No. 25-325

IN THE
# Supreme Court of the United States

ROBERT L. FOOKS,
*Petitioner*,

v.

STATE OF MARYLAND,
*Respondent*.

**On Petition for Writ of Certiorari to the Supreme Court of Maryland**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In 2021, the State of Maryland charged petitioner Robert L. Fooks with stealing thirteen firearms and unlawfully possessing them as a prohibited person due to a prior criminal conviction. Mr. Fooks ultimately pleaded guilty to two counts of possessing a handgun in violation of Section 5-133(b)(2) of the Public Safety Article of the Maryland Code. That statute provides that "a person may not possess a regulated firearm"—which includes handguns—if the person "has been convicted of a violation classified as a common law crime and received a term of imprisonment of more than 2 years." Md. Code Ann., Pub. Safety § 5-133(b)(2). The question presented is:

Does the Second Amendment prohibit the State from punishing Mr. Fooks for possessing firearms after having been convicted of a common-law crime and sentenced to more than two years' incarceration, where the firearms at issue did not belong to him and were evidently stolen?

## PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The caption of the case lists all parties. The petitioner's list of directly related proceedings is complete and correct.

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## STATEMENT

### The Charges and Mr. Fooks's 2016 Conviction for Constructive Criminal Contempt

In January 2021, the State of Maryland charged Mr. Fooks with one count of theft, three counts of possessing a "regulated firearm" in violation of Public Safety § 5-133(b)(2), and ten counts of possessing a rifle or shotgun in violation of Public Safety § 5-205(b)(2). App. 240a-246a, 248a.[1]

With respect to the theft charge, "the State accused Mr. Fooks of stealing several firearms from a relative and selling them at pawn shops." *Id.* at 67a. Specifically, the statement of charges alleged that Mr. Fooks "did steal firearms property of Johnnie Artis

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[1] The "Firearms" title of the Public Safety Article of the Maryland Code contains two similar prohibitions on the possession of firearms that address different types of firearms. Public Safety § 5-133, codified under the "Regulated Firearms" subtitle, prohibits the possession of "regulated firearms" by individuals with certain criminal convictions or other disqualifications. The Maryland Code defines "regulated firearm" as including all handguns (among other enumerated weapons). Pub. Safety § 5-101(r)(1). Public Safety § 5-205, codified under the "Rifles and Shotguns" subtitle, similarly prohibits the possession of rifles and shotguns by individuals with certain criminal convictions or other disqualifications.

Here, as part of the plea agreement that Mr. Fooks accepted, the State dropped the charges alleging that he unlawfully possessed rifles and/or shotguns. Thus, on appeal, the parties and the Supreme Court of Maryland focused on the constitutionality of the statute under which he was convicted, Public Safety § 5-133(b)(2). In his petition before this Court, Mr. Fooks again challenges only