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10 PRODUCTIONS, INC.; JANE DOE A/K/A  
11 KAYDEN KROSS; AND JOHN DOE A/K/A  
12 LOGAN PIERCE

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA

15 VIVID ENTERTAINMENT, LLC;  
16 CALIFA PRODUCTIONS, INC.; JANE  
17 DOE a/k/a Kayden Kross; and JOHN  
18 DOE a/k/a Logan Pierce,

19 Plaintiffs,

20 vs.

21 JONATHAN FIELDING, Director of  
22 Los Angeles County Department of  
23 Public Health, JACKIE LACEY, Los  
24 Angeles County District Attorney, and  
25 COUNTY OF LOS ANGELES

26 Defendants.

Case No. **CV13-00190 DDP (AGR~~x~~)**  
Assigned to the Hon. Dean D. Pregerson

**PLAINTIFFS VIVID ENTERTAINMENT, LLC'S, CALIFA PRODUCTIONS, INC.'S, JANE DOE A/K/A KAYDEN KROSS'S, AND JOHN DOE A/K/A LOGAN PIERCE'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; DECLARATION OF JANET L. GRUMER**

Date: May 6, 2013  
Time: 10:00 a.m.

Courtroom 3

Action Filed: January 10, 2012

[Filed concurrently with Request for Judicial Notice]

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1 TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on Monday, May 6, 2013, at 10:00 a.m. or as  
 3 soon thereafter as counsel may be heard before the Honorable Dean Pregerson, in  
 4 Courtroom 3, 2nd Floor, located at 312 N. Spring Street, Los Angeles, CA 90012,  
 5 Plaintiffs Vivid Entertainment Group, Califa Productions, Inc., and Jane Doe and  
 6 John Doe, also known professionally as, respectively, Kayden Kross and Logan  
 7 Pierce, will and hereby do move this Court, pursuant to Fed. R. Civ. P. 12(c), for  
 8 judgment on the pleadings in their challenge to the County of Los Angeles Safer  
 9 Sex in the Adult Film Industry Act ("Measure B"). Plaintiffs' Motion is based on  
 10 the pleadings, this Notice, and the accompanying memorandum of points and  
 11 authorities.

12 Plaintiffs seek judgment on the pleadings in this civil rights action challeng-  
 13 ing Measure B's constitutionality, because among other things Measure B imposes  
 14 an intolerable burden on the exercise of rights under the First Amendment. Judg-  
 15 ment on the pleadings is proper, and should be granted, insofar as any party may so  
 16 move "[a]fter the pleadings are closed[,] but early enough not to delay trial," Fed.  
 17 R. Civ. P. 12(c), and Plaintiffs here can readily "establish[] on the face of the plead-  
 18 ings that no material issue of fact remains to be resolved and that [they are] entitled  
 19 to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*,  
 20 896 F.2d 1542, 1550 (9th Cir. 1990). In this regard, while Measure B suffers from  
 21 fatal flaws that would be plain with further factual development in this case, it also  
 22 is unconstitutional on several grounds based solely on the undisputed facts arising  
 23 from the initial pleadings.

24 Measure B inflicts constitutional harm by forcing adult film producers to pay  
 25 fees and obtain permits from the Los Angeles County Department of Public Health,  
 26 before any production occurs. The permitting and fee regime requires all principals  
 27 and management-level employees – including film directors – to complete blood  
 28 borne pathogen training, and allows immediate and potentially permanent permit

1 revocation without prior notice. Measure B also requires the use of condoms during  
2 the production of adult films, even though the performers are – as are all performers  
3 in adult films – consenting adults engaged in constitutionally protected expression.  
4 Measure B is backed by draconian penalties that the County Department of Public  
5 Health enjoys total discretion to enforce against the adult film industry under broad,  
6 vague, and unlimited enforcement powers.

7       Given these contours, and the manner in which they necessarily intrude  
8 on adult films’ expressive elements, Measure B facially violates numerous First  
9 Amendment and other protections, as shown in the accompanying memorandum.  
10 First, Measure B curtails freedom of expression via a county ballot initiative, while  
11 also purporting to impose restrictions on protected speech based on “findings” that  
12 lack any legislative record. In addition, Measure B serves as a prior restraint by  
13 preemptively prohibiting the production of any adult film if its director (among  
14 others) has not completed blood borne pathogen training, if the production has not  
15 secured a permit (or its producer had a permit suspended or revoked, even if the  
16 new production has nothing to do with the suspension/revocation), and/or if the  
17 performers do not use condoms, even if in their sound discretion and artistic judgment  
18 they wish to forgo doing so. Measure B also gives the Department of Public  
19 Health unlimited, standardless discretion to suspend and revoke permits, and empowers  
20 it to seize “any evidence” that “bears on” compliance – without limit or  
21 cause – including, conceivably, sole copies of expressive works. The permit-fee  
22 also acts as a prior restraint in its own right, and is not limited to the expense incident  
23 of implementing and enforcing Measure B.

24       Moreover, Measure B incorporates several key terms without definition, and  
25 imposes without explanation discretionary mandates relating to permit suspension  
26 and revocation, as well as to forfeitures and enforcement. This leaves persons of  
27 common intelligence unsure as to what actions and/or characteristics are prohibited,  
28 required, and/or subject to regulation. The vagueness and subjective definitions of

1 these terms and mandates also provide inadequate guidance to law enforcement and  
 2 health department officials, who themselves must guess at their meanings, creating  
 3 the prospect of differential application of the law. Measure B is also unconstitution-  
 4 ally under-inclusive because it fails to reach adult films not made for commercial  
 5 purposes but that pose the same health risks that Measure B purports to address.

6 The enforcement of Measure B also presents serious due process problems.  
 7 Its permit suspension/revocation regime operates without prior hearing and lacks  
 8 procedural safeguards. It also allows searches of any location “suspected” of being  
 9 subject to Measure B, and seizures of all manner of personal property, including  
 10 “samples,” without any warrant or probable cause requirement. Thus, if enforced,  
 11 Measure B would violate Plaintiffs’ liberty and property interests in the expressive  
 12 works they create through the exercise of First Amendment rights, in documents  
 13 and other personal property used to create those works, and in the ongoing freedom  
 14 to create such works.

15 For all these reasons, Plaintiffs are entitled to a judgment on the pleadings  
 16 that invalidates Measure B on any, some, or all of these grounds.

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1 This motion is made following the conference of counsel pursuant to L.R. 7-3  
2 which took place on March 26, 2013. *See* Declaration of Janet L. Grumer ¶ 2.  
3

4 DATED: April 5, 2013

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## TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. INTRODUCTION .....	1
4	II. FACTUAL BACKGROUND.....	3
5	III. PLAINTIFFS ARE ENTITLED TO JUDGMENT	
6	AS A MATTER OF LAW.....	7
7	A. The Government Cannot Constitutionally Restrict First	
8	Amendment Activity by Referendum. ....	8
9	B. Measure B Imposes an Unconstitutional System of Prior	
10	Restraint in Violation of The First Amendment.....	10
11	C. Measure B’s Permitting Fees Violate the First Amendment.....	12
12	D. Measure B is Unconstitutionally Vague.....	14
13	E. Measure B is Underinclusive.....	17
14	F. Measure B Imposes An Unconstitutional System That Deprives	
15	Plaintiffs of Due Process. ....	18
16	G. Measure B Is Preempted By State Law.....	20
17	1. The State Has Exclusive Jurisdiction Over	
18	Workplace Safety .....	21
19	2. Measure B is Preempted.....	23
20	IV. CONCLUSION.....	25
21		
22		
23		
24		
25		
26		
27		
28		

## TABLE OF AUTHORITIES

Page

## CASES

<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	2, 11
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965).....	18
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964).....	15
<i>Board of Regents of Univ. of Wis. Sys. v. Southworth</i> , 529 U.S. 217 (2000).....	8
<i>Brown v. Entm't Merchs. Ass'n</i> , 131 S. Ct. 2729 (2011).....	3, 9, 10, 17
<i>Buckley v. American Const'l Law Found.</i> , 525 U.S. 182 (1999).....	2, 8
<i>California Fed. Savings &amp; Loan Ass'n v. City of Los Angeles</i> , 54 Cal. 3d 1 (1991).....	21
<i>People v. Freeman</i> , 46 Cal. 3d 419 (1988).....	4
<i>Carroll v. United States</i> , 267 U.S. 132 (1925).....	19
<i>CBS v. District Court</i> , 729 F.2d 1174 (9th Cir. 1983).....	11
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	17
<i>City of Houston v. Hill</i> , 482 U.S. 451 (1987).....	15
<i>City of Lakewood v. Plain Dealer Publ'g Co.</i> , 486 U.S. 750 (1988).....	15



