorities of performers who contracted HIV, did not write a written injury

¹⁸⁰ *For Adult Industry Responsibility Committee & Aids Healthcare Foundation, VOTE YES ON PROP 60, <http://www.voteyesprop60.com/facts/> (last visited October 17, 2016).*

¹⁸¹ *Id.*

¹⁸² MOTYL, *supra* note 5 at 230.

¹⁸³ *Id.* at 230-232.

¹⁸⁴ *Id.* at 235.

¹⁸⁵ *Study Shows STD Rates Much Higher in Adult Film Performers, BUSINESS WIRE, (July 28, 2011) available at <http://www.businesswire.com/news/home/20110728006637/en/Study-Shows-STD-Rates-Higher-Adult-Film>.*

¹⁸⁶ MOTYL, *supra* note 5 at 236.

¹⁸⁷ Dennis Romero, *Some Big Players Are against Safe Sex in Porn*, LOS ANGELES WEEKLY, (August 10, 2014), available at <http://www.laweekly.com/news/some-big-players-are-against-safe-sex-in-porn-7237338>.

¹⁸⁸ Brian Chase, *An Analysis of Potential Liability Within the Adult Film Industry Stemming From Industry Practices Related to Sexually Transmitted Infections*, 23 STAN. L. & POL'Y REV. 213, 218 (2012).

¹⁸⁹ *Id.*

¹⁹⁰ MOTYL, *supra* note 5 at 236.

prevention program, and failed to report a workplace accident to CAL/OSHA within eight hours of the incident.¹⁹¹ Larry Flynt Productions, owner of Hustler, was also fined for failing to require condom usage.¹⁹² These are mere examples and there is still a need for adult film producer accountability with concerns to health practices.¹⁹³

e. Performers Don't Sue Due to Fear of Retaliation

There are also examples of instances of adult film producers retaliating against performers. In August 2010, a 24 year old man named Derrick Burts began working in the adult film industry and worked in both heterosexual and homosexual productions. Once Burts contracted HIV in 2010 he revealed his disease and criticized health and safety practices within the industry. The response from the industry was basically a threat that if Burts continued to speak out about industry practices others within the industry would publish damaging and embarrassing information about him.¹⁹⁴ This appears to be an effective deterrent to litigation by performers, as another performer, Monica Foster, had a similar experience. Foster expressed anger regarding a breach of her confidential information when the parties responsible for Porn WikiLeaks viciously targeted her by publicly posting the address and a photograph of her home, her parents' addresses, photographs of their homes, and threatened to inform the school where the Foster's mother worked as a teacher about Foster's work in adult films.¹⁹⁵ Although not confirmed, it is said that the creator of Porn WikiLeaks, Donald Carlos, is a racist and homophobic former pornography performer and director whose mission is to expose performer's real names, addresses, and further personal information for purposes of intimidation and fear.¹⁹⁶

2. Opponent's Arguments

a. California Division of Occupational Health and Safety is Currently Updating Existing Regulations

Opponents are more interested in maintaining the current regulations that are in place and working to assure that these regulations are being followed. Organizations such as the Los Angeles LGBT Center and the San Francisco Foundation are working within their local communities to uphold the current regulations and discussing further methods of efficient enforcement. These organizations believe that strategic, organic community involvement is more productive than statewide regulations because all interested parties should be working together to achieve their common goals. Instead of imposing new regulations that were never discussed

¹⁹¹ *Health and Safety in the Adult Film Industry*, CAL. DEPT. OF INDUSTRIAL RELATIONS, available at <http://www.dir.ca.gov/dosh/adultfilmindustry.html> (last visited Sept. 6, 2016).

¹⁹² Chase, *supra* note 188 at 218.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 228.

¹⁹⁵ *Id.*

¹⁹⁶ Richard Abowitz, *the Person behind the Porn WikiLeaks Website*, THE DAILY BEAST, (March 31, 2011), available at <http://www.thedailybeast.com/articles/2011/04/01/porn-wikileaks-the-person-behind-the-website-scaring-porn-stars.html>.

between interested parties, including producers, performers, health experts, and regulatory agencies, interested parties should be at the forefront of the discussion and the movement.¹⁹⁷

b. There are Economic Concerns that Will Drive the Industry out of State or Underground

There is a concern that the current six billion dollar adult film industry in California will either get pushed out of state or be forced underground with the potential risk of lawsuits and new regulations.¹⁹⁸ There are various concerns regarding the profitability of these industries and producers if they choose to stay in California if Proposition 60 passes. It is no secret that the visible use of condoms reduces the marketability of pornography and producers are aware of this viewer preference to keep adult films condom-free.¹⁹⁹ Proposition 60 allows for condoms to be edited out of the scenes in films; however, producers state that the removal of the condom from the image of the film is cost-prohibitive.²⁰⁰ It is argued that profits will decrease whether producers abide by distributing films with condoms or by editing condoms from the films.

