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Idaho Supreme Court
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**IN THE SUPREME COURT OF
THE STATE OF IDAHO**

UNITED STATES OF AMERICA,	)	CASE NO. 48454-2020
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
ANTONIO FRANCISCO GUTIERREZ,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF AMICI CURIAE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (IACDL), FIREARMS POLICY COALITION (FPC), SECOND AMENDMENT FOUNDATION (SAF), IDAHO SECOND AMENDMENT ALLIANCE (ISAA), FEDERAL DEFENDER SERVICES OF IDAHO (FDSI), AND THE FEDERAL DEFENDERS OF EASTERN WASHINGTON AND IDAHO (FDEWI) IN SUPPORT OF APPELLANT

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I. Statement of Interests of Amici Curiae

Established in 1989, the Idaho Association of Criminal Defense Lawyers is a nonprofit, voluntary organization of attorneys. IACDL has over 400 lawyer members, all of whom practice criminal defense. IACDL's membership includes public defenders and private counsel, attorneys who work in both state and federal courts, and attorneys who focus on trials, appeals, post-conviction actions, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially for those who cannot afford to retain counsel. For those reasons, IACDL has a strong commitment to ensuring that Idaho defendants have fair and just proceedings at trial, on appeal, and in post-conviction proceedings.

As a consortium of criminal defense lawyers, IACDL's members represent numerous individuals who will be impacted by the Court's decision in this case. To name a few examples, IACDL's members represent clients assessing plea deals relating to charges for offenses which would disqualify them from gun ownership under I.C. § 18-310(2); clients who have been convicted of disqualifying offenses who are evaluating whether to file for § 19-2604(2) relief or pursue remedies from the Commission of Pardons and Parole ("the Commission");[1] clients who have had convictions reduced under § 19-2604(2); and clients who are facing federal charges for being felons in possession of a firearm. Firearms play an important role in the lives of many of these clients, as they do in the lives of multitudes of Idahoans, and they have a critical need to know where they stand in the eyes of the federal criminal justice system. Since its community

[1] Section 18-310(3) provides that certain convicts can apply to regain their firearm rights with the Commission.

advises such defendants on a regular basis, IACDL has the experience and insight to help inform the Court's resolution of the dispute.

Firearms Policy Coalition is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy that respects individual freedom and self-government. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope. Since its founding in 2015, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or amicus curiae.

Second Amendment Foundation, Inc. is a nonprofit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including members in the State of Idaho. The purposes of SAF include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms set forth in the Second Amendment and various state constitutions.

Idaho Second Amendment Alliance, Inc. is a non-profit advocacy organization registered (and in good standing) with the Idaho Secretary of State. ISAA is a membership organization that is built around the principle that law-abiding citizens have an inalienable right to keep and bear arms for the defense of themselves, their family, their community, their state, and their nation. ISAA also advocates for the right to keep and bear arms for sporting purposes such as hunting and target practice. ISAA lobbies for changes in Idaho's gun laws to enhance those rights, clarify those

rights, and ensure that the political foundation for those rights remain intact. To that end, ISAA is committed to educating the public through various media on how, when, and where they may exercise their right to keep and bear arms. ISAA also accomplishes its mission through litigation, if necessary, to guarantee that governments at all levels (local, state, and federal) remain servants of the people and adhere to the constitutions that the people have ratified for their safety and protection. ISAA is not a publicly traded corporation.

The Federal Defender Services of Idaho, Inc. and the Federal Defenders of Eastern Washington and Idaho are nonprofit community defender organizations that provide indigent defense services to individuals charged with federal crimes in the District of Idaho and the Eastern District of Washington. They are devoted to the zealous defense of poor people charged with federal crimes at all phases of their criminal cases—pretrial, trial, sentencing, and post-conviction. Because prior Idaho state criminal proceedings often have a direct impact on their clients, FDSI and FDEWI work hard to maintain a high degree of competence in the interplay between Idaho state law and federal law, and they have a strong interest in ensuring that Idaho defendants receive a fair shake in state trial, appellate, and post-conviction proceedings. Assisting Idaho state courts in the fair, rational, and informed development of Idaho state criminal law—and helping inform Idaho state courts about the unexpectedly severe federal consequences that can sometimes arise from a particular development in state law—is a critical part of FDSI's and FDEWI's broader mission.

II. Introduction

This case concerns whether Antonio Gutierrez can validly be prosecuted in federal court for being a felon in possession of a firearm. In the early 2000s, Mr. Gutierrez was convicted of Idaho burglary and sentenced to a rider. In October 2003, after performing perfectly on probation,

the Idaho sentencing court entered an order under the authority of I.C. § 19-2604 reducing Mr. Gutierrez's felony burglary convictions to misdemeanor petit thefts. In its charge-reduction order, the state court expressly declared that Mr. Gutierrez was "not to be considered a convicted felon."

Nearly twenty years later, a federal grand jury charged Mr. Gutierrez with the crime of being a felon in possession of a firearm, because he had possessed a firearm after his (long-reduced) Idaho burglary convictions.

Before trial, Mr. Gutierrez moved to dismiss his federal felon-in-possession charge, arguing that the Idaho sentencing court's charge-reduction order meant he was not a felon. The federal district court refused to dismiss the charge, Mr. Gutierrez was convicted, and he then appealed.

On appeal, the Ninth Circuit recognized that the correct outcome of Mr. Gutierrez's case turned on an unresolved issue of Idaho state law—whether the state court's charge-reduction order in this case operated to restore Mr. Gutierrez's firearm rights. The Ninth Circuit accordingly certified the following question to this Court: whether an Idaho state court order reducing a defendant's judgment of conviction for a felony offense to a judgment of conviction for a different misdemeanor offense under the authority of I.C. § 19-2604(2) changes the operative conviction for the purposes of I.C. § 18-310, which prohibits the restoration of firearm rights to those citizens convicted of specific felony offenses.

