

IN THE SUPREME COURT FOR THE STATE OF IDAHO

ALIZA COVER

Petitioner/Respondent/  
Cross-Appellant,

v.

IDAHO BOARD OF CORRECTION,  
IDAHO DEPARTMENTS OF  
CORRECTION, and JEFFREY RAY,  
Public Information Office,

Respondents/Appellants/  
Cross-Respondents.

Supreme Court Case No. 47004-2019

District Court Case No. CV01-18-3877

---

**IDAHOANS AGAINST THE DEATH PENALTY'S AMICUS BRIEF IN  
SUPPORT OF CROSS-APPELLANT**

---

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

---

HONORABLE LYNN NORTON  
District Judge, Presiding

---

Richard Eppink, ISB 7503  
ACLU of Idaho Foundation  
P.O. Box 1897  
Boise, Idaho 83701  
Telephone: (208) 344-9750  
Facsimile: (208) 331-7201  
[reppink@acluidaho.org](mailto:reppink@acluidaho.org)  
*Attorney for Petitioner/Respondent/Cross-  
Appellant*

Jessica Kuehn  
Office of the Attorney General  
700 W. State St., 4<sup>th</sup> Floor  
Boise, ID 83720  
Telephone: (208) 334-4103  
Facsimile: (208) 854-8083  
[jessica.kuehn@ag.idaho.gov](mailto:jessica.kuehn@ag.idaho.gov)  
*Attorney for Respondents/Appellants/Cross-  
Respondents*

Marty Durand, ISB 5111  
Piotrowski Durand, PLLC  
PO Box 2864  
Boise, ID 83701  
Telephone: (208) 331-9200  
Facsimile: (208)331-9201  
[marty@idunionlaw.com](mailto:marty@idunionlaw.com)  
*Attorney for Idahoans Against the Death Penalty, filing Amici Curiae*

**TABLE OF CONTENTS**

I.	INTRODUCTION.....	1
II.	INTEREST OF THE AMICUS CURIAE.....	1
III.	RELEVANT LAW AND FACTS.....	2
IV.	ARGUMENT.....	3
	A. IDOC Articulated No Legitimate Fear or Clear Legal Standard.....	3
	B. The Public’s Interest in Disclosure Outweighs Any Interest in Secrecy.....	4
	CONCLUSION.....	6

## TABLE OF CASES & AUTHORITIES

### CASES

<i>Bucklew v. Precythe</i> , 139 S. Ct. 1112, 1127, 203 L. Ed. 2d 521, 536 (2019).....	5
<i>Cowles Publishing Co. v. Kootenai County Bd. of County Comm'rs</i> , 144 Idaho 259, 264 (2007).....	2
<i>Detroit Free Press v. Ashcroft</i> , 303 F.3d 681, 683 (6 <sup>th</sup> Cir. 2002).....	6
<i>Federated Publications v. Boise City</i> , 128 Idaho 459, 463 (1996).....	3
<i>Glossip v. Gross</i> , 135 S. Ct. 2726, 2795 (2015).....	5
<i>Gregg v. Georgia</i> , 428 U.S. 153, 172-173 (1976).....	5
<i>Jackson v. Bishop</i> , 404 F. 2d 571, 579 (CA8 1968).....	5
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886, 913 (1982).....	4
<i>Trop v. Dulles</i> , 356 U.S. 86, 101 (1958).....	4
<i>Twin Falls Construction Co. v. Operating Engineers Local No 370</i> , 95 Idaho 370, 372 (1973)	4
<i>Wade v. Taylor</i> , 156 Idaho 91, 96, (2014).....	3
<i>Ward v. Portneuf Med. Ctr., Inc.</i> , 150 Idaho 501, 504 (2011).....	2

### STATUTES

Idaho Code	
§ 74-102(1).....	2, 3
§ 74-105(4)(a)(i).....	3

## **I. INTRODUCTION**

Amicus Curiae Idahoans Against the Death Penalty (“IADP”) submit this brief in support of cross-appellant Aliza Cover and against appellant Idaho Department of Corrections (“IDOC”) on the issue of whether the public interest is served by full disclosure of the manner in which condemned inmates are executed, including the source of the lethal drugs. IADP addresses only one issue on appeal:

Whether the public’s interest in disclosure is clearly outweighed by any public interest in secrecy of the following documents:

- Bates 654 reveals the source of drugs used to execute Leavitt and a commitment to provide drugs for future executions.
- Bates 655 could reveal the source of drugs used to execute Rhoades.
- Confidential Cash Log could identify sources of execution drugs.

The secretiveness with which IDOC has treated its execution process has hampered informed debate and the development of sound public policy. The people of Idaho have a significant interest in knowing how justice is carried out in their name and the records should be subject to disclosure pursuant to the Idaho Public Records Act.