It is also argued that the industry may go “underground,” in the sense that filming and business in general could be done in an “under the table,” manner where regulations would not be followed.²⁰¹ The counter-argument is that regulations are currently not being followed; however, there is a concern that a black-market for condom-less adult films would result in even worse work conditions and absolutely no safety regulations at all for performers.²⁰²

c. Lawsuits against the Adult Film Industry will Congest Administrative Proceedings

The ability for individuals to engage in the litigation process is perhaps one of the most criticized aspects of this proposition among many organizations, including the California Democratic Party and the California Republican Party.²⁰³ Exposing producers to potential litigation for violation of a regulation is said to have two important negative effects. First, it could be detrimental to judicial administrative efficiency and lead to clogging up courts with litigation.²⁰⁴ Second, the cost to producers could also drive them out to a State where there is no

¹⁹⁷ Letter from Darrel Cummings Chief of Staff, LA LGBT Center, to Alex Padilla, California Secretary of State (July 5, 2016) [Cummings Letter] (on file with the *California Initiative Review*); Letter from James Loduca, Senior Vice President, San Francisco AIDS Foundation, to Alex Padilla, California Secretary of State (June 17, 2016) [Loduca Letter] (on file with the *California Initiative Review*).

¹⁹⁸ Letter from San Francisco Democratic Party to Alex Padilla, California Secretary of State, [S.F. Democratic Party Letter] (on file with the *California Initiative Review*).

¹⁹⁹ April Dembosky, *Should Porn Stars Use Condoms?* NPR, (February 16, 2016), available at <http://www.npr.org/sections/health-shots/2016/02/18/467132549/should-porn-stars-use-condoms-california-grapples-with-regulation>.

²⁰⁰ S.F. Democratic Party Letter, *supra* note 198.

²⁰¹ *Id.*

²⁰² Letter from Rick Zbur, Executive Director, Equality California, to Alex Padilla, California Secretary of State (July 12, 2016), [Zbur Letter] (on file with the *California Initiative Review*).

²⁰³ *2016 Ballot Initiatives*, CALIFORNIA DEMOCRATIC PARTY, available at <http://www.cadem.org/vote/2016-ballot-initiatives>; *Ballot Measure Endorsements*, CALIFORNIA REPUBLICAN PARTY, available at https://www.cagop.org/ballot_measure_endorsements.

²⁰⁴ S.F. Democratic Party Letter, *supra* note 198.

litigation concern for failure to comply with regulations.²⁰⁵ Overall, the ability for any individual to sue whenever a condom is not visibly present in an adult film seems to be a major concern for many organizations ranging from health, political, social, and commerce.²⁰⁶

d. Privacy Concerns for Performers Undergoing Litigation

It is possible that personal information, including legal name and address, may be revealed to the public for litigation and licensing purposes if Proposition 60 passes. There is fear that disclosing private information regarding performers will permit further stigmatization of the industry and leave performers exposed to stalkers, extortion, and various forms of harassment.²⁰⁷ Organizations such as the Adult Performer Advocacy Committee are deeply concerned for the threatening of safety, protection, and well-being of adult film performers who are already in weak positions due to their line of work.²⁰⁸

e. Infringing on the Performer's Right to Self-Expression

Adult film performers have spoken out about their discomfort with what seems to be a top-down regulatory approach that compromises a performer's right to self-expression.²⁰⁹ The Adult Performer Advocacy Committee explains that these decisions regarding the use of condoms and are highly personal and "cannot be imposed without our consent."²¹⁰ The argument is that Proposition 60 and measures like it affect the bodies and well-being of adult film performers, yet they do so without taking into account the opinion of the adult film industry and its members.

Opponents are upset that proponents claim to care about health and well-being but have not been in communication with committees that represent and voice the concerns of adult film performers.²¹¹

One specific adult film performer, Kayden Kross, has spoken out about her disagreement with these decisions being imposed and about her general uneasiness of having to use a condom. Ms. Kross addressed the condom debate in an opinion essay where she stated, "I don't see why Cal(OSHA) is interested in the health of us sex workers when there are other, larger, more vocal industries to control. I don't think Cal(OSHA) really cares about my vagina. I do think the State of California would love to fine someone seventy thousand dollars for an infraction. I do think that if a performer wants to work with condoms, that is the performer's choice, and there are companies who will shoot it. And finally, anything that forces itself into my vagina is by

²⁰⁵ S.F. Democratic Party Letter, *supra* note 198.

²⁰⁶ Cummings Letter, *supra* note 197; Loduca Letter, *supra* note 197; S.F. Democratic Party Letter, *supra* note 198; Zbur Letter, *supra* note 202; Letter from Chanel Preston, President, Adult Performer Advocacy Committee, to Alex Padilla, California Secretary of State (May 23, 2016) [Adult Performer Advocacy Committee Letter] (on file with the *California Initiative Review*); Letter from Kevin Tamaki, Chairman, Valley Industry & Commerce Association, to Alex Padilla, California Secretary of State (May 05, 2016) [Tamaki Letter] (on file with the *California Initiative Review*).