On January 25, 2021, the Court permitted IACDL to submit an amicus brief, which it is now timely doing with the likeminded organizations listed above.

The answer to the certified question is yes. When a trial court enters a charge-reduction order under I.C. § 19-2604(2), the effect of that order is to "deem[]" the reduced charge to be a misdemeanor. I.C. § 19-2604(2) (when court amends judgment, "the amended judgment may be

deemed to be a misdemeanor conviction"); *see also Rich v. State*, 364 P.3d 254, 256 n.3 (Idaho 2015) (explaining that when a district court enters a charge-reduction order under I.C. § 19-2604(2) it thereby "deem[s] [the defendant's] judgment to be a misdemeanor conviction"). This, in turn, creates a "conclusive presumption" that the offense *is* a misdemeanor. *Striebeck v. Emp. Sec. Agency*, 366 P.2d 589, 536–37 (Idaho 1961) (when the law "deems" something to have occurred it creates a "conclusive presumption" that the thing did occur).

Under the Idaho Constitution, it is unlawful for the legislature to prohibit individuals convicted of misdemeanors from keeping and bearing arms. In fact, the Idaho Constitution expressly guarantees the individual right to keep and bear arms to everyone who is not a "convicted felon." Idaho Const. Art. I, § 11. If I.C. § 18-310 prohibits firearm possession by a person—like Mr. Gutierrez—whom the district court expressly declared "not to be considered a convicted felon," then it plainly runs afoul of the Idaho Constitution's mandate that the right to keep and bear arms "shall not be abridged" except for "possession of firearms by a convicted felon."

A ruling to the contrary would create significant legal problems. Mr. Gutierrez (like countless others in his position) received a court order clearly stating he is no longer considered a convicted felon. Expecting him to intuit that he is nevertheless to be treated as a convicted felon for firearm possession purposes would raise serious issues of fairness, due process, and notice.

III. Background

In the early 2000s, Antonio Gutierrez was convicted of burglary in Bannock County District Court. On October 27, 2003, the Bannock County District Court entered an order deeming those felony burglary convictions to be misdemeanor petit theft convictions. Under the terms of that order, the Bannock County District Court "REDUCED" Mr. Gutierrez's burglary convictions "to Misdemeanor Petit Theft" and ordered that Mr. Gutierrez "is not to be considered a convicted

felon." *United States v. Gutierrez*, 981 F.3d 660, 662 (9th Cir. 2020) (per curiam) (internal quotations marks omitted).

In 2018, Antonio Gutierrez was federally indicted for being a felon in possession of a firearm. *See id.* at 661. The indictment alleged that Mr. Gutierrez committed this crime by possessing a firearm after having been convicted of Idaho burglary in the early 2000s. *See id.* at 662. The 2018 federal felon-in-possession charge was thus predicated on Mr. Gutierrez's Idaho burglary convictions—which had since been reduced to misdemeanor convictions.

Before his federal trial began, Mr. Gutierrez moved to dismiss the felon-in-possession charge, arguing that he was not a felon when he possessed the firearm. *See id.* The federal district court denied this motion to dismiss, and Mr. Gutierrez was convicted of the felon-in-possession charge. *See id.* Mr. Gutierrez then appealed his conviction to the Ninth Circuit. *See id.*

The Ninth Circuit recognized that resolution of this question (whether Mr. Gutierrez was a felon when he possessed the firearm in question) turns on an issue of Idaho state law. *See id.* The Ninth Circuit therefore certified to this Court the question of whether the Idaho state court's order reducing Mr. Gutierrez's felony burglary convictions to misdemeanor petit theft convictions changed the operative convictions for the purposes of I.C. § 18-310. *See id.* at 664.

IV. Discussion

A. The operative statutory framework

I.C. § 18-310 governs restoration of civil rights—including firearm rights—to individuals convicted of Idaho crimes. The general rule is that a person convicted of "any Idaho felony shall be restored the full rights of citizenship." I.C. § 18-310(2). With one limited exception, the restoration of citizenship rights under I.C. § 18-310 is full and automatic.

The one limited exception concerns firearm rights. For individuals convicted of certain felony offenses—including Idaho burglary—I.C. § 18-310(2) bars automatic restoration, providing that "the right to ship, transport, possess, or receive a firearm shall not be restored." *Id.* For those individuals, I.C. § 18-310 provides a separate mechanism for firearm restoration: five years after final discharge of their sentence, a person convicted of an enumerated felony "may make application to the commission of pardons and parole to restore the civil right to ship, transport, possess or receive a firearm." I.C. § 18-310(3).

The crucial point here is that whether an individual's firearm rights are automatically restored under I.C. § 18-310—or whether, instead, I.C. § 18-310's ban on firearm possession applies—turns on whether that individual has a conviction for one of its enumerated felonies.

