

# IDAHO LIBERTY



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FALL / WINTER 2016

## UNCOVERING IDAHO ART: WE ALREADY WON OUR NEWEST LAWSUIT

BY: RITCHIE EPPINK, LEGAL DIRECTOR

Last year, two men went out together to a movie. They went to see *50 Shades of Grey*. It was playing at the new Village Cinema in Meridian, Idaho. Afterwards, they wrote up a report about what they saw. That report then became a formal complaint. “During one scene which lasted approximately three (3) minutes” in the film, they wrote, a “male and female both removed all their clothing and were completely naked.”

“The male rubbed the female’s naked body with his hands. At least once, the male touched and/or caressed the female’s bare breasts with his hands. The male and female engaged in actual or simulated sexual intercourse for approximately forty (40) seconds.”

The complaint was then filed with the Idaho State Police. The two men were undercover officers. They were Alcohol Beverage Control detectives. The complaint sought to revoke the Village Cinema’s license to serve alcohol. So the Village Cinema sued. The Idaho Legislature quickly changed the law, updating the Idaho Code to comply with U.S. Supreme Court precedent that made clear 20 years ago that alcohol regulations could not be used to censor art.

Except that the Legislature declined to update the entire statute: it carved out an exception only for films and still images. Live performance remained censored.

That’s why, just a couple months later, the morality police showed up again. This time, they went to an award-winning contemporary art gallery in Garden City: the Visual Arts Collective.



The VAC, as it’s known to many, has grown to be cherished by artists and their patrons throughout the region as one of Idaho’s few safe and supportive spaces for creativity and truly free expression. As Karen Bubb, a well-known Boise visual artist, said in a statement she filed with the court: “the VAC is the primary Idaho alternative cultural space that develops new talent and brings people together around creative causes.”

Two undercover Idaho State Police officers went to the VAC in March of this year for a burlesque show featuring Anne McDonald, who performs as Frankly Franky. Trained as a classical

actor, McDonald went on to co-found the Red Light Variety Show, was selected by the Boise City Arts and History Department as one of five important emerging artists, and was funded by the Idaho Commission on the Arts to study in New York. Boise State Public Radio profiled her work under the headline “How Anne McDonald Makes Art Accessible With Boise Burlesque Show.”

And the morality police were there for her show. As before with the Village Cinema, their visit turned into a formal complaint seeking to revoke the VAC’s license to serve alcohol of any kind. The offense? “Permitt[ing] multiple performers to expose, to viewing by others, any portion of the female performers’ breasts below the top of the areola(s),” as well as “the cleft of the performers’ buttocks.” That’s right: women wore pasties and thongs at an artistic neo-burlesque show in Idaho. Because the VAC could not survive as a contemporary art gallery in Idaho without alcohol revenue, it was compelled to agree to a fine and license suspension to avoid license revocation.

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But the VAC also came to the ACLU of Idaho. Right after the administrative case was closed, we sued in federal court, joining forces with Deborah Ferguson and Craig Durham, famous for their victory in Idaho's same-sex marriage case, and former ACLU of Idaho Executive Director Jack Van Valkenburgh. The lawsuit challenged all of the restrictions on live performance: restrictions on costuming, touching, devices, and simulated sexual activity on stage. We challenged the statute as unconstitutional not just under the free speech guarantee in the First Amendment, but also under the Equal Protection clause in the Fourteenth Amendment, because the law regulates only the "female," not the male breast—a gender stereotyping restriction, and one that is especially absurd to apply to transgender performers. We represented the VAC, McDonald, and the Alley Repertory Theater, which was planning to open a production of a critically acclaimed comedy about the state of American politics called *The Totalitarians*. Because the play included a simulated hernia exam and some simulated sex scenes, it would violate the statute. We asked the court to enter an injunction before the curtains went up.

Just days later, though, the State caved. The case law is so clear, and the statute therefore so unconstitutional, that even the morality police at Idaho Alcohol Beverage Control Bureau could not defend Idaho's antiquated law. Not only that, the State Police agreed to reverse the VAC's administrative suspension and pay back every cent of their fine. Plus, the case will remain looming until the end of the 2017 legislative session. If the Idaho Legislature enacts amendments we feel are still unconstitutional, we will be able to challenge them without filing a new lawsuit.