1	<i>City of Rancho Palos Verdes v. Abrams</i> ,	
2	101 Cal. App. 4th 367 (2002) .....	24
3	<i>City of Renton v. Playtime Theatres, Inc.</i> ,	
4	475 U.S. 41 (1986) .....	1
5	<i>Conley v. Dauer</i> ,	
6	463 F.2d 63 (3d Cir. 1972) .....	25
7	<i>Cox v. New Hampshire</i> ,	
8	312 U.S. 569 (1941) .....	13, 14
9	<i>Dailey v. Superior Court</i> ,	
10	112 Cal. 94 (1896) .....	10
11	<i>Everlasting Dev. Corp. v. Sol Luis Descartes</i> ,	
12	95 F.Supp. 954 (D.P.R.), <i>aff'd</i> , 192 F.2d 1 (1st Cir. 1951) .....	25
13	<i>FCC v. Fox Television Stations, Inc.</i> ,	
14	132 S. Ct. 2307 (2012) .....	15
15	<i>FCC v. League of Women Voters</i> ,	
16	468 U.S. 364 (1984) .....	18
17	<i>Flack v. Municipal Court</i> ,	
18	66 Cal. 2d 981 (1967) .....	10
19	<i>Fly Fish, Inc. v. City of Cocoa Beach</i> ,	
20	337 F.3d 1301 (11th Cir. 2003) .....	13
21	<i>Forsyth County v. Nationalist Movement</i> ,	
22	505 U.S. 123 (1992) .....	15
23	<i>Freedman v. Maryland</i> ,	
24	380 U.S. 51 (1965) .....	11
25	<i>Friedman v. Rogers</i> ,	
26	440 U.S. 1 (1979) .....	18
27	<i>Gentile v. State Bar</i> ,	
28	501 U.S. 1030 (1991) .....	14
	<i>Grayned v. City of Rockford</i> ,	
	408 U.S. 104 (1972) .....	14

1	<i>Greater Balt. Ctr. for Pregnancy Concerns, Inc.</i>	
2	<i>v. Mayor &amp; City Council of Balt.,</i>	
3	683 F.3d 539 (4th Cir. 2012).....	8
4	<i>Hal Roach Studios, Inc. v. Richard Feiner &amp; Co.,</i>	
5	896 F.2d 1542 (9th Cir. 1990).....	3, 7
6	<i>In re JS Brower &amp; Assocs., Inc.</i>	
7	Cal/OSHA App. 77-1315 (1980) .....	22
8	<i>In re Marriage of Candiotti,</i>	
9	34 Cal. App. 4th 718 (1995).....	10
10	<i>In re National Security Letter,</i>	
11	2013 WL 1095417 (N.D. Cal. Mar. 14, 2013).....	11
12	<i>In re Portnoy,</i>	
13	21 Cal. 2d 237 (1942).....	21
14	<i>In re Sacramento Mun. Util. Dist.,</i>	
15	Cal/OSHA App. 00-1136, 2001 WL 427621 (2001).....	23
16	<i>In re SAIC,</i>	
17	Cal/OSHA App. 03-2201, 2009 WL 1204886 (2009).....	22, 23
18	<i>Johnson v. United States,</i>	
19	333 U.S. 10 (1948) .....	19
20	<i>Katz v. United States,</i>	
21	389 U.S. 347 (1967) .....	19, 20
22	<i>Kolender v. Lawson,</i>	
23	461 U.S. 352 (1983) .....	14, 15
24	<i>Long Beach Area Peace Network v. City of Long Beach,</i>	
25	574 F.3d 1011 (9th Cir. 2009).....	2, 11
26	<i>Marshall v. Barlow's, Inc.,</i>	
27	436 U.S. 307 (1978) .....	19
28	<i>Mathews v. Eldridge,</i>	
	424 U.S. 319 (1976) .....	18
	<i>Minnesota v. Dickerson,</i>	
	508 U.S. 366 (1993) .....	20

1	<i>Murdock v. Pennsylvania,</i>	
2	319 U.S. 105 (1943) .....	12, 13, 14
3	<i>Nebraska Press Ass'n v. Stuart,</i>	
4	427 U.S. 539 (1976) .....	10, 11
5	<i>O'Connell v. City of Stockton,</i>	
6	41 Cal. 4th 1061 (2007) .....	21
7	<i>O'Rourke v. Hayes,</i>	
8	378 F.3d 1201 (11th Cir. 2004) .....	19
9	<i>People ex rel. Sneddon v. Torch Energy Servs., Inc.,</i>	
10	102 Cal. App.4th 181 (2002) .....	24
11	<i>Perry v. Brown,</i> 671 F.3d 1052 (9th Cir. 2012),	
12	<i>cert. granted, Hollingsworth v. Perry,</i> 133 S. Ct. 786 (2012) .....	9
13	<i>Reich v. Malcolm Pirnie, Inc.,</i>	
14	821 F.Supp. 905 (S.D.N.Y. 1993) .....	25
15	<i>Reno v. ACLU,</i>	
16	521 U.S. 844 (1997) .....	14
17	<i>Rental Housing Ass'n of N. Alameda County v. City of Oakland,</i>	
18	171 Cal. App. 4th 741 (2009) .....	21
19	<i>Roth v. United States,</i>	
20	354 U.S. 476 (1957) .....	1
21	<i>Schad v. Borough of Mount Ephraim,</i>	
22	452 U.S. 61 (1981) .....	1, 9
23	<i>Sherwin-Williams Co. v. City of Los Angeles,</i>	
24	4 Cal. 4th 893 (1993) .....	21
25	<i>Skinner v. Railway Labor Executives' Ass'n,</i>	
26	489 U.S. 602 (1989) .....	19
27	<i>Sorrell v. IMS Health, Inc.,</i>	
28	131 S. Ct. 2653 (2011) .....	8
	<i>Speiser v. Randall,</i>	
	357 U.S. 513 (1958) .....	14

1	<i>Terry v. Ohio,</i>	
2	392 U.S. 1 (1968).....	20
3	<i>Thomas v. Chicago Parks Dist.,</i> 534 U.S. 316 (2002).....	11
4	<i>Thornhill v. Alabama,</i>	
5	310 U.S. 88 (1940).....	15
6	<i>Torbet v. United Airlines, Inc.,</i>	
7	298 F.3d 1087 (9th Cir. 2002), <i>overruled on other grounds,</i>	
8	<i>United States v. Aukai,</i> 497 F.3d 955 (9th Cir. 2007).....	7
9	<i>Traverso v. People ex rel. Dep't of Transp.,</i>	
10	6 Cal. 4th 1152 (1993) .....	18
11	<i>Trinity United Methodist Parish v. Board of Educ.,</i>	
12	907 F.Supp. 707 (S.D.N.Y. 1995).....	14
13	<i>Turner Broad. Sys. v. FCC,</i>	
14	512 U.S. 622 (1994).....	9
15	<i>United Air Lines, Inc. v. Occupational Safety &amp; Health Appeals Bd.,</i>	
16	32 Cal. 3d 762 (1982).....	22
17	<i>United States v. Aukai,</i>	
18	497 F.3d 955 (9th Cir. 2007).....	7
19	<i>United States v. Caronia,</i>	
20	703 F.3d 149 (2d Cir. 2012).....	8
21	<i>United States v. O'Brien,</i>	
22	391 U.S. 367 (1968).....	9
23	<i>United States v. Playboy Entm't Group, Inc.,</i>	
24	529 U.S. 803 (2000).....	2
25	<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,</i>	
26	455 U.S. 489 (1982).....	14
27	<i>Wearly v. FTC,</i>	
28	462 F.Supp. 589 (D.N.J. 1978), <i>vacated on other grounds,</i> 616 F.2d 662	
	(3d Cir. 1980) .....	25
	<i>Wecosign, Inc. v. IFG Holdings, Inc.,</i>	
	845 F.Supp.2d 1072 (C.D. Cal. 2012) .....	25

1	<i>Wendling v. City of Duluth,</i>	
2	495 F.Supp. 1380 (D. Minn. 1980).....	13
3	<i>West Va. State Bd. of Educ. v. Barnette,</i>	
4	319 U.S. 624 (1943).....	2, 8
5	<i>Younger v. Board of Supervisors,</i>	
6	93 Cal. App. 3d 864 (1979).....	21
7	<b>STATUTES</b>	
8	California Elections Code § 9100 <i>et seq.</i> .....	8
9	California Labor Code	
10	§ 140 <i>et seq.</i> .....	24
11	§ 142 .....	22
12	§ 142.3 .....	23
13	§ 142.3(a)(l).....	22
14	§ 144 .....	23
15	§ 144.5 .....	23
16	§ 144.7 .....	passim
17	§ 1173 .....	22
18	§ 3003 .....	23
19	§ 6300 .....	23
20	§ 6304 .....	23
21	§ 6304.1 .....	23
22	§ 6307 .....	22, 23
23	§ 6360 .....	23
24	§ 6700 .....	23
25		
26		
27		
28		

1	Los Angeles County Code	
2	Chapter 11-39 .....	1
3	Chapter 11-39, pt. 2.....	5
4	§ 11.39.010.....	6, 9
5	§ 11.39.080.....	6, 17
6	§ 11.39.080.A.....	7
7	§ 11.39.080.B.....	6
8	§ 11.39.080.C.....	19
9	§ 11.39.090.....	6
10	§ 11.39.110.....	6, 7
11	§ 11.39.110.A.....	passim
12	§ 11.39.110.C.....	11, 19
13	§ 11.39.110.D.....	15, 16, 19
14	§ 11.39.110.D-H.....	7
15	§ 11.39.110.E.....	11, 16
16	§ 11.39.110.F.....	16
17	§ 11.39.110.H.....	11
18	§ 11.39.120.....	6, 7
19	§ 11.39.120.C.....	16
20	§ 11.39.120.D.....	16
21	§ 11.39.130.....	6, 16, 19, 20
22	§ 11.39.140.....	7, 16
23	§ 22.56.1925(C).....	24
24	<b>REGULATIONS</b>	
25	California Code of Regulations, Title 8, § 5193 .....	passim
26	California Code of Regulations, Title 8, § 5193(b) .....	5, 22
27	<b>CONSTITUTIONAL PROVISIONS</b>	
28	California Constitution, art. I, § 2(a).....	10
	California Constitution, art. I, § 7 .....	18
	United States Constitution, First Amendment .....	passim
	United States Constitution, Fourth Amendment.....	1, 3, 19, 20
	United States Constitution, Fourteenth Amendment .....	1, 18, 19