²⁰⁷ Loduca Letter, *supra* note 197.

²⁰⁸ Adult Performer Advocacy Committee Letter, *supra* note 206.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

definition raping me, and Cal(OSHA), darling, no means no.”²¹² The condom comparisons to rape clearly demonstrate an issue with the lack of consent and consideration in the matter.

A second opinion regarding the discomfort with condom usage for adult films comes from a small sample size study in which most respondents felt that condoms made their work unnecessarily difficult.²¹³ Most male performers from this study found that it was much easier for them to complete their jobs without a condom. One specifically shared, “I’m against [condom use] as a male performer. It adds a level of complexity . . . I’ve done it [with a condom] when it’s a situation where either the company requires it or the [co-performer] requires it, but it’s not my preference.”²¹⁴ Whether it is due to discomfort or lack of consent, some performers have strong oppositions.

f. Proposition 60 Ignores Recent HIV Biomedical Intervention

Forcing condoms to be a requirement in the adult film industry is under scrutiny due to recent scientific developments to prevent HIV infections.²¹⁵ Various organizations critique the lack of consideration to new health models to prevent HIV infections such as pre-exposure prophylaxis, also known as “PrEP.” Essentially, PrEP in its blue pill form serves as protection of our T cells and blocks out the HIV virus. PrEP must be taken for a minimum of seven consecutive days in order to be effective in protecting against HIV and should not be taken once a person is already diagnosed with HIV.²¹⁶ PrEP has been proven to have a 95% to 99% efficiency rate in preventing HIV infections. This is significant when compared to the 70% efficiency rate of condoms alone used to prevent HIV infections.²¹⁷ PrEP is approved by the Food and Drug Administration and is an exciting health development that many organizations are further researching.²¹⁸

g. Proposition 60 Does Not Require Protective Measures for STIs that Could be Contracted Through Cunnilingus

Studies demonstrate that performers in the adult film industry are at an increased risk for a variety of STDs other than HIV, including: gonorrhea; chlamydia; syphilis; genital herpes; trichomoniasis; and human papillomavirus virus (HPV). A study conducted by the Los Angeles County Department of Public Health found that between 2004 and 2007, there were a total of 2,633 chlamydia and/or gonorrhea cases reported among the 1,849 adult film performers in Los Angeles County, of which 72 percent of the cases were among females.²¹⁹ Keeping in mind that exposure to STIs among females is particularly high in the adult film industry, it needs to be emphasized that Proposition 60 only requires condom usage for film scenes of penetration by a

²¹² CHASE, *supra* note 188 at 237.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Loduca Letter, *supra* note 197..

²¹⁶ *What is PrEP?*, PREP REP PROJECT, available at <http://www.whatisprep.org> (last visited Oct. 19, 2016).

²¹⁷ S.F. Democratic Party Letter, *supra* note 198

²¹⁸ *What is PrEP?*, PREP REP PROJECT, available at <http://www.whatisprep.org> (last visited Oct. 19, 2016).

²¹⁹ Deborah Gold, *Commentary An Industrial Hygienist Looks at Porn*, JOURNAL OF OCCUPATIONAL AND ENVTL. HYGIENE, D184, D185 (2015) (on file with the *California Initiative Review*).

penis.²²⁰ The measure leaves females engaged in female partner scenes unprotected by not requiring the use of dental dams, female condoms, to prevent STIs.

IX. CONCLUSION

Proposition 60, in its efforts to hold adult film industries accountable, will restate current regulations and add the ability for individuals to file lawsuits against producers who have violated regulations. Individuals will have the opportunity to write a request to the administrative agency, CAL/OSHA, and if the matter is not resolved within the time restrictions, individuals may file civil claims.²²¹ Adult film producers who violate a regulation will be fined and required to pay penalties.²²² Adult film performers are generally not considered producers and therefore will not be liable unless they have a financial stake in the production and benefit economically within the definition of the proposition.²²³

While there is heavy concern that the ability to sue producers will clog up court dockets and affect administrative efficiency, the actual or even likely outcome is unknown. There are potential privacy concerns in regards to the disclosure of private information if litigation occurs and there are current privacy concerns for the open and widely shared databases utilized by different producers. Proponents of Proposition 60 argue there is no producer accountability in the current legal standard and Proposition 60 will improve the health conditions and accountability overall. Opponents argue the adult film industry in California will move out of state or underground to avoid the economic burden of the regulations.

²²⁰ NOVEMBER 2016 VOTER GUIDE at 68.

²²¹ *Id.* at 69.

²²² *Id.*

²²³ *Derrick Burts*, No. 34-2016-80002404-CU-Wm-GDS, slip op. at 4-5.