In many cases, determining whether a person has an enumerated felony conviction is as simple a matter as examining their prior convictions. But not always. That's because a separate provision of Idaho law—I.C. § 19-2604—provides a mechanism for amending a person's prior criminal judgments and convictions. Section 19-2604 governs the "amendment of judgment," i.e., the power of Idaho district courts to dismiss or reduce convictions after they are entered. Subsection (1) of I.C. § 19-2604 empowers courts, in certain circumstances, to set aside a defendant's guilty plea and dismiss the case—which "shall have the effect of restoring the defendant to his civil rights." Subsection (2), for its part, permits district courts to deem the felony convictions of certain defendants—those subject to the retained jurisdiction of the district court—to be misdemeanors. *See Rich*, 364 P.3d at 256 n.3 (noting that when a district court exercises its I.C. § 19-2604(2) charge-reduction authority it "deem[s] [the defendant's] judgment to be a misdemeanor conviction"). While deeming a felony to be a misdemeanor does not restore all the defendant's civil rights—misdemeanants, for example, continue to have a number of occupational

license restrictions[2]—it does create a "conclusive presumption" that the defendant is not a felon. *Striebeck*, 366 P.2d at 536–37.

Structurally, I.C. § 19-2604 and I.C. § 18-310 dovetail with each other. I.C. § 19-2604 largely governs charge-reduction and civil-rights restoration for individuals subject to the continuing jurisdiction and supervision of the district court. Section 19-2604(1) authorizes the district court to dismiss counts of conviction for individuals who perform well on probation and thereby demonstrate there is "good cause for granting the requested relief." I.C. § 19-2604(1). Section 19-2604(2) operates similarly, authorizing the court to reduce a defendant's charges—and deem them misdemeanors—when that defendant has successfully completed both the retained-jurisdiction and probationary piece of his sentence. § 19-2604(2). In both of these cases, the defendant will have been under the continuous jurisdiction and monitoring of the district court, which is thus best suited to decide whether—and to what extent—their charges should be reduced, and their civil rights restored.

By contrast, I.C. § 18-310(3) governs rights restoration for defendants who are ineligible for charge-reductions under I.C. § 19-2604, either because they performed poorly on probation or because they were sentenced to the custody of the Idaho Department of Correction (IDOC). When such individuals apply for firearm-rights restoration, they will necessarily have long been out from under the jurisdiction of the district court. This is why I.C. § 18-310(3) vests authority to decide whether to restore their firearm rights not with the court but instead with the Commission.

Operating in tandem, then, I.C. § 19-2604 and I.C. § 18-310(3) create a rational division of labor between the court system and the Commission. The court controls charge-reduction and

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[2] *See generally* Lindsay Atkinson, Idaho Freedom Foundation, *Lockdown to Liberty: How to help Idahoans trying to rebuild their lives*, available at: https://idahofreedom.org/wp-content/uploads/2019/12/LockdowntoLiberty.full_.pdf.

any accompanying firearm-right restoration for individuals under its continuing jurisdiction. For those who are *not* under its jurisdiction, by contrast, the application is made to the Commission.

B. Interpreting I.C. § 18-310 to prohibit individuals whose felonies are reduced to misdemeanors under I.C. § 19-2604(2) would cause § 18-310 to run afoul of the right to keep and bear arms enshrined in the Idaho Constitution.

For the reasons explained in this section, if a person's felony conviction is reduced to a misdemeanor under I.C. § 19-2604(2), then the Idaho Constitution prohibits the legislature from banning them from possessing firearms. Thus, interpreting I.C. § 18-310 to prohibit firearm possession by individuals whose felonies have been reduced would cause § 18-310 to run afoul of the Idaho Constitution. Here's why.

1. The Idaho Constitution's guarantee of the individual right to keep and bear arms cannot be abridged except in cases involving convicted felons.

First, the Idaho Constitution guarantees an individual right to keep and bear arms to everyone except convicted felons. This guarantee is located in article 1, section 11, which reads as follows:

> The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration, or a special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

Idaho Const., Art. 1, § 11.

The right guaranteed under article 1, section 11—like its federal counterpart—is an *individual* right. *See in re Brickey*, 70 P. 609, 609 (Idaho 1902); *see also District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("[T]he Second Amendment confer[s] an individual right to keep and bear arms."). As an individual right, it imposes a corollary responsibility on the legislature; in

general, "the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho." *In re Brickey*, 70 P. at 609; *see also State v. Woodward*, 74 P.2d 92, 95 (Idaho 1937) ("Under the Constitution, the right to bear arms may not be denied by the Legislature."). And the scope of this right is broad: the legislature can prohibit only one category of individuals from possessing firearms—"convicted felon[s]."

The Idaho right to keep and bear arms was not always as broad as it is today. When article 1, section 11 was first enacted, it contained a more limited right to possess firearms. It initially provided that "[t]he people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law." Former Idaho Const. Art. 1, § 11. This right was greatly expanded in 1978, when the citizens of Idaho overhauled article 1, section 11 and thereby carefully limited the legislature's authority to regulate firearm possession. The purpose of amending article 1, section 11 was to "set[] out ways in which the legislature may and may not regulate firearms." State of Idaho, Office of Att'y Gen., Opinion No. 86-5, 1986 WL 193882, at *1 (July 2, 1986).

While section 11 initially left it up the legislature to decide how to regulate the possession of firearms, the clause now deliberately circumscribes the ways in which the legislature can—and cannot—regulate firearm possession. In particular, the legislature can 1) regulate the carrying of concealed weapons; 2) authorize sentencing enhancements for people who possess firearms when they commit crimes; and 3) proscribe certain firearm uses. Additionally, section 11 allows the legislature to prohibit one (and only one) group of people from possessing firearms—"convicted felon[s]." *Id.* All other people retain "the right to keep and bear arms"—a right that "shall not be abridged." *Id.*

2. **Reading I.C. § 18-310 to prohibit individuals whose felony convictions are reduced to misdemeanors from possessing firearms would abridge their Idaho constitutional right to keep and bear arms.**

In light of the Idaho Constitution's individual guarantee of the right to keep and bear arms to everyone except convicted felons, interpreting I.C. § 18-310 to prohibit firearm possession by those whose felony convictions have been reduced to misdemeanors under I.C. § 19-2604(2) would violate the Idaho Constitution.