**OTHER AUTHORITIES**

43 Ops. Cal. Atty. Gen. 261 (1964) .....	23
60 Ops. Cal. Atty. Gen. 44 (1977) .....	24
77 Ops. Cal. Atty. Gen. 147 (1994) .....	21

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiffs Vivid Entertainment Group, Califa Productions, Inc., and Jane Doe and John Doe, also known professionally as, respectively, Kayden Kross and Logan Pierce, are among the many producers, distributors, and performers of works that explore and portray the “great and mysterious motive force in human life” that “has indisputably been a subject of absorbing interest ... through the ages,” *i.e.*, sexuality and sexual relations. *Roth v. United States*, 354 U.S. 476, 487 (1957). It is beyond dispute that such works – including erotic adult films – are protected by the First Amendment, which applies to the States and their subdivisions under the Fourteenth Amendment. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Despite this long-standing recognition, virtually no effort was made to ensure that the recently enacted County of Los Angeles Safer Sex in the Adult Film Industry Act, also known and referred to as “Measure B,”<sup>1</sup> avoided running roughshod over the constitutional rights of those subject to it. This action and Motion accordingly seek to protect the First, Fourth, and Fourteenth Amendment rights of producers of sexually oriented films and of those who perform in them, and to uphold the supremacy of the law of the State of California, from encroachment by Measure B.

Measure B was drafted, proposed and introduced by putative Intervenor AIDS Health Care Foundation, *et al.*, and was adopted by referendum. It establishes an onerous licensing and fee regimen as a multi-level system of prior restraint before shooting may commence. It also requires condoms for all filmed vaginal or anal sex acts, even if the performers – who are consenting adults, as are all adult film performers – prefer in their sound discretion and artistic judgment to forgo on-camera

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<sup>1</sup> A copy of Measure B is attached to the Complaint (Docket No. 1) (hereinafter “Measure B”) and is codified at Los Angeles County Code of Ordinances, Chapter 11-39.



1 condom use. Measure B thus constitutes a significant barrier to producing adult  
2 films in Los Angeles County, and necessarily intrudes on the expressive elements  
3 of the films as works of creative speech.

4 Measure B's constitutional flaws are apparent on its face and from the initial  
5 submissions in this case. Defendants admit that "Plaintiffs' Complaint presents  
6 important constitutional questions that require and warrant judicial determination."  
7 Answer at 1 (Docket No. 21). Some constitutional failings result from Measure B's  
8 genesis as a referendum. While referenda may be useful to address a variety of  
9 issues, the First Amendment prohibits subjecting the exercise of the rights to freedom  
10 of speech and expression to popular vote. *See, e.g., Buckley v. American Const'l*  
11 *Law Found.*, 525 U.S. 182, 194 (1999); *West Va. State Bd. of Educ. v. Barnette*, 319  
12 U.S. 624 (1943). In addition, Measure B contains various findings that purport to  
13 justify its enactment, Measure B § 2, but its adoption via referendum means those  
14 findings lack a legislative record or similar evidentiary support, which is fatal to the  
15 County's burden to justify Measure B as a regulation of speech. *E.g., United States*  
16 *v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). *Infra* § III.A.

17 The provisions of Measure B that require pre-production blood pathogen train-  
18 ing, permitting, and the payment of permit-fees, and its condom-use mandate, both  
19 individually and together, are prior restraints on producing adult films in Los Angeles  
20 County, *infra* §§ III.B-C, that render Measure B presumptively invalid. *E.g., Alex-*  
21 *ander v. United States*, 509 U.S. 544, 550 (1993); *Long Beach Area Peace Network*  
22 *v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009). Various of Measure B's  
23 mandates are unconstitutionally vague, *infra* § III.D, and its sponsors and the County  
24 Defendants charged with implementing and enforcing it cannot even agree on its  
25 scope. *E.g., Mot. to Intervene* at 18 (Docket No. 24). In addition, as explained more  
26 fully below, Measure B is a content-based regulation that cannot satisfy either strict  
27 or intermediate First Amendment scrutiny. *Infra* § III.E. Not least among the rea-  
28 sons for which is that Measure B is unconstitutionally underinclusive, *id.*, which

1 raises serious doubts about whether it targets the interests it invokes, or simply dis-  
 2 favors adult film. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2740 (2011).

3 Nor are Measure B's failings limited to violating the First Amendment. It also  
 4 violates the Fourth Amendment by conferring upon the County Department of Public  
 5 Health ("Department") broad authority to suspend or revoke production permits for  
 6 adult films – without prior hearing or procedural safeguards – and by allowing unan-  
 7 nounced access to production facilities coupled with authority to seize expressive  
 8 works that adult film producers and performers create, along with documents and  
 9 other personal property used to create them. *Infra* § III.F. Measure B also is pre-  
 10 empted by California Labor Code Section 144.7 and California Code of Regulations  
 11 Title 8, Section 5193 insofar as it intrudes on the exclusive jurisdiction of the Cali-  
 12 fornia Occupational Safety and Health Standards Board ("Standards Board") and  
 13 the Division of Occupational Safety and Health ("Cal-OSHA"). *Infra* § III.G.

14 Each of these infirmities is clearly established on the face of the pleadings, and  
 15 no material issue of fact need be resolved to invalidate Measure B on any, or all, of  
 16 the grounds advanced herein. Although other fatal constitutional flaws would be  
 17 apparent with factual development at later stages of this case,<sup>2</sup> Plaintiffs are entitled  
 18 to judgment as a matter of law on the pleadings, for the reasons that follow. *See Hal*  
 19 *Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

## 20 II. FACTUAL BACKGROUND

21 Measure B targets constitutionally protected expressive enterprises that have  
 22 longstanding roots in Los Angeles County, and that make significant contributions to

23  
 24 <sup>2</sup> For example, some of Measure B's "findings" are demonstrably false, *see*,  
 25 *e.g.*, Measure B §§ 2(a), (d), while others are highly disputable. The insufficiency of  
 26 such findings would preclude showing that Measure B identifies an "actual problem  
 27 in need of solving," *e.g.*, *Brown*, 131 S. Ct. at 2738, and that there is either a compel-  
 28 ling or important government interest, or that Measure B actually furthers or justifies  
 that interest. Additionally, factual development would show Measure B to be over-  
 inclusive given the strict requirements the adult film industry already imposes to pro-  
 tect its performers, and to prevent the spread of HIV and other sexually transmitted  
 diseases. *See infra* 4.

1 its economy. Since the California Supreme Court held in *People v. Freeman*, 46  
 2 Cal. 3d 419 (1988), that the creation of non-obscene adult films are protected by the  
 3 First Amendment and do not violate California's criminal prostitution statutes, Los  
 4 Angeles County has become one of the world's leading locations for the production  
 5 of adult films. Given the nature of the expressive efforts that animate the industry,  
 6 adult film producers are especially aware of the potential health risks to performers  
 7 from exchanges of bodily fluids and/or exposure to blood borne pathogens. Indeed,  
 8 as the public was first becoming aware of diseases like HIV/AIDS and hepatitis, the  
 9 adult film industry provided information about the diseases, their transmission, and  
 10 how to prevent exposure. Between that time and present, the leading creators and  
 11 producers of adult films implemented strict requirements for each production, in  
 12 order to protect performers, and to prevent the spread of HIV and other sexually  
 13 transmitted diseases. *See generally* Compl. ¶¶ 20-31.

14 Adult film industry members and their trade associations established testing  
 15 and reporting regimes to assist adult film producers and performers to ensure safe  
 16 and healthy work environments. This led to the availability of databases that provide  
 17 continually updated information on adult film performers who have a negative-test  
 18 status, based on monthly (or more frequent) testing. Adult film producers and per-  
 19 formers can access the database to confirm the negative-test status of any performer  
 20 on any given production date. No law-abiding adult film producer would allow a  
 21 performer to participate in the production of an adult film without a current negative-  
 22 test confirmation, and no performer would agree to film without confirming his or  
 23 her co-performers' negative test status. *Id.*

24 At the same time, the State of California enacted its own laws and regulations  
 25 regarding exposure to blood borne pathogens, which confer jurisdiction over the field  
 26 of occupational safety and health in California workplaces – including those in Los  
 27 Angeles County – to the Standards Board and Cal-OSHA. California Labor Code  
 28 section 144.7 required the Standards Board to adopt a blood borne pathogen standard

1 that mandates that employees exposed to blood borne pathogens in the workplace re-  
 2 ceive barrier protection. Title 8, Section 5193 of the California Code of Regulations  
 3 contains the prescribed standards, and requires all employees exposed to blood borne  
 4 pathogens, including semen and vaginal secretions, be provided with “personal pro-  
 5 tective equipment” by their employers. 8 Cal. Code Regs. tit. 8, § 5193(b). It is  
 6 against this backdrop that Measure B was proposed and enacted.