All of that in just 13 days. Alley Repertory Theater opened *The Totalitarians* on time and on script. The VAC, which had to instruct its sound and light engineers to cut power to censor performers whose art did not match with the government's morals, can now let creativity and expression free in its gallery. Even more importantly, our plaintiffs stood up for artists throughout Idaho, whose work and performances are now unfettered from State censorship. As Oscar Wilde observed after his play *Salomé* was banned from being performed in London: "No art ever survived censorship; no art ever will."

## VICTORY IN DECLO HIGH SCHOOL LAWSUIT

Two years ago, Declo High School refused to put Sierra Norman's name on the ballot for student body president. Sierra was taking online classes, school officials said, and therefore did not qualify as a "full time" student. But the other student who wanted to run was also taking online classes, plus leaving school altogether to attend LDS seminary during the school day. The school let him run, and win, unopposed. He was male and LDS. Sierra was neither.

Sierra complained to the ACLU of Idaho and we filed a complaint with the Cassia County School District. After we got nowhere at the administrative level, we filed a federal lawsuit earlier this year, claiming violations of Title IX, the Idaho Human Rights Act, and the Equal Protection guarantees in the federal and state constitutions.

Rather than face a court decision, the School District settled the case, agreeing to permanent policy change backed by a federal court order. The policy change, which Sierra herself drafted, ensures that no student will have to go through what she did again. The District will be required to make certain that school activities are open to all students, including those who take online classes or receive home-school instruction. This will bring the District into compliance with state and federal law, including constitutional protections, when it comes to student activities.

The settlement was filed this September. Sierra is now a sophomore at Bryn Mawr College, studying to become a pediatric psychiatrist.

## LANDMARK SETTLEMENT REACHED IN MEDICAID CLASS ACTION

In our last newsletter, we profiled our big victory in the *K.W. v. Armstrong* case, a class action protecting the due process rights of thousands of adults with developmental disabilities on Medicaid in Idaho. We have won in this case at every turn, and this spring Judge B. Lynn Winnill granted our motion for summary judgment and ordered the Idaho Department of Health and Welfare to develop extensive plans to make systemic changes.

After nearly six months in negotiations with the Attorney General's office, we have reached a comprehensive settlement to seal our victory. The settlement, presented to the court in September for approval, requires the State to work with an outside expert and with program participants themselves in a multi-year process to develop lasting program reforms. Other changes, to take effect more immediately, will safeguard participants' constitutional rights in the meantime.

Among the provisions of the settlement agreement, the Idaho Department of Health and Welfare will cover the ACLU of Idaho's costs for outreach work to participants and their families. That outreach will help monitor whether the changes are bringing promised improvement and help mobilize participants and strengthen the voice they have in program change. We launched a website especially for participants and their families, [www.OurHealthandWelfare.org](http://www.OurHealthandWelfare.org), earlier this fall to keep class members updated on the status of the settlement implementation.



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#### CONTACT INFORMATION

ACLU of Idaho & ACLU  
of Idaho Foundation  
PO Box 1897, Boise, ID 83701  
Phone (208) 344-9750  
Fax (208) 344-7201  
admin@acluidaho.org  
www.acluidaho.org



Hello, my name is Kaitlyn Bishop! I joined the ACLU of Idaho as a Development Associate in September 2016 and am excited to be here. My role is to help connect our members to the mission of the ACLU and help strengthen our gifts program. Before transitioning into the nonprofit world, I worked in the financial services industry while attending Boise State University. I received my undergraduate degree in business and my minor in nonprofit management. I have development experience from a local nonprofit organization, Ūsful Glassworks, which provides job training to those who have a barrier to entry in the workforce while recycling glass. I enjoy food, exploring new places, and serving in the community. I feel so fortunate to work for an organization that defends liberty, equality and justice. I look forward to working with you and continuing to protect civil rights in Idaho. If you have any questions, comments or just want to chat- call or email me at kbishop@acluidaho.org or 208-344-9750 x1207. Thanks!

## 2017 LEGISLATIVE PREVIEW – ENDING POLICING FOR PROFIT IN IDAHO

BY: KATHY GRIESMYER, PUBLIC POLICY STRATEGIST

It might not be 2017 yet, but our legislative work is ramping up with the quickly approaching 2017 session right around the corner. As always, there a few familiar (and often depressing) bills we expect to see every legislative session – anti-women’s health, anti-LGBT, anti-immigrant – but this year we’re bringing smart justice to Idaho with the hopeful introduction of a civil asset forfeiture reform bill.