Mr. Gutierrez's situation provides a clear example of why this is so. In Mr. Gutierrez's case, the Bannock County District Court reduced his felony convictions to misdemeanors and specifically decreed that he was "not to be considered a convicted felon." *Gutierrez*, 981 F.3d at 662 (internal quotation marks omitted). If I.C. § 18-310 prohibits firearm possession by a person expressly declared "not to be considered a convicted felon," then it plainly runs afoul of Idaho's guarantee of the individual right to keep and bear arms to every individual except "convicted felon[s]."

Mr. Gutierrez's case also illustrates a broader legal point: the recipient of an I.C. § 19-2604(2) charge-reduction order is no longer a "convicted felon." The text of I.C. § 19-2604(2)—and background principles of law—show this to be true.

First, the text. I.C. § 19-2604(2) provides that when a court amends a defendant's felony conviction under that provision, that conviction "may be deemed to be a misdemeanor conviction." *Id.* § 19-2604(2); *accord Rich*, 364 P.3d at 256 n.3 (effect of order under I.C. § 19-2604(2) is to "deem[] [a felony] judgment to be a misdemeanor conviction"). Under well-established interpretive principles in Idaho, when one thing is "deemed" to be another, the effect of that is to create a "conclusive presumption" in favor of the thing deemed to be true. *Striebeck*, 366 P.2d at 536–37. Thus, when a felony conviction is deemed to be a misdemeanor, the effect is to create a conclusive presumption that it *is* a misdemeanor. If I.C. § 18-310 prohibits a person whose felony

conviction has been "deemed a misdemeanor conviction"—i.e., has been conclusively presumed to be a misdemeanor conviction—from possessing firearms, I.C. § 19-2604(2), then it violates the Idaho Constitution by abridging the firearm rights of a non-felon.

The government may argue that Mr. Gutierrez remained a prohibited person under I.C. § 18-310(2) because, even though his charges were reduced from felony burglaries to misdemeanor petit thefts (and even though the district court declared he was "no longer a convicted felon"), he nonetheless had once been convicted of felony burglary. But the Idaho Constitution does not authorize the legislature to prohibit firearm possession by those who *have been convicted of felonies*; it only authorizes the legislature to strip firearm rights from "convicted felons." It would be an end run around the Idaho Constitution to hold that a person deemed to have been convicted only of misdemeanor petit theft—a person who has been declared "not . . . a convicted felon"—can be prohibited from possessing a firearm because he once pled guilty to a felony. If I.C. § 18-310 prohibits Mr. Gutierrez from possessing a firearm based on his Bannock County convictions, then it abridges his right to bear arms and violates the Idaho Constitution.

3. Because interpreting I.C. § 18-310 to bar recipients of I.C. § 19-2604(2) charge-reduction orders from possessing firearms would create constitutional problems, this Court should hold that people whose felony convictions are reduced to misdemeanors automatically have their firearm rights restored.

Applying the rule of constitutional avoidance, this Court should avoid creating constitutional problems by interpreting I.C. § 18-310 not to bar firearm possession by people, like Mr. Gutierrez, whose charges have been reduced under I.C. § 19-2604(2). "[I]n deference to the Legislature of the state," this Court "assume[s] that it did not overlook the provisions of the Constitution" when it enacted a statute. *State v. Olivas*, 347 P.3d 1189, 1194 (Idaho 2015) (quoting *Grice v. Clearwater Timber Co.*, 117 P. 112, 114 (Idaho 1911)). This doctrine—the "rule of

constitutional avoidance"—"encourages courts to interpret statutes so as to avoid unnecessary constitutional questions." *Miller v. Idaho State Patrol*, 252 P.3d 1274, 1282 (Idaho 2011).

In particular, the rule of constitutional avoidance requires that "[w]henever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction *will be* adopted by the courts." *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041, 1047 (Idaho 2017) (emphasis added) (internal quotation marks omitted). The rule creates a "*strong* presumption of the validity of an ordinance, and an appellate court is *obligated* to seek an interpretation of a statute that upholds its constitutionality." *State v. Hellickson*, 24 P.3d 59, 61 (Idaho 2001) (emphases added) (internal quotation marks omitted).

I.C. § 18-310 can easily be interpreted to harmonize it with article 1, section 11 of the Idaho Constitution. Indeed, the constitutionally permissible interpretation of I.C. § 18-310 is also the interpretation best supported by the text and structure of Idaho law.

a. The text of sections 18-310 and 19-2604 most naturally bear a constitutionally permissible construction.

First, the text of the operative statutory scheme supports an interpretation on which the recipient of an I.C. § 19-2604(2) charge-reduction order thereby has his firearm rights automatically restored.

Section 18-310 concerns the effect of felony convictions[3] on individuals' civil rights. Section 18-310(1) provides that such a conviction temporarily "suspends all . . . civil rights." I.C. § 18-310(1). Section 310(2) sets forth the conditions on which those suspended civil rights "shall be restored":

[3] Section 18-310 relates to defendants in the custody of the Idaho Board of Correction. *See* I.C. § 18-310(1). A defendant so placed is by definition a felon. *See State v. Horejs*, 141 P.3d 1129, 1135 (Idaho Ct. App. 2006).

> Upon final discharge, a person convicted of any Idaho felony shall be restored the full rights of citizenship, except that for persons convicted of treason or [other] . . . enumerated . . . offenses the right to ship, transport, possess or receive a firearm shall not be restored.