7 With respect to Measure B and this challenge to it, the following undisputed  
 8 facts are established by the pleadings.<sup>3</sup> Measure B sets forth restrictions and require-  
 9 ments for the adult film industry. Compl. ¶ 40; Ans. ¶ 40. The Defendants allowed  
 10 Measure B to be placed on the ballot for the November 2012 election, upon which it  
 11 was approved. Compl. ¶ 36; Ans. ¶ 36. Measure B acknowledges that “the produc-  
 12 tion of sexually explicit adult films is legal in ... California,” and that Regulation  
 13 5193 provides requirements to protect adult film performers and models. Compl.  
 14 ¶ 37; Ans. ¶ 37. *See also* Measure B § 2(c), (g)-(h).

15 Nonetheless, Measure B requires producers of adult films to pay a fee and to  
 16 obtain a permit from the Los Angeles County Department of Public Health under a  
 17 regime that requires all principals and management-level employees – including film  
 18 directors – to complete blood borne pathogen training, and that allows immediate and  
 19 potentially permanent permit revocation without prior notice. Compl. ¶ 3; Ans. ¶ 3;  
 20 L.A. Cty. Code Ch. 11-39, Part 2. It also requires condom use during production of  
 21 adult films, *id.*, and subjects the adult film industry to penalties that the Department  
 22 has broad discretion to apply. Compl. ¶ 6; Ans. ¶ 6; L.A. Cty. Code § 11.39.110.A.

23 More specifically, Measure B requires producers of adult films to obtain a  
 24 permit from the Department **before** any production can take place, which requires  
 25 producers to pay fees and file applications that demonstrate successful completion of  
 26

27 <sup>3</sup> The above discussion regarding the State of California’s laws and  
 28 regulations regarding exposure to blood borne pathogens is also undisputed.  
*See* Compl. ¶¶ 32, 34; Ans. ¶¶ 32, 34.

1 blood borne pathogen training approved by the Department. Compl. ¶ 41; Ans. ¶ 41;  
 2 L.A. Cty. Code § 11.39.080. If the producer is a business entity, *all* of its “principals  
 3 and management-level employees” (which are undefined terms), including any and  
 4 all film directors, must complete the required course. *Id.* Once an application is ap-  
 5 proved and the Department issues a permit, which is valid for two years, it must be  
 6 displayed at all times where any adult film is shot. Compl. ¶ 41; Ans. ¶ 41; L.A. Cty.  
 7 Code §§ 11.39.080.B, 11.39.090. Measure B further requires the use of condoms by  
 8 performers for all acts of anal or vaginal sex during the production of adult films.  
 9 Compl. ¶ 42; Ans. ¶ 42. L.A. Cty. Code § 11.39.110.A. For these purposes, “adult  
 10 films” are “any film, video, multimedia or other representation of sexual intercourse  
 11 in which performers actually engage in oral, vaginal, or anal penetration, including,  
 12 but not limited to, penetration by a penis, finger, or inanimate object; oral contact  
 13 with the anus or genitals of another performer; and/or any other sexual activity that  
 14 may result in the transmission of blood and/or any other potentially infectious  
 15 materials.” L.A. Cty. Code § 11.39.010.

16 Department inspectors are granted access to “any location suspected of con-  
 17 ducting any activity regulated by” Measure B, without notice. Compl. ¶ 44; Ans.  
 18 ¶ 44; L.A. Cty. Code § 11.39.120. Department inspectors may thereupon take pos-  
 19 session of “any sample, photograph, record or other evidence, including any docu-  
 20 ments *bearing on*” compliance with Measure B. Compl. ¶ 44; Ans. ¶ 44; L.A. Cty.  
 21 Code § 11.39.130. The Department may, at any time and without prior notice, sus-  
 22 pend or revoke permits for *any* violation of Measure B’s provisions, or of *any other*  
 23 *laws* – which are not identified or limited – if the violation may create a risk to per-  
 24 formers of exposure to sexually transmitted diseases, which “risks” also are unde-  
 25 fined. Compl. ¶ 45; Ans. ¶ 45; L.A. Cty. Code § 11.39.110.

26 If a permit is suspended or revoked, work must not only stop on a given pro-  
 27 duction, its producer cannot engage in *any* other filming, thus prohibiting the creation  
 28 of other works as well. *Id.* The Department may reinstate a permit, or issue a new

1 permit, to a given producer whose permit was revoked, Compl. ¶ 46; Ans. ¶ 46; L.A.  
 2 Cty. Code § 11.39.110.D-H, but nothing in Measure B specifies that the Department  
 3 must do so, or when it should do so. To effectuate its permitting (and enforcement)  
 4 regime, Measure B imposes a fee structure, but only states that the fee “shall be set  
 5 ... in an amount sufficient to provide for the cost of any necessary enforcement.”  
 6 Compl. ¶ 48; Ans. ¶ 48; L.A. Cty. Code § 11.39.080.A.<sup>4</sup> Any person determined to  
 7 have violated Measure B is subject to fines, civil actions, and jail time. Compl. ¶ 47;  
 8 Ans. ¶ 47; L.A. Cty. Code §§ 11.39.120, 11.39.140.

### 9 III. PLAINTIFFS ARE ENTITLED TO JUDGMENT 10 AS A MATTER OF LAW

11 The undisputed facts derived from Plaintiffs’ Complaint and the Defendants’  
 12 Answer demonstrate that Plaintiffs are entitled to judgment in full as a matter of law  
 13 on Counts I-IV and VI-VII of the Complaint, and partial judgment on Count V. *See*  
 14 *Hal Roach Studios*, 896 F.2d at 1550. Judgment for the Plaintiffs is warranted even  
 15 accepting as well-founded all denials of fact stated in the Answer and treating as  
 16 false all of the allegations in the Complaint that Defendants have not admitted. *See,*  
 17 *e.g., Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1089 (9th Cir. 2002), *overruled*  
 18 *on other grounds, United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007).  
 19 Accordingly, this Court should declare Measure B is unconstitutional and  
 20 unenforceable, and grant such other relief as is appropriate given Measure B’s  
 21 invalidity.

22  
 23  
 24 <sup>4</sup> Though the Department has stated that Measure B has become effective, it  
 25 has not conducted any proceedings, conducted any analyses, or otherwise taken steps  
 26 to establish the proper amount of permitting fees. Instead, it has set a “provisional  
 27 fee” ranging from \$2,000 to \$2,500 per year, without any findings or factual basis for  
 28 the amount, or any explanation how it will determine where within that range to set  
 the fee for any specific applicant or permittee. Letter from Jonathan E. Fielding to  
 “Producers of Adult Films in Los Angeles County,” dated Dec. 14, 2012. Request  
 for Judicial Notice, Exhibit A (Docket No. 38).



**A. The Government Cannot Constitutionally Restrict First Amendment Activity by Referendum**

The provisions of Measure B violate the First Amendment by curtailing freedom of expression via a county ballot initiative. The exercise of First Amendment freedoms cannot be limited by referendum. *Buckley v. American Const'l Law Found.*, 525 U.S. 182, 194 (1999) ("The voters may no more violate the United States Constitution by enacting a ballot issue than the general assembly may by enacting legislation."); *Barnette*, 319 U.S. at 638 ("One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."). Imposing regulation in this way is inherently content-based. *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235-36 (2000). The fact that Measure B purported to be a "public health" ballot measure does not immunize it from First Amendment scrutiny. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). See *United States v. Caronia*, 703 F.3d 149, 166 (2d Cir. 2012); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539, 556 (4th Cir. 2012).

Here, Measure B was placed on the November 2012 ballot under California's initiative process, whereby if an initiative's proponent collects sufficient signatures and a county clerk certifies them, the measure is put to a public vote. See Cal. Elec. Code § 9100 *et seq.* The Los Angeles County Registrar-Recorder/County Clerk certified the signatures in support of Measure B on July 3, 2012. Though given the opportunity, the County, through its Board, declined to implement Measure B and instead put it to a public vote. Measure B passed by a 57-43% margin. Limiting First Amendment rights in this manner is simply impermissible.