What is civil asset forfeiture exactly? Perhaps that’s a new term to you, but it’s a term well known in the law enforcement community. According to Idaho statute, law enforcement agencies – including local, state, and federal departments – are granted the authority to partake in civil asset forfeiture. This allows those agencies to seize property believed to be connected to criminal activity, including an individual’s cash on hand, car, home or other property located at the scene of the suspected crime, often times without securing a criminal conviction. It leaves property owners on the hook to navigate a confusing legal system to have their property returned to them unless they can afford to hire private counsel. And here’s the real kicker - what’s most troubling about Idaho’s law is that law enforcement in the state reaps all the rewards of civil forfeitures - meaning the agencies keep 100 percent of all funds and face no requirement to collect or report data on forfeiture use and proceeds. This perverse financial incentive encourages police departments to re-shift their focus away from community safety and instead prioritize how they can continue to collect money to fund their departments.

According to the report “Policing for Profit: The Abuse of Civil Asset Forfeiture”, the sum total of property seized in Idaho between 2000 and 2013 equaled \$5,374,865 and in just FY 2014 the sum total of property seized around the state equaled \$799,491. Add in questions of innocence for the property owner, the arbitrary nature of civil forfeiture use, the high legal burden for individuals to retrieve their property, and the all-too-common racial disparities intertwined with policing and together it makes a system clearly unjust and ripe for reform.

Come January, the ACLU of Idaho, in partnership with the Idaho Freedom Foundation and our legislative sponsors, hope to introduce legislation aimed at curtailing this highly troublesome practice. First and foremost, a criminal conviction must be required before an individual’s property can be formally seized. Funds earned from state-wide forfeitures should be removed from law enforcement’s budgets and instead reallocated to the State’s general funds, removing the policing incentive. And finally, law enforcement should report annually how they use civil asset forfeiture – who’s property they’re seizing, how much is the property worth, how much money is collected – to ensure transparency and public oversight of this policing practice. With nationwide bipartisan support for these reforms growing by the minute, it’s time for legislators to protect the property rights of Idahoans, and in turn, create a smarter, more fair criminal justice system for all.

AMERICAN CIVIL  
LIBERTIES UNION OF  
IDAHO FOUNDATION  
PO BOX 1897  
BOISE, ID 83701  
T/208-344-9750  
F/208-344-7201  
ACLUIDAHO.ORG

NON-PROFIT ORG.  
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## BOARD OF DIRECTORS ELECTIONS

Each year our Board Development Committee carefully considers the applications of potential board members to join the group of people who govern and direct the Idaho affiliate of the ACLU. If you would like to be considered for nomination by the Board Development Committee, you must be a member in good standing and submit a brief statement of interest.

Nominations may also be submitted by petition. Nomination petitions must include a statement of interest with a short statement of petitioner's background and qualifications and be signed by ten (10) current ACLU of Idaho members that includes the name and address of the nominee. The submissions must be received in the ACLU of Idaho office at PO Box 1897, Boise, ID 83701 by December 5, 2016. This information will be summarized and included on the ballot to the same extent as is such information of persons nominated by the nominating committee.

Members of the ACLU of Idaho Board of Directors serve three year terms and are voted in by the membership. All ACLU of Idaho members will receive their ballots and voting instructions by mail in December. The election results will be announced at the Annual Membership Meeting on January 26, 2017.

For more information on how to become a member, or if you do not receive your ballot by the end of December, please contact our office at (208) 344-9750 ext. 1200 or at [admin@acluidaho.org](mailto:admin@acluidaho.org).

## WILL YOU HELP DEFEND CIVIL LIBERTIES?

Support the ACLU of Idaho by  
becoming a member today!

Yes! I want to help protect and expand civil liberties in Idaho. Enclosed is a check for my membership donation in the amount of:

- \$5 Student       \$20 Individual  
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For more information or to charge your contribution on a credit card, contact the Office Manager at (208) 344-9750 x 1200 or at [admin@acluidaho.org](mailto:admin@acluidaho.org).

You can also become a member through the ACLU of Idaho's secure website at [www.acluidaho.org](http://www.acluidaho.org).