I.C. § 18-310(2).

The triggering condition for I.C. § 18-310(2)'s continuing firearm prohibition is a felony conviction. *See also* I.C. § 18-310(4) (characterizing I.C. § 18-310(2) as addressing restoration of firearm rights for "Idaho felon[s]" and setting forth the mechanism by which an out-of-state felon can have his firearm rights restored). To avoid an unconstitutional interpretation of I.C. § 18-310, then, the Court need only hold that it does not apply to recipients of charge-reduction orders under I.C. § 19-2604(2) because—once the charge-reduction order is entered—those individuals are not Idaho felons and no longer have felony convictions.

That interpretation best honors the legislature's intent. In enacting I.C. § 19-2604, the legislature wanted to create a mechanism by which judges can give relief from a felony conviction. I.C. § 19-2604 itself says that subsections (1) and (2) of that statute describe "the circumstances in which *relief from a felony conviction may be granted*." I.C. § 19-2604(3)(a) (emphasis added). So does legislative history. *See* 2013 I.D. S.B. 1151 (NS) (Apr. 5, 2013) (describing I.C. § 19-2604 as "relating to when relief from a felony conviction may be granted").

By contrast, the unconstitutional interpretation of I.C. § 18-310 is implausible and fails to honor legislative intent. In its briefing before the Ninth Circuit, the United States argued that an interpretation of I.C. § 18-310(2) that allows recipients of I.C. § 19-2604(2) charge-reduction orders to possess firearms can be sustained only by "ignor[ing]" I.C. § 18-310. Brief for United States, United States v. Gutierrez, 981 F.3d 550 (9th Cir. 2020) (No. 19-30107) (Apr. 10, 2020), 2020 WL 2061105 (hereinafter "Gov't 9th Cir. Br."), at *22. After all, the government contended, I.C. § 18-310 "specifically identifie[s] burglary"—Mr. Gutierrez's prior conviction—"as one of

the crimes for which [firearm] restoration is not automatic." *Id.* at *22–23. And § 18-310(3) sets out a mechanism for an individual convicted of burglary to restore their firearm rights: applying to the Commission. *See id.*

But not only does the government's preferred interpretation create constitutional problems, it also simply misunderstands how I.C. § 18-310 is supposed to work. I.C. § 18-310(2) is intended to carve out a well-defined exception to automatic restoration of firearm rights for certain convicted felons. The condition precedent for application of I.C. § 18-310(2)'s firearm bar is thus a current operative felony conviction for one of that section's enumerated offenses. A person whose judgment has been amended, under I.C. § 19-2604(2), from a felony to a misdemeanor is no longer an Idaho felon. Holding that such a person has had his firearm rights restored does not "ignore" I.C. § 18-310; instead, it honors I.C. § 18-310's text and harmonizes I.C. § 18-310, I.C. § 19-2604(2), and the Idaho Constitution.

Mr. Gutierrez's case underscores this dynamic. The district court's order reducing Mr. Gutierrez's charges from felony burglary to misdemeanor petit theft had the necessary effect of canceling out his felony burglary conviction—meaning he could no longer be considered a felon with a burglary conviction. Yet the government would have this Court hold that he was exactly that, as I.C. § 18-310(2) would prohibit him possessing a firearm only if he were still considered a felon with a burglary conviction. The government's argument thus has the textually unsupportable consequence that a person with only a misdemeanor petit theft conviction could be prohibited from possessing a gun—even though § 18-310(2) makes no mention of petit theft or any other misdemeanor.

In its briefing to the Ninth Circuit, the government also suggested that its interpretation of I.C. § 18-310 found support in *Rich*. *See* Gov't 9th Cir. Br. at *23. This is a misreading of *Rich*.

Rich concerned a person who had been convicted of rape, whose rape conviction had later been reduced to a misdemeanor under I.C. § 19-2604(2), and who subsequently moved to Pennsylvania and wanted to purchase a firearm. Unsure whether his Idaho crime made him a prohibited person, Mr. Rich sought a declaratory judgment from the district court that his firearm rights had been restored under Idaho law. 364 P.3d at 254. The district court dismissed the case "on two alternative grounds": 1) lack of standing, and 2) the district court's theory that "even though Mr. Rich's conviction was reduced to a misdemeanor, it does not change that he was convicted of rape." *Id.* at 255.

On appeal, Mr. Rich made a procedural mistake: he challenged only *one* of the two alternative grounds for his lawsuit's dismissal—the district court's ruling that he lacked standing. *Id.* Mr. Rich thus left the district court's alternative holding—that his receipt of an I.C. § 19-2604(2) charge-reduction order did not change the operative conviction for purposes of I.C. § 18-310(2) —uncontested. This Court thus felt *obligated* to affirm based on that uncontested ruling—not because of any assessment of the *merits* of that ruling, but due to the rule of appellate procedure that "[w]here a lower court makes a ruling based on two alternative grounds and only one of those grounds is challenged on appeal, the appellate court must affirm on the uncontested basis." *Id.* (quoting *State v. Grazian*, 164 P.3d 790, 797–98 (Idaho 2007)). *Rich* describes—in a footnote—the theory underlying the district court's ruling, 364 P.3d at 255 n.3, but it correctly takes no position on that theory's merit. The government's attempt to suggest otherwise is an effort to ascribe to this Court an interpretive commitment it has not made.[4]

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[4] Additionally, to the extent the *Rich* footnote articulates a conclusion, rather than simply describing a theory, it is clearly dicta, as the Court's holding rested entirely on the forfeiture problem mentioned above. *See Petersen v. State*, 393 P.2d 585, 587 (Idaho 1964) (explaining that

b. Mr. Gutierrez's interpretation of I.C. § 18-310(2) finds support in California's approach to its similar statutory scheme.