In addition, as Measure B was enacted by referendum, its findings are not backed by any legislative record. See Measure B § 2. Specifically, its drafters included a section entitled "Findings and Declaration," that makes various statements

1 about the adult film industry and about the spread of sexually transmitted infections  
 2 in Los Angeles County. Measure B at 1. These “findings” are not supported by any  
 3 references or facts, and none of these “findings” were directly considered or adopted  
 4 by the County, and thus remain unsubstantiated claims.<sup>5</sup> Accordingly, there is no  
 5 legislative record to support the “findings” in Measure B. *See Perry v. Brown*, 671  
 6 F.3d 1052, 1075 (9th Cir. 2012) (messages in support of ballot measure are given  
 7 deference only as adjudicative facts, not legislative findings), *cert. granted*,  
 8 *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

9 Yet as a content-based restriction on protected speech, Measure B is subject  
 10 to strict scrutiny, which requires demonstrating a compelling government interest that  
 11 Measure B is narrowly drawn to serve, *Brown v. Entm’t Merchs.*, 131 S. Ct. at 2738,  
 12 or at a minimum, to intermediate scrutiny that requires furtherance of important  
 13 governmental interests through regulation that is no greater than necessary to achieve  
 14 those objectives. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting  
 15 *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). Measure B is clearly content-  
 16 based in that its requirements and restrictions target a category of speech – non-  
 17 obscene sexual expression – that is protected by the First Amendment. *See, e.g.*,  
 18 *Schad*, 452 U.S. at 65. Measure B does *not* apply to *all* commercial “film, video,  
 19 multimedia or other representation” where the activity depicted may result in  
 20 transmissions of blood and/or any other potentially infectious materials.” Rather,  
 21 it applies only to films “of sexual intercourse in which performers actually engage  
 22 in oral, vaginal, or anal penetration ... and/or any other sexual activity.” L.A. Cty.  
 23 Code § 11.39.010. This renders Measure B subject to strict scrutiny that it is  
 24 “rare” for a regulation to survive. *Brown*, 131 S. Ct. at 2738.

25  
 26  
 27 <sup>5</sup> Though a determination to such effect is not necessary to granting judgment  
 28 on the pleadings, Measure B’s claims about purported links between the adult film  
 industry and sexually transmitted disease are misleading and incorrect.



Measure B is particularly subject to invalidation under strict scrutiny because it became law via the initiative process, such that there is no legislative record or other factual support for its “findings.” This means there is no legislative record to demonstrate the government’s interest – there is nothing upon which to evaluate the County’s interest in enforcing Measure B. Measure B thus fails to properly identify an “actual problem in need of solving.” *Id.* at 2738. In addition, without legislative history or a factual record, Measure B cannot demonstrate a “direct causal link” between the adult film industry and the spread of sexually transmitted infections in Los Angeles County. *Id.* Accordingly, Measure B necessarily fails strict scrutiny. The same outcome arises even under intermediate scrutiny. Lack of any legislative record precludes establishing an important government interest in support of Measure B, and similarly prevents any showing that it will achieve whatever objectives it may be surmised that Measure B hopes to achieve. Measure B is invalid based on these referendum-related grounds alone.

**B. Measure B Imposes an Unconstitutional System of Prior Restraint in Violation of The First Amendment**

Regardless of any legislative record – or lack thereof – the mechanism dictated by the Measure’s drafters is constitutionally defective. Measure B violates the First Amendment because it imposes a prior restraint on producing constitutionally protected films. As the Supreme Court has made clear, “prior restraints ... are the most serious and the least tolerable infringement on First Amendment rights,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976),<sup>6</sup> and they accordingly carry a heavy

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<sup>6</sup> California courts have also universally rejected prior restraints. As the guarantees of free speech and press in article I, section 2(a) of the California Constitution are “more definitive and inclusive than the First Amendment,” the burden on a party seeking a prior restraint is more onerous, and potentially insurmountable. *In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 724 (1995). For over a century, California courts have relied on this guarantee, *see Dailey v. Superior Court*, 112 Cal. 94, 97 (1896), as well as on the First Amendment, to reject prior restraints, which the California Supreme Court has denounced as perhaps “the most severe method of intellectual suppression known in modern times.” *Flack v. Municipal Court*, 66 Cal. 2d 981, 988 n.5 (1967).

1 presumption against their validity. *E.g.*, *Long Beach Area Peace Network*, 574 F.3d  
 2 at 1023. A prior restraint is any government action or order that restricts or forbids  
 3 speech in advance of the time it is to be made or disseminated. *Alexander*, 509 U.S.  
 4 at 550. That a restraint imposed may only be temporary is of no moment. *Nebraska*  
 5 *Press Ass’n*, 427 U.S. at 559 (“A prior restraint ... has an immediate and irreversible  
 6 sanction.”); *id.* at 609 (Brennan, J., concurring). *See also Freedman v. Maryland*,  
 7 380 U.S. 51, 59 (1965) (determination of validity of a prior restraint “must [ ] be  
 8 limited to ... the shortest fixed period compatible with sound judicial resolution”);  
 9 *CBS v. District Court*, 729 F.2d 1174, 1177 (9th Cir. 1983) (“The first amendment  
 10 informs us that the damage resulting from a prior restraint – even a prior restraint  
 11 of the shortest duration – is extraordinarily grave.”).

12 A “provision [that] clearly restrains speech of a particular content ... must  
 13 [ ] meet the heightened justifications for sustaining prior-restraints [ ] in *Freedman*  
 14 *v. Maryland* and must be narrowly tailored to serve a compelling governmental in-  
 15 terest.” *In re National Security Letter*, 2013 WL 1095417, at \*6 (N.D. Cal. Mar. 14,  
 16 2013). This means “that (1) any restraint prior to judicial review can be imposed  
 17 only for a specified brief period during which the status quo must be maintained;  
 18 (2) expeditious judicial review of that decision must be available; and (3) the censor  
 19 must bear the burden of going to court to suppress the speech and must bear the bur-  
 20 den of proof once in court.” *Id.* at \*8 (quoting *Thomas v. Chicago Parks Dist.*, 534  
 21 U.S. 316 (2002)). Measure B does not conform to most of these requirements, and  
 22 in some respects runs directly counter to some of them. *See, e.g.*, L.A. Cty. Code  
 23 § 11.39.110.C, E, H.

24 Measure B represents a classic example of a prior restraint. *See Nebraska*  
 25 *Press Ass’n*, 427 U.S. at 549. It preemptively prohibits the production of any adult  
 26 film if its director (among others) has not completed a blood borne pathogen training  
 27 course affirmatively approved by the Department, if the production has not secured a  
 28 permit issued by the Department, and/or if the performers do not use condoms for all

1 acts of anal or vaginal sex, even if in their sound discretion and artistic judgment they  
 2 wish to forgo doing so. The permit and condom requirements are preconditions to  
 3 producing adult films that serve as prior restraints on protected speech.

4 Measure B also prohibits the production of adult films by any entity that  
 5 has had a permit suspended or revoked, including even creating other works having  
 6 nothing to do with the suspension/revocation. The Department is granted unlimited,  
 7 standardless discretion to impose such suspensions and/or revocations. Accordingly,  
 8 Measure B grants the Department the ability to institute a lengthy or potentially  
 9 permanent restriction on protected speech.

10 Measure B further empowers Department inspectors to take possession of “any  
 11 evidence” that “bears on” compliance with Measure B, without limitation or a cause  
 12 requirement, which could conceivably include sole copies of adult films produced in  
 13 alleged violation of Measure B. In addition, Measure B permits the suppression of  
 14 expression and speech by imposing serious civil and criminal penalties for noncom-  
 15 pliance with its permitting and/or barrier-protection requirements. The threat of  
 16 these unbounded investigation and enforcement measures are further preconditions  
 17 to producing adult films that serve as prior restraints on protected speech. On all  
 18 these grounds, Measure B must be invalidated as an unconstitutional prior restraint  
 19 upon protected expression and the creation and dissemination of protected speech.

### 20 **C. Measure B’s Permitting Fees Violate the First Amendment**

21 Measure B further violates the First Amendment by requiring the payment of  
 22 a permitting fee as a precondition to producing any adult film, thus imposing another  
 23 form of prior restraint. Just as with a licensing regime, conditioning the ability to  
 24 produce expressive works on the payment of a fee to the government is presump-  
 25 tively unconstitutional. *See* § III.B, *supra*. In this regard, Measure B’s fee regime  
 26 is utterly at odds with well-established case law through which the Supreme Court  
 27 has shown its aversion to special taxes or fees on expressive activities.

1 It is bedrock law that no one may be “compelled to purchase, through a license  
 2 fee or a license tax, the privilege freely granted by the constitution.” *Murdock v.*  
 3 *Pennsylvania*, 319 U.S. 105, 114 (1943) (internal quote omitted). Although the  
 4 government may constitutionally impose a fee limited to the “expense incident to  
 5 the administration” of a speech regulation, *Cox v. New Hampshire*, 312 U.S. 569,  
 6 577 (1941), such fees must be narrowly tailored to match actual administrative costs.  
 7 *Murdock*, 319 U.S. at 113-14. Excessive fees are “viewed as a tax on the exercise  
 8 of the fundamental rights guaranteed by the First Amendment and hence [as] prior  
 9 restraint[s].” *Wendling v. City of Duluth*, 495 F.Supp. 1380, 1385 (D. Minn. 1980).  
 10 The government bears the burden of demonstrating that a license fee is reasonably  
 11 related to the recoupment of the costs in administering the program for which the fee  
 12 is collected. *See Murdock*, 319 U.S. at 113-114; *Cox*, 312 U.S. at 577. And multiple  
 13 courts have held that *Cox* and *Murdock* apply fully even to expression considered at  
 14 the “outer perimeter” of the First Amendment’s protection. *See, e.g., Fly Fish, Inc. v.*  
 15 *City of Cocoa Beach*, 337 F.3d 1301, 1314 (11th Cir. 2003).