## **II. INTEREST OF THE AMICUS CURIAE**

Idahoans Against the Death Penalty is an unincorporated association located in Boise, Idaho and is the oldest organization in Idaho working solely to raise public awareness about the inhumanity of capital punishment. IADP members oppose capital punishment for a variety of reasons, including faith, conscience and practicality. IADP members have testified before the Idaho legislature, participated in public policy discussions, attended and led prayer vigils, sought information regarding execution protocols in Idaho and have educated the public regarding nationwide trends in the increased abandonment of capital punishment as an effective deterrent.

IADP members have worked collaboratively with other organizations nationwide seeking to increase public awareness of capital punishment and the methods of execution used in Idaho.

IADP has organized prayer vigils at the Maximum Security Prison for the executions of Paul Rhoades and Richard Leavitt. IADP members worked with the Idaho Department of Corrections to ensure that the vigils were not disruptive of IDOC operations and respectful of the family and friends of crime victims, as well as those of the condemned and IDOC staff. The issue on appeal is of interest to IADP as its members work to raise public awareness about the reality of the death penalty, the futility of executions as a deterrent and the impact of carrying out executions on IDOC staff, those witnessing the execution and the public.

The failure of public disclosure in this case has resulted in reduced public understanding of capital punishment in Idaho. It is imperative that executions carried out in the name of the people of Idaho, be transparent and understood by the people of Idaho.

### **III. RELEVANT LAW AND FACTS**

It is the public policy of the State of Idaho that public disclosure of how government operates serves to enhance government and its programs. Idaho Code § 74-102(1) states:

Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

The presumption of transparency and disclosure is only overcome by a specific demonstration that an exemption applies to the record being requested. *Ward v. Portneuf Med. Ctr., Inc.*, 150 Idaho 501, 504 (2011). When considering the question of exemption, a court must start with the presumption that "all public records are open to disclosure and that all exemptions are narrowly construed." *Cowles Publishing Co. v. Kootenai County Bd. of County Comm'rs*, 144 Idaho 259,

264 (2007). IDOC must overcome this presumption and the District Court found that it did not regarding Bates 654:

Idaho Code § 74-105(4)(a)(i) provides an exemption for department of correction records if the board identified the public interest in confidentiality, public safety, security, and habilitation clearly outweighs the public interest in disclosure. Board Rule 135.06 lacks that explicit determination. Although Respondents argue that weighing can be implied, the Court disagrees, especially given the Public Records Act's presumption in favor of disclosure and the Court's responsibility of making an objective determination. If the Court implies anything, it applies the statutory presumption from Idaho Code § 74-102(1) that the public records are open for inspection by the public.

R, p. 47, ¶ 1. The same should be true for Bates 655 and the Confidential Cash Log.

The right to inspect records is a right belonging to the public, and not the public agency. Once a request for public records is made, the custodian of the records is to make no inquiry of the person making the request, except as otherwise explicitly provided. *Wade v. Taylor*, 156 Idaho 91, 96, (2014). The District Court heard testimony that information from public records could be used to “boycott, protest, lobby, research or advocate related to the death penalty and lethal injections.” R, p. 41, ¶ 2. The District Court concluded that the Public Records Act makes it clear that a requester's motive in obtaining public records is “completely irrelevant.” R, p. 41, ¶ 3.

#### **IV. ARGUMENT**

The records should not be exempt as the public interest in disclosure outweighs other public interests identified in Idaho Code § 74-105(4)(a)(i).

##### **A. IDOC Articulated No Legitimate Fear or Clear Legal Standard.**

IDOC failed to meet its burden under Idaho Code § 74-105(4)(a)(i) as it did not demonstrate that the records are exempt as narrowly construed under the proper test. *Ward v. Portneuf Medical Center*, 150 Idaho 501, n.3 (2011); *Federated Publications v. Boise City*, 128

Idaho 459, 463 (1996). IDOC must show a reasonable probability of an enumerated harm resulting from disclosure. *Hymas v. Meridian Police Dept.* 159 Idaho 594, 601 (Ct. App. 2015)

The district court found no harm, only the absence of harm. R, p. 35, ¶173; ¶174; ¶177; ¶178. The only harm IDOC is able to articulate is fear that groups such as IADP may protest or boycott businesses identified as supplying lethal drugs. Cross-Appellants's Brief, p. 32. This fear is insufficient grounds to withhold records as the Public Records Act encourages an informed citizenry. IDOC cannot prohibit disclosure based on fear of public action that is protected by the First Amendment. Peaceful picketing is not unlawful. *Twin Falls Construction Co. v. Operating Engineers Local No 370*, 95 Idaho 370, 372 (1973). Economic boycott designed to bring about political or social change is protected by the First Amendment:

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467. "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270

*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). IADP members are free to picket or boycott businesses that do not reflect their values. IDOC cannot be allowed to deny information for fear of protected activity. Citizens must not be made to choose between access to information and protest activity. Both are protected.