Mr. Gutierrez's interpretation of I.C. § 18-310(2) finds support in the approach California takes to its analogous statutory scheme. Like Idaho, California has a statutory provision permitting its trial courts to reduce felony convictions to misdemeanors under certain circumstances. *See* Cal. Penal Code § 17. Again, like Idaho, California has a separate statutory provision barring felons from possessing firearms. *See* Cal. Penal Code § 12021(a)(1). And, echoing I.C. § 18-310(3), California has a separate statutory provision dealing with restoration of firearm rights to convicted felons—and vesting that authority not in the courts, but with a non-judicial body (in this case, the governor). *See* Cal. Penal Code § 4854.

In all pertinent respects, California's charge-reduction scheme is functionally identical to Idaho's. The law provides that a crime "is a misdemeanor for all purposes" if "at the time of granting probation, or on an application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." Cal. Penal Code § 17. Idaho's analogous provision—empowering a court to "deem[]" a felony conviction a misdemeanor—has the exact same effect of making that conviction a misdemeanor conviction for all purposes. I.C. § 19-2604(2); *see Striebeck*, 366 P.2d at 536–37.

California courts have addressed the statutory scheme—and held that the recipient of a charge-reduction order ceases to be a felon. "[T]he reduction of [an] earlier offense to a

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a discussion in a previous appellate opinion was dicta with respect to authorities that did not "play[] a role in the ultimate decision of the court"). The Court is not bound by dicta from its previous decisions. *See City of Weippe for Use and Benefit of Les Schwab Tire Ctrs. of Idaho, Inc. v. Yarno*, 528 P.2d 201, 205 (Idaho 1974). And it would be especially inappropriate to allow the dicta in question to control the analysis here when *Rich* did not even consider the serious constitutional implications outlined in this brief. In other words, if the Court relies now on the dicta from *Rich* it will curtail Idahoans' constitutional rights based entirely on an opinion that never even considered such rights.

misdemeanor preclude[s] using it as the predicate offense to the charge that defendant was a felon in possession of a firearm." *People v. Gilbreth*, 156 Cal. App. 4th 53, 57 (2007). Instead, once a section 17 charge-reduction order is entered, its recipient "stands convicted of a misdemeanor, not a felony[.]" *Id.*

Unlike Idaho, California's Constitution contains no guarantee of the right to keep and bear arms. *See Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000) ("If plaintiffs are implying that a right to bear arms is one of the rights recognized in the California Constitution's declaration of rights, they are simply wrong."). Thus, unlike in Idaho, the California courts have no constitutional reasons to favor the construction of their firearm-prohibition scheme that they have adopted. That they nonetheless understand charge-reduction orders to automatically restore firearm rights is persuasive evidence that Idaho's similar statutory scheme can and should be understood in the exact same way—especially in light of the unique constitutional dimensions to the interpretive problem here.

c. The relationship between the courts and the Commission supports interpreting I.C. § 18-310 to automatically restore firearm rights to those who receive a charge-reduction order under I.C. § 19-2604(2).

The broader structure of Idaho law also supports Mr. Gutierrez's view that an I.C. § 19-2604(2) charge-reduction order automatically restores firearm rights. Properly understood, I.C. § 18-310 and I.C. § 19-2604 represent the legislature's rational allocation of authority between the Commission and the judiciary.

When an offender remains under the jurisdiction of the court—and when the court is tasked with supervising and evaluating the offender's performance and rehabilitation—I.C. § 19-2604 gives the court authority to decide whether that offender has earned a measure of relief from his original conviction (either dismissal of the charges, *see* I.C. § 19-2604(1), or their reduction from

a felony to a misdemeanor, § 19-2604(2)). By contrast, when an offender has been placed in the custody of IDOC—or if he has already completed serving his sentence—then I.C. § 18-310(3) gives the Commission authority to decide whether that offender should receive relief. *See, e.g.*, I.C. § 18-310(3).

This allocation of authority is sensible. Idaho courts are best positioned to evaluate the rehabilitation of individuals on probation or otherwise subject to their retained jurisdiction. Because the courts are charged with monitoring these individuals' progress, the courts have both an informational and relationship advantage over the Commission in deciding to what extent an individual's charges should be reduced or dismissed (and all or certain civil rights thereby restored).

By contrast, the rehabilitation of individuals *not* under the supervision of the court is best measured by the Commission, whose job is to perform "risk assessment[s]" and otherwise gauge the rehabilitation of those who have been placed in the custody of IDOC or are otherwise not under the supervision of the courts. I.C. § 20-223(5). Once a court is no longer supervising an offender, it is poorly positioned to undertake the flexible, nuanced, evidence-based evaluation of their rehabilitation that is required to assess whether—and to what extent—their criminal record should be mitigated and their rights restored. But as long as a court is actively supervising an offender, it has the informational advantage over the Commission.

Mr. Gutierrez's interpretation of I.C. § 18-310 operationalizes the allocation of authority between Commission and court that sections 18-310 and 19-2604 are intended to accomplish. Under his interpretation, the Commission plays an important role in evaluating whether *one group* of offenders—those not subject to the courts' continued jurisdiction—should have their firearm rights restored. But courts also retain a role in this assessment in that they can evaluate whether

individuals under their supervision have proven themselves worthy of having their conviction reduced from a felony to a misdemeanor—or dismissed outright. Properly understood, I.C. § 18-310 and I.C. § 19-2604 harmonize to accomplish the same underlying objective: enabling the prudent restoration of crucially important constitutional rights to people who deserve a second chance.