16 Here, in order to secure a filming permit, producers of adult films must pay a  
 17 permitting fee to the Department. The Department has set a “provisional fee” that  
 18 ranges from \$2,000 to \$2,500 per year, and indicated that payment will be required  
 19 immediately. *See supra* note 4. Plaintiffs may not exercise their First Amendment  
 20 rights to create adult films without first paying the required fee. Accordingly, the fee  
 21 regime under Measure B is a precondition to producing adult films that serves as a  
 22 prior restraint on protected speech.

23 In addition, Measure B’s permitting fee is an unlawful tax on speech, rather  
 24 than a fee incident to legitimate regulatory costs. Measure B itself does not provide  
 25 the Department any guidance on how to set the fee, other than by stating it “shall be  
 26 ... an amount sufficient to provide for the cost of any necessary enforcement.” The  
 27 Department set the “provisional fee” range in a December 14, 2012, letter that was  
 28 devoid of analysis, findings or factual basis, or explanation how the Department will

determine where within the range to set the fee for any particular permittee. And the Department gave *no* information about the administrative costs associated with the implementation or enforcement of Measure B, *or* the amount of money it proposes to collect through the fees. Due to the Department's failure to obtain reliable evidence supporting the provisional fee, and due to Measure B's failure to limit the fee to that which suffices to provide for the cost of enforcement, or to provide parameters for setting fees in an amount sufficient to provide for enforcement, Defendants cannot satisfy their burden of demonstrating the permitting fees are reasonably related to the recoupment of the costs in administering Measure B. *See Murdock*, 319 U.S. at 113-14; *Cox*, 312 U.S. at 577.

#### **D. Measure B is Unconstitutionally Vague**

Measure B's provisions and mandates are unconstitutionally vague. It is basic First Amendment doctrine that the government cannot use a vague standard for the sensitive task of regulating constitutionally protected speech. *E.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (if law threatens to inhibit exercise of constitutionally protected rights, like free speech, "a more stringent vagueness test should apply"). Imprecise speech restrictions are invalid for a number of reasons. First, without clear guidelines, those subject to the restriction cannot understand what is forbidden and what is not.<sup>7</sup> Second, a vague standard impermissibly chills speech, causing speakers to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958), and to restrict their expression "to that which is unquestionably safe."

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<sup>7</sup> *See, e.g., Reno*, 521 U.S. at 871; *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991) (regulation of speech is unconstitutional when those subject to it can do no more than "guess at its contours"); *Trinity United Methodist Parish v. Board of Educ.*, 907 F.Supp. 707, 718 (S.D.N.Y. 1995) ("To avoid chilling the exercise of vital First Amendment rights, restriction of expression must be expressed in terms which clearly inform citizens of prohibited conduct and in terms susceptible of objective measurement.").

1 *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Third, restrictions on speech that lack  
 2 clear limits afford government officials too much discretion to curb disfavored  
 3 expression.<sup>8</sup>

4 Here, Measure B incorporates the use of several terms without definition and  
 5 in many instances defines terms in language that would leave persons of common  
 6 intelligence unsure as to their specific meaning, forcing them to necessarily guess as  
 7 to what specific actions and/or characteristics would be subject to regulation. *FCC*  
 8 *v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). These terms include,  
 9 but are not limited to “adult film,” “exposure control plan,” “producer of adult film,”  
 10 “principals,” “management-level employees,” “commercial purposes,” “reasonably  
 11 suspected,” “hazardous condition,” “interference,” and other terms.

12 Measure B also incorporates several mandates without explanation, that are  
 13 discretionary in nature, such that a person of common intelligence would be unsure  
 14 as to their specific meaning, forcing them to necessarily guess as to what specific  
 15 actions are required and/or prohibited under the regulation. These mandates include,  
 16 but are not limited to, the following (all emphases added):

- 17 i. “Any permit issued pursuant to this chapter *may* be suspended or revoked . . .  
 18 and fines . . . *may* be imposed . . . for a violation of this chapter *or any other*  
 19 *violation of law* creating a risk” of sexually transmitted disease exposure L.A.  
 20 Cty. Code § 11.39.110.A.
- 21 ii. “For permits that have been suspended or revoked, the notice of decision shall  
 22 specify . . . the terms upon which the permit may be reinstated or reissued, *if*  
 23 *any.*” *Id.* § 11.39.110.D.

24  
 25  
 26  
 27 <sup>8</sup> See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133  
 28 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988);  
*City of Houston v. Hill*, 482 U.S. 451, 468-69 n.18 (1987); *Kolender*, 461 U.S. at  
 358, 360; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).



- 1    iii. “Notwithstanding any other provision of this chapter, if any *immediate danger*  
2    *to the public health or safety* is found or is *reasonably suspected*, the  
3    department *may* immediately suspend the adult film production public health  
4    permit, initiate a criminal complaint *and/or* impose *any* fine permitted by this  
5    chapter .... Immediate danger to the public health and/or safety shall include  
6    *any* condition, based upon inspection findings *or other evidence*, that *can* cause,  
7    or is *reasonably suspected* of causing, infection or disease transmission, or *any*  
8    known or *reasonably suspected hazardous condition*.” *Id.* § 11.39.110.E.
- 9    iv. “The department may ... modify, suspend, revoke *or* continue all such actions  
10    previously imposed upon a permittee ... for violations of this chapter *or any*  
11    *other laws or standards affecting public health and safety* ... or the exposure  
12    control plan of the permittee, *or any combination thereof*, or for *interference*  
13    with a county health officer[] ....” *Id.* § 11.39.110.F.
- 14    v. “[T]he department may impose a fine on persons violating *any* provision of this  
15    chapter or *any law, regulation or standard incorporated into this chapter*.” *Id.*  
16    § 11.39.120.C.
- 17    vi. “Any person or entity who ... violates *any* law, ordinance or regulation govern-  
18    ing *any activity regulated by this chapter* ... is guilty of a misdemeanor.” *Id.* at  
19    § 11.39.120.D.
- 20    vii. “The county health inspector may enter and inspect any location *suspected* of  
21    conducting *any activity regulated by this chapter* ... and take possession of *any*  
22    sample . . . or other evidence, including any documents *bearing on* adult film  
23    producer’s compliance with the provisions of the chapter.” *Id.* § 11.39.130.
- 24    viii. “A civil action to enforce the provisions of this section may be brought by the  
25    county counsel, the district attorney or *any person directly affected* by said  
26    failure to comply ....” *Id.* § 11.39.140.

27    The vagueness and subjective definitions of the above terms and mandates do not  
28    provide adequate guidance to those subject to Measure B, and do not make clear

1 what is forbidden and what is permissible. This uncertainty, coupled in particular  
 2 with the potential civil and criminal punishments for violation, necessarily will chill  
 3 protected speech and expression.

4 In addition, the vagueness and subjective definitions of the above terms and  
 5 mandates do not provide adequate guidance to law enforcement officers and Depart-  
 6 ment officials, who themselves would have to necessarily guess as to the meaning of  
 7 these terms and mandates and differ as to their application, thus giving government  
 8 officials too much discretion in enforcement and potentially leading to differential  
 9 application of the law.

#### 10 **E. Measure B is Underinclusive**

11 Measure B cannot withstand either strict or even intermediate scrutiny to the  
 12 extent it is unconstitutionally underinclusive. Even if the government can demon-  
 13 strate legitimate ends (which it does not here, as shown above), “when they affect  
 14 First Amendment rights they must be pursued by means that are [not] seriously  
 15 underinclusive[.]” *Brown*, 131 S. Ct. at 2741-42 (citing *Church of Lukumi Babalu*  
 16 *Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). “Underinclusiveness raises  
 17 serious doubts about whether the government is in fact pursuing the interest it in-  
 18 vokes, rather than disfavoring a particular speaker or viewpoint.” *Id.* at 2740.

19 Measure B claims to address the spread of HIV/AIDS and other sexually trans-  
 20 mitted diseases in Los Angeles County. *See generally* Measure B, §§ 2-3. However,  
 21 it applies only to adult films produced for a commercial purpose, to the exclusion of  
 22 non-commercial films whose performers are exposed to risks (accepting *arguendo*  
 23 the Measure’s assumptions) that are the same as those for performers in commercial  
 24 adult films. L.A. Cty. Code § 11.39.080. More importantly, Measure B fails to  
 25 address the risks of sexually transmitted diseases to the overall population of Los  
 26 Angeles County, of which the adult film industry is only a tiny percentage. This  
 27 drastic underinclusiveness suggests that Measure B is actually intended to disfavor  
 28 and restrict constitutionally protected speech and expression involved in the creation



1 of adult films, and to target and harm the adult film industry. Accordingly, Measure  
 2 B fails for multiple reasons under a strict scrutiny analysis. Underinclusiveness is  
 3 equally fatal under intermediate scrutiny, *see, e.g., FCC v. League of Women Voters*,  
 4 468 U.S. 364, 396-98 (1984), and Measure B accordingly would be invalid even if  
 5 that somewhat more forgiving standard were to apply.