**B. The Public's Interest in Disclosure Outweighs Any Interest in Secrecy.**

The Eighth Amendment has not been regarded as a static concept. Chief Justice Warren said, in an often-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86,

101 (1958); *Jackson v. Bishop*, 404 F. 2d 571, 579 (CA8 1968). While an assessment of contemporary values requires the Court to look to objective indicia that reflect the public attitude toward a given sanction it is clear that public perceptions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Gregg v. Georgia*, 428 U.S. 153, 172-173 (1976) citing *Trop v. Dulles*, supra, at 100. A punishment is unconstitutionally cruel when the punishment "superadds" pain well beyond what's needed to effectuate a death sentence. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127, 203 L. Ed. 2d 521, 536 (2019). Justice Sotomayor recognized that Oklahoma's lethal injection protocol authorized "the chemical equivalent of being burned alive." *Glossip v. Gross*, 135 S. Ct. 2726, 2795 (2015) Sotomayor, dissenting. Lethal drugs cannot be obtained from the EU (R, p. 38, ¶202), those from China or India may be subject to a "really bad recall" (R, p. 38, ¶204), and those obtained from a compounding pharmacies may be unstable (R, p. 38, ¶208) or improperly mixed (R, p. 39, ¶212). This does not instill confidence for a pain free execution and the source of the drugs must be made available to help the public understand if the lethal injection executions are unconstitutionally cruel. Identifying the source of lethal injection drugs would allow IADP to research basic safety and determine if the source meets standards applicable to suppliers of drugs for human use. This information must be disclosed for the people of Idaho to understand what is being done in their name.

Disclosure of the source of the drugs IDOC uses to execute people is a legitimate inquiry to inform public perception concerning methods of execution. The public cannot determine the efficacy, or cruelty, of deadly drugs the source of which remain secret. "Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they



handled it the same way they handled many other controversial issues: they left it to the People to decide.” *Glossip v. Gross*, 135 S. Ct. 2726, 2749-2750 (2015) The people of Idaho cannot decide in a vacuum and the source of IDOC’s execution drugs should be made public.

### **CONCLUSION**

For all of the reasons stated above, the public interest in disclosure outweighs any interest in secrecy. This Court should hold that Bates 654, 655 and the confidential cash log are public records not exempt from disclosure. Disclosure furthers the purpose of the Idaho Public Records Act and the development of sound public policy surrounding executions. Executions must be bathed in the sunlight of disclosure:

Democracies die behind closed doors. ... When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.

*Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6<sup>th</sup> Cir. 2002). If democracy dies behind closed doors, then a society’s standards of decency cannot evolve or mature when documents critical to informed debate remain locked in a file cabinet.

Dated: February 28, 2020.

IDAHOANS AGAINST THE DEATH PENALTY

By:           /s/          Marty Durand            
                  Marty Durand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of February, 2020, a true and correct copy of the above and foregoing. IDAHOANS AGAINST THE DEATH PENALTY’S AMICUS BRIEF IN SUPPORT OF CROSS-APPELLANT was forwarded addressed as follows in the manner stated below:

Richard Eppink  
ACLU of Idaho Foundation  
P.O. Box 1897  
Boise, Idaho 83701  
Telephone: (208) 344-9750  
Facsimile: (208) 331-7201  
[reppink@acluidaho.org](mailto:reppink@acluidaho.org)

Hand Delivered	<input type="checkbox"/>
U.S. Mail	<input type="checkbox"/>
Fax	<input type="checkbox"/>
iCourt EFS	<input checked="" type="checkbox"/>

Jessica Kuehn  
Office of the Attorney General  
700 W. State St., 4<sup>th</sup> Floor  
Boise, ID 83720  
Telephone: (208) 334-4103  
Facsimile: (208) 854-8083  
[jessica.kuehn@ag.idaho.gov](mailto:jessica.kuehn@ag.idaho.gov)

Hand Delivered	<input type="checkbox"/>
U.S. Mail	<input type="checkbox"/>
Fax	<input type="checkbox"/>
iCourt EFS	<input checked="" type="checkbox"/>

\_\_\_\_\_  
/s/ Marty Durand  
Marty Durand

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on this 28<sup>th</sup> day February, 2020, the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

Richard Eppink

[reppink@acluidaho.org](mailto:reppink@acluidaho.org)

Jessica Kuehn

[jessica.kuehn@ag.idaho.gov](mailto:jessica.kuehn@ag.idaho.gov)

\_\_\_\_\_  
/s/ Marty Durand  
Marty Durand