An intertextual analysis of I.C. § 18-310 and I.C. § 19-2604 confirms this structural point. The default rule under I.C. § 18-310 is automatic restoration of firearm rights. Sections 18-310(2) and (3) then carve out a limited exception to automatic restoration for individuals convicted of certain enumerated felonies—categorically barring them from restoration for at least a five-year period. Section 19-2604 thus provides an additional remedy for certain individuals who would otherwise be subject to I.C. § 18-310(2) and (3)'s bar on automatic restoration: it gives sentencing courts authority to grant post-sentencing, charge-reduction relief to defendants who have performed well on probation so as to encourage and reward rehabilitation.

Since I.C. § 19-2604 is a remedial statute, it should be construed "broadly 'to satisfy [its] remedial purposes.'" *Smith v. Glenns Ferry Highway Dist.*, 462 P.3d 1147, 1157 (Idaho 2020) (quoting *Eller v. Idaho State Police*, 443 P.3d 161, 170 (2019)); *see also Bennett v. Bank of E. Or.*, 472 P.3d 1125, 1137 (Idaho 2020) (Idaho's quiet title statute is a remedial statute, "hence, it should be broadly construed."). Section 19-2604 charge-reduction orders remove their recipients from the limited ambit of IC 18-310's exception to automatic restoration of firearm rights and place them squarely back within its default rule.

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The rule of constitutional avoidance calls on this Court to adopt an interpretation of I.C.

§ 18-310(2) that does not abridge the people's right to keep and bear arms. This can only be achieved by avoiding an interpretation that would bar non-felons from possessing firearms. For reasons of text and structure, such an interpretation is available to the Court—and the Court should adopt it.

C. Mr. Gutierrez's interpretation of I.C. § 18-310(2) would advance both the rule of law and the fair administration of justice.

Finally, more sweeping constitutional considerations—and administration-of-justice concerns—favor Mr. Gutierrez's interpretation of I.C. § 18-310(2). Prosecuting a person for being a felon-in-possession even though his burglary convictions have been reduced to misdemeanor petit thefts—and even though a court has told him he is "not to be considered a convicted felon"—raises due process problems. Felon-in-possession is a status-based crime; it is "the defendant's *status*" as a felon, "and not his conduct alone, that makes the difference." *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019) (emphasis in original). Concomitantly, the defendant's knowledge of that status is crucial to his culpability. "Without knowledge of that status, the defendant may well lack the [general criminal] intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.*

If this Court were to answer the certified question against Mr. Gutierrez, the ultimate consequence would go beyond punishing Mr. Gutierrez for a status he was unaware of, though that would be enough to transgress *Rehaif* standing alone. Rather, the district court's I.C. § 19-2604(2) charge-reduction order *affirmatively told him* that he was *not* a convicted felon. The government's suggestion that—despite this order—Mr. Gutierrez remained a felon thus invites the Court to inject an element of a "gotcha" game into the Idaho Code. The court may reduce a person's charges, deem his crime a misdemeanor, and affirmatively advise him that he is not to be considered a felon—and yet, under a separate provision of Idaho law, that person continues to be

considered a felon. This is unfair, and it undermines the rule of law. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (explaining how it violates due process when the law "lulls the potential defendant into a false sense of security").

Further, the government's proposed interpretation would impose significant costs on the administration of justice with no commensurate public-safety gains. At the federal level, prosecuting recipients of I.C. § 19-2601(2) charge-reduction orders tends to give rise to costly litigation. The procedural history before the Court now is illustrative. That is, the government's decision to charge Mr. Gutierrez with felon-in-possession has given rise to extensive litigation ultimately consuming the resources of the federal district court, the Ninth Circuit, and this tribunal. Now that the United States Supreme Court has ruled, in *Rehaif*, that a person can only be federally prosecuted for felon-in-possession if he *knew* his status as a felon at the time he possessed the firearm, such costly litigation will only intensify if this Court holds that charge-reduction orders under I.C. § 19-2601(2) do not automatically restore firearm rights, increasing the burden on taxpayer-funded institutions in an area of law where such burdens are already high. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 252 n.16 (2020) (calculating that since 2008 "the federal statute prohibiting felons from possessing firearms . . . has been the most challenged law under the Second Amendment" and providing in support fifty-four citations to cases from the U.S. Courts of Appeal).

And for what gains? People whose charges are reduced under I.C. § 19-2604 are among the least serious offenders. They are individuals who were placed on probation and whose rehabilitation persuaded the court that they merited a sentence reduction and the vacation of their felony conviction. These are individuals who have demonstrated their rehabilitation, and it makes

sense to allow them to possess firearms. While such individuals should certainly be prosecuted if they commit future non-status crimes, prosecuting them simply for possessing a firearm is a poor use of judicial resources. There is no reason to open these floodgates here—and abundant good reason, sounding in both textual interpretation and constitutional avoidance, to keep them closed.