6 **F. Measure B Imposes An Unconstitutional System That Deprives Plaintiffs**  
 7 **of Due Process**

8 The Due Process Clause of the Fourteenth Amendment, guarantees that no  
 9 person shall be deprived of life, liberty or property without due process of law. U.S.  
 10 Const. amend. XIV; *see also* Cal. Const. art. I, § 7. To ensure this right, the Four-  
 11 teenth Amendment requires “some form of hearing before an individual is finally  
 12 deprived of a property interest.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).  
 13 “The fundamental requirement of due process is the opportunity to be heard ‘at a  
 14 meaningful time and in a meaningful manner.’” *Id.* (quoting *Armstrong v. Manzo*,  
 15 380 U.S. 545, 552 (1965)). Here, Plaintiffs have liberty and property interests in the  
 16 expressive works they create through the exercise of their First Amendment rights,  
 17 in the documents and other personal property used to create those works, and in their  
 18 ongoing freedom to continue to create such works. *See, e.g., Friedman v. Rogers*,  
 19 440 U.S. 1, 12 n.11 (1979) (protected property interests in means of communication);  
 20 *Traverso v. People ex rel. Dep’t of Transp.*, 6 Cal. 4th 1152, 1160-61 (1993) (broad  
 21 due process protections for personal property under Federal and California law).  
 22 Yet Measure B allows deprivation of those rights without prior notice or hearing.

23 More specifically, Measure B allows the Department to suspend or revoke,  
 24 without prior hearing or any procedural safeguards whatsoever, the required permit  
 25 for *any* alleged violation of Measure B’s provisions *or* any alleged violation of *any*  
 26 *other law* that may create a risk for performers of exposure to sexually transmitted  
 27 infections. L.A. Cty. Code § 11.39.110.A. If a Measure B permit is suspended or  
 28 revoked, work not only must stop on the production giving rise to the suspension or

1 revocation, but the producer cannot engage in *any* filming, thus prohibiting creation  
 2 of other works. *Id.* § 11.39.080.C. Any such producer whose permit is suspended  
 3 or revoked has no recourse until *after* they lose the ability to work and exercise their  
 4 First Amendment rights. *Id.* § 11.39.110.C. In addition, if a permit is suspended, the  
 5 Department may refuse, with unfettered discretion, to reinstate the permit, or to issue  
 6 a new permit to a given producer. *Id.* § 11.39.110.D. Thus, the Department has the  
 7 ability – potentially for a single technical violation – to destroy, almost overnight, a  
 8 producer’s entire business, and to eliminate the jobs of its employees and contractors,  
 9 without due process protections. This is untenable under the Fourteenth Amendment.

10 In addition, under the Fourth Amendment, Plaintiffs have a liberty interest  
 11 to be free from unreasonable searches and seizures of their persons, including their  
 12 bodily fluids and other aspects of their physical persons, as well as a property interest  
 13 to be secure from unreasonable searches and seizures within the private spaces where  
 14 Plaintiffs engage in conduct that is filmed to create expressive works protected by  
 15 the First Amendment. *See, e.g., Skinner v. Railway Labor Executives’ Ass’n*, 489  
 16 U.S. 602, 616-17 (1989) (where the “Government seeks to obtain physical evidence  
 17 from a person, the Fourth Amendment may be relevant at several levels”); *O’Rourke*  
 18 *v. Hayes*, 378 F.3d 1201, 1207-08 (11th Cir. 2004) (workers have reasonable expect-  
 19 tation of privacy under Fourth Amendment in area of place of business that is off-  
 20 limits to the public, such that government officers must have a search warrant to  
 21 enter those areas) (citing *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 315 (1978)).

22 The Fourth Amendment also contains a presumptive warrant requirement  
 23 for government searches and seizures, *see Katz v. United States*, 389 U.S. 347, 357  
 24 (1967); *see also Johnson v. United States*, 333 U.S. 10, 14-15 (1948), and allows a  
 25 warrantless search or seizure only if there is probable cause. *See Carroll v. United*  
 26 *States*, 267 U.S. 132, 155-56 (1925) (probable cause is a “reasonableness” standard  
 27 for warrantless searches and seizures). Yet Measure B allows Department inspectors  
 28 to access, without notice, “any location” that is merely “*suspected* of conducting any

1 activity [that is] regulated by” Measure B. L.A. Cty. Code § 11.39.130 (emphasis  
 2 added). Inspectors may then take possession of “any sample, photograph, record or  
 3 other evidence, including any documents” that “bears on” compliance with Measure  
 4 B, without any limitation or cause requirement. *Id.* This includes the authority to  
 5 seize personal property, private documents, and “samples” from any person present  
 6 at a location where an inspector “suspects” that activity regulated by Measure B is  
 7 occurring. *Id.*

8 By not including a warrant requirement, the search and seizure provisions  
 9 of Measure B are presumptively invalid. *See Katz*, 389 U.S. at 357. In addition,  
 10 Measure B does not require an inspector to have probable cause before searching  
 11 a location or seizing items. Instead, the inspector must only “suspect” activity  
 12 regulated by Measure B is occurring. However, “suspicion” (or even “reasonable  
 13 suspicion,” which is *not* the language used by Measure B), is a lesser standard than  
 14 probable cause, and therefore cannot satisfy the Fourth Amendment.<sup>9</sup> Accordingly,  
 15 Measure B’s provisions for searching individuals at locations suspected of being  
 16 regulated by Measure B, and for the seizure of all manner of personal items, fail  
 17 to satisfy the Fourth Amendment, and therefore are invalid.

#### 18 **G. Measure B Is Preempted By State Law**

19 Plaintiffs are entitled to judgment as a matter of law independent of Measure  
 20 B’s constitutional flaws because Measure B also is preempted by provisions of the  
 21 California Labor Code and related regulations, and as such is unenforceable and  
 22 void. Charter counties have only such legislative authority as is expressly conferred  
 23 by the California Constitution and the laws of the state, such that if those sources do  
 24 not delegate particular authority, the authority remains with the Legislature. *Younger*

25  
 26  
 27 <sup>9</sup> *See Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (“reasonable  
 28 suspicion” is the standard applied to protective searches under *Terry v. Ohio*, 392  
 U.S. 1 (1968), but is a standard “less than probable cause” that does not authorize a  
 constitutional search beyond that necessary to determine if a suspect is armed).

1 *v. Board of Supervisors*, 93 Cal. App. 3d 864, 870 (1979). Generally, a local ordi-  
 2 nance is preempted by state law if the issue is deemed one of “statewide concern,” or  
 3 where the state’s interest is deemed to be “more substantial” than that of the county.  
 4 *California Fed. Savs. & Loan Ass’n v. City of Los Angeles*, 54 Cal. 3d 1, 18 (1991).  
 5 Preemption also occurs when “local legislation duplicates, contradicts, or enters an  
 6 area fully occupied by general [state] law, either expressly or by legislative implica-  
 7 tion.” *Rental Housing Ass’n of N. Alameda County v. City of Oakland*, 171 Cal. App.  
 8 4th 741, 752 (2009) (citation omitted). *See also In re Portnoy*, 21 Cal. 2d 237 (1942)  
 9 (supplemental regulations that conflict with state statutes preempted); *O’Connell v.*  
 10 *City of Stockton*, 41 Cal. 4th 1061, 1067 (2007). Moreover, “[i]f otherwise valid  
 11 local legislation conflicts with state law, it is preempted by such law and is void.”  
 12 *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993).

13 In addition to being duplicative, a local ordinance can also be preempted “if  
 14 it enters an area that is ‘fully occupied’ by general law” when the Legislature has  
 15 expressly or impliedly manifested its intent to “fully occupy” via one of the follow-  
 16 ing indicia of intent: “1) the subject matter has been so fully and completely covered  
 17 by general law as to clearly indicate that it has become exclusively a matter of state  
 18 concern; 2) the subject matter has been partially covered by general law couched  
 19 in such terms as to indicate clearly that a paramount state concern will not tolerate  
 20 further or additional local action; or 3) the subject matter has been partially covered  
 21 by general law, and the subject is of such a nature that the adverse effect of a local  
 22 ordinance on the transient citizens of the state outweighs the possible benefit to the  
 23 locality.” 77 Ops. Cal. Atty. Gen. 147 (1994) (citation omitted).

#### 24 **1. The State Has Exclusive Jurisdiction Over Workplace Safety**

25 Measure B is preempted because it empowers the County to regulate employee  
 26 workplace safety, even though State law preempts the field of employee workplace  
 27 safety. Cal-OSHA and the Standards Board have exclusive jurisdiction over the field  
 28 of Occupational Safety and Health in the workplace, and state law specifically pre-

1 empts counties from regulating workplace health and safety standards related to  
 2 transmission of blood borne pathogens. In this regard, Cal-OSHA is the sole entity  
 3 empowered to set blood borne pathogen regulations, and Labor Code section 142.3,  
 4 subsection (a)(l) mandates that the Standards Board “shall be the only agency in the  
 5 state authorized to adopt occupational safety and health standards.”

6 This is reinforced by the regulations adopted by the Standards Board found  
 7 in California Code of Regulations Title 8. Labor Code section 142 provides that the  
 8 Division of Occupational Safety and Health “shall enforce all occupational safety  
 9 and health standards adopted pursuant to this chapter[.]” *United Air Lines, Inc. v.*  
 10 *Occupational Safety & Health Appeals Bd.*, 32 Cal. 3d 762, 766-67 (1982). Labor  
 11 Code section 6307 adds that the Division “has the power, jurisdiction, and super-  
 12 vision over every employment and place of employment in this state.”

13 The state has exercised this exclusive authority to specifically regulate work-  
 14 place transmission of blood borne pathogens. Labor Code section 144.7 requires the  
 15 Standards Board to adopt a blood borne pathogen standard. Regulation 5193 is that  
 16 standard, and requires all employees exposed to blood borne pathogens, including  
 17 semen and vaginal secretions, be provided with “personal protective equipment”  
 18 by employers. Cal. Code of Regs. tit. 8, § 5193(b). Regulation 5193 and Labor Code  
 19 section 144.7 apply to adult film performers and include the required use of condoms  
 20 in the adult film industry. The State legislature has stated that the Standards Board  
 21 has exclusive jurisdictions over conflicting occupational health and safety standards.  
 22 *See* Cal. Lab. Code § 1173.

23 In view of this detailed regulatory framework, the State of California expressly  
 24 intends to occupy the field with regard to workplace safety. “California has actively  
 25 asserted jurisdiction over all places of employment with California since 1917. Ex-  
 26 ceptions to the broad claims of jurisdiction have been narrowly construed.” *In re*  
 27 *SAIC*, Cal/OSHA App. 03-2201, 2009 WL 1204886 (2009); *United Air Lines*, 32  
 28 Cal. 3d 762; *In re JS Brower & Assocs., Inc.* Cal/OSHA App. 77-1315 (1980); *In*

1 *re Sacramento Mun. Util. Dist.*, Cal/OSHA App. 00-1136, 2001 WL 427621 (2001)  
 2 (employer has burden to prove exception to jurisdiction exists). Moreover, “[u]nder  
 3 the Labor Code, the Division (referring to Cal-OSHA) has jurisdiction over every  
 4 employment and place of employment of California. (Labor Code section 6307.)”  
 5 *In re SAIC*, Cal/OSHA App. 03-2201. *See also* Lab. Code §§ 6307, 6304.1,  
 6 6304/3003, 144.5, 144, 144.7, 142.3.

7 In addition to expressly occupying the field, the state can impliedly occupy  
 8 the field of a particular area. “[I]n determining whether the State has preempted the  
 9 field, the courts will look to the ‘whole purpose and scope of the legislative scheme’  
 10 and will determine whether the field is one which requires uniform regulation  
 11 throughout the state.” 43 Ops. Cal. Atty. Gen. 261, 262 (1964) (citations omitted).  
 12 Regarding workplace safety, the Legislature has enacted a comprehensive statutory  
 13 scheme that covers multiple areas, including Hazardous Substances Information and  
 14 Training (Section 6360). *See also* Sections 6300-6700.

15 Regarding workplace safety, the legislative scheme is lengthy and thorough –  
 16 implying that the Legislature intended to occupy the field, in addition to expressing  
 17 its intent. Moreover, it can reasonably be implied that the Legislature intended the  
 18 State retain jurisdiction over occupational safety and health regulations adopted by  
 19 the Standards Board, as the Legislature requires all agencies other than the Depart-  
 20 ment of Industrial Relations (which oversees the Occupational Safety and Health  
 21 Standard Board) to enter written agreements with the State before assisting with im-  
 22 plementation of any of the Standard Board’s statutes, including Labor Code § 144.7.

## 23 **2. Measure B is Preempted**

24 Measure B is clearly preempted in view of the detailed web of state-level  
 25 legislation and regulation outlined above, as Measure B duplicates Regulation 5193  
 26 and/or Labor Code § 144.7. Measure B provides that “Any person or entity issued  
 27 a permit for the filming of an adult film” must “maintain engineering and work  
 28 practice controls sufficient to protect **employees** from exposure to blood and/or any



1 other potentially infectious materials controls, in a matter consistent with **California**  
 2 **Code of Regulations, Title 8, Section 5193.**” L.A. Cty. Code § 22.56.1925(C).

3 Measure B is thus premised on a regulation adopted by the Standards Board and is  
 4 enforceable to protect employees. Thus, Measure B requires the County to enforce  
 5 the Standard Board’s blood borne pathogen regulation with regard to employees,  
 6 which the Legislature gave Cal-OSHA exclusive jurisdiction over.

7 Moreover, California has expressly demonstrated an intent to fully occupy the  
 8 field of workplace exposure to blood borne pathogen with respect to the regulations  
 9 adopted by the Standards Board, codified in Labor Code § 140, *et seq.* The Legis-  
 10 lature also has implied its intent through its comprehensive statutory scheme and by  
 11 requiring cooperative agreements to enforce regulations adopted by the Standards  
 12 Board. For this additional, independent reason, Measure B is preempted.

13 The County cannot evade preemption by imposing local permit conditions.  
 14 Measure B grants the County the ability to condition film permits on occupational  
 15 safety and health standards adopted by the Standards Board, against employees, for  
 16 which the County is preempted from regulating. But when a county is preempted  
 17 from regulating a certain area of law, courts have held, a permit condition that dupli-  
 18 cates state law cannot be used as a vehicle to avoid or circumvent preemption. *See*  
 19 *e.g. City of Rancho Palos Verdes v. Abrams*, 101 Cal. App. 4th 367 (2002) (FCC has  
 20 exclusive jurisdiction over radio communication so city could not require permits for  
 21 ham radio operators). *See also People ex rel. Sneddon v. Torch Energy Servs., Inc.*,  
 22 102 Cal. App.4th 181 (2002). The California Attorney General has reached similar  
 23 conclusions. *See* 60 Ops. Cal. Atty. Gen. 44 (1977) (Health & Safety Code occupies  
 24 field of housing discrimination so county could not require anti-discrimination  
 25 marketing as part of issuing building permits).

26 Together, by imposing workplace safety measures regarding blood borne path-  
 27 ogens, Measure B intrudes on an area where Cal-OSHA has exclusive jurisdiction,  
 28 and where California has expressly occupied the field, via Labor Code § 144.7 and

1 California Code of Regulations Title 8, § 5193. Accordingly, Measure B is pre-  
 2 empted, and judgment should be entered on that basis as well.

### 3 IV. CONCLUSION

4 For the foregoing reasons, Plaintiffs respectfully request that the Court grant  
 5 Plaintiff judgment on the pleadings, by issuing a declaration that Measure B is  
 6 unconstitutional and/or preempted by California state law.<sup>10</sup>

7 DATED: April 5, 2013

DAVIS WRIGHT TREMAINE LLP

8 By: /s/ Matthew D. Peterson

Matthew D. Peterson

9  
 10 Attorneys for Plaintiffs

VIVID ENTERTAINMENT, LLC; CALIFA

11 PRODUCTIONS, INC.; JANE DOE a/k/a Kayden

12 Kross; and JOHN DOE a/k/a Logan Pierce

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 23 <sup>10</sup> With such a declaration, permanent injunctive relief should not be  
 24 necessary. *See, e.g., Conley v. Dauer*, 463 F.2d 63, 67 n.14 (3d Cir. 1972); *Reich v.*  
 25 *Malcolm Pirnie, Inc.*, 821 F.Supp. 905, 910 (S.D.N.Y. 1993); *Wearly v. FTC*, 462  
 26 F.Supp. 589, 604 (D.N.J. 1978), *vacated on other grounds*, 616 F.2d 662 (3d Cir.  
 27 1980); *Everlasting Dev. Corp. v. Sol Luis Descartes*, 95 F.Supp. 954, 957 (D.P.R.),  
 28 *aff'd*, 192 F.2d 1 (1st Cir. 1951). However, in view of the showing in this Motion,  
 Plaintiffs would be able to satisfy the traditional test for injunctive relief, *i.e.*, actually  
 succeeding on the merits, a likelihood of irreparable harm, a balance of hardships that  
 favors them, and advancement of the public interest. *E.g., Wecosign, Inc. v. IFG*  
*Holdings, Inc.*, 845 F.Supp.2d 1072, 1084 (C.D. Cal. 2012). *See also generally*  
 Plaintiffs' Motion for Preliminary Injunction, filed concurrently herewith.



# DECLARATION

**DECLARATION OF JANET L. GRUMER**

I, Janet L. Grumer, declare and state as follows:

1. I am an attorney licensed to practice law before all the courts of the State of California and before this Court. I am an attorney in the law firm of Davis Wright Tremaine LLP, and one of the attorneys for Plaintiffs VIVID ENTERTAINMENT, LLC; CALIFA PRODUCTIONS, INC.; JANE DOE A/K/A KAYDEN KROSS; AND JOHN DOE A/K/A LOGAN PIERCE, in this action. The matters stated below are true of my own personal knowledge.

2. On March 26, 2013 at approximately 11:00 a.m., Robert Corn-Revere and I spoke with John Ly, counsel for Defendants JONATHAN FIELDING, Director of Los Angeles County Department of Public Health, JACKIE LACEY, Los Angeles County District Attorney, and COUNTY OF LOS ANGELES (together, "Defendants") regarding Plaintiffs' intention to file a Motion for Judgment on the Pleadings under Rule 12(c). We discussed the issues to be addressed in the motion and potential resolution. Mr. Ly indicated that Defendants planned to remain neutral on the issue of the constitutionality of Measure B, but that Defendants would not agree to the relief requested by Plaintiffs.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed at Los Angeles, California on April 3, 2013.

/s/ Janet L. Grumer  
Janet L. Grumer