This is not a small problem. The floodgates at issue are substantial. For starters, felon-in-possession charges under the statute invoked against Mr. Gutierrez, 18 U.S.C. § 922(g), are among the most commonly prosecuted offenses in federal court. *See* U.S. Sentencing Commission, *Quick Facts, Felon in Possession of a Firearm*[5] (noting that the Department of Justice obtained roughly 7,600 felon-in-possession convictions in 2019, more than 10% of the total convictions for that year). Idaho is no exception, as § 922(g) cases are routinely pursued here. *See, e.g.*, *United States v. Hottel*, No. 4:17-cr-015, 2020 WL 534041, at *1 (D. Idaho Feb. 3, 2020); *Bernal v. United States*, No. 1:17-cr-250, 2020 WL 497152, at *1 (D. Idaho Jan. 30, 2020); *United States v. Smith*, No. 4:19-cr-304, 2019 WL 6718082, at *1 (D. Idaho Dec. 10, 2019); *United States v. Davis*, No. 1:18-cr-046, 2019 WL 112771, at *1 (D. Idaho Jan. 4, 2019), *aff'd*, 806 F. App'x 572 (9th Cir.) (per curiam), *cert. denied*, 141 S. Ct. 386 (2020); *Ward v. United States*, No. 1:16-cv-282, 2017 WL 2216394, at *2 (D. Idaho May 18, 2017), *aff'd*, 936 F.3d 914 (9th Cir. 2019). And as the case at bar highlights, the Court's account of Idaho law will impact prosecutions in other places, too, when defendants convicted here leave the state.

The federal law at issue here intersects in the instant case with a frequently litigated area of Idaho law. A defendant is eligible to apply for relief under § 19-2604(2) by the statute's plain terms whenever his sentence has been suspended during the first year of custody and he has

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[5] Available at https://bit.ly/2M79mMB.

successfully completed probation. As the Court knows, that describes a large number of Idahoans in the criminal justice system. Indeed, the Court's data reflect that 126 defendants successfully applied for reductions under § 19-2604(2) between 2015 and 2020 alone. *See* Ex. 1.[6] Furthermore, the list of offenses for which a defendant does not automatically regain firearms rights upon discharge—and thus the list of offenses for which § 19-2604(2) is relevant here—includes several of the most popularly pursued offenses in the state, including the charge at issue in this case: burglary. *See* I.C. § 18-310(2). In addition, Idaho has a strong gun-enthusiast community. According to a recent report by the Rand Corporation, between 1980 and 2016, a firearm was owned in over 60% of all households in Idaho, which was fourth among all states. *See* Terry L. Schell, *State-Level Estimates of Household Firearm Ownership* 21 RAND (2020), available at https://www.rand.org/pubs/tools/TL354.html; *see also* Stephanie Pagones, *More than 23M firearms sold, over 21M gun background checks conducted in 2020*, FOXBUSINESS.COM, available at https://www.foxbusiness.com/lifestyle/gun-background-checks-2020-record-firearms (Jan. 5, 2021).

In short, the government's reading of § 19-2604(2) unjustifiably strips from scores of Idahoans a right that is dear to large swaths of the state's population.

V. Conclusion

Amici respectfully ask the Court to answer the certified question in Mr. Gutierrez's favor. Where an Idaho state court has ordered a conviction for felony burglary reduced to a judgment of conviction for misdemeanor petit theft under I.C. § 19-2604(2), that order changes the operative conviction for the purposes of I.C. § 18-310—meaning such a person's firearm rights are restored.

[6] Exhibit 1 was provided to undersigned counsel by the Administrative Office of the Courts upon their request.

Respectfully submitted this 22nd day of February 2021.

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Jonah Horwitz

/s/ Craig Durham
Craig Durham

/s/ Brian McComas
Brian McComas

On behalf of IACDL

/s/ Joseph G.S. Greenlee
Joseph Greenlee
On behalf of FPC

/s/ Alexandria Kincaid
Alexandria Kincaid
On behalf of SAF and
ISAA

/s/ Miles Pope
Miles Pope
On behalf of FDSI

/s/ Houston Goddard
Houston Goddard
On behalf of FDEWI

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February 2021, I caused a true and correct copy of the foregoing document to be served as follows:

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Exhibit 1
(Idaho Supreme Court Statistics Regarding I.C. § 19-2604 Orders)

Orders for 19-2604 in Idaho Courts

By Calendar Year

Number of Specific Orders Entered- by Order Event Code

Code	Event Description	2015	2016	2017	2018	2019	2020
OAMJ	Order Amending Judgment 19-2604	4	7	9	30	71	54
OAJMA	Order Amending Judgment to Misdemeanor 19-2604(2)(a)	3	2	3	19	39	34
OAJMB	Order Amending Judgment to Misdemeanor 19-2604(2)(b) SC	1	0	2	6	6	11
		8	**9**	**14**	**55**	**116**	**99**

Number of Generic Order Event Codes Entered- with a comment for Order of 19-2604

	2015	2016	2017	2018	2019	2020
Generic Order Event- Comment for Order of 19-2604	247	228	231	188	154	166
Combined Total	**255**	**237**	**245**	**243**	**270**	**265**

NOTE: *Considering the number of generic event code options available and used, these numbers are less than precise. Relying on event code comments is not ideal data collection.*

Generic Order Event Codes Included:

Code	Description
MINO	Minute Entry and Order
MNO	Motion and Order
ODCSAGP	Order Dism Case, Setting Aside Guilty Plea
ODSCP	Order to Dismiss (Specialty Court Application)
OFER	Order for Early Release
OGMFR	Order Granting Motion For Relief
OMSADJ	Order on Motion to Set Aside Default Judgment
OOM	Order on Motion
ORD	Order
ORDM	Order of Dismissal
ORDPTP	Order Releasing Defendant from Probation &Terminating Prob
ORDR	Order
ORMP	Order on Request to Modify Probation
ORTP	Order Terminating Probation
OWGPDC	Order Withdrawing Guilty Plea and Dismissing the Case
PROD	Order of Discharge from Probation

Generic Order Event Codes Not Included:

PROP	Proposed Order
PROPORD	Proposed Order
PTSTIPO	Pretrial Stipulation and Order
SCHOR	Scheduling Order
ORDD	Order Denied
ODENY	Proposed Order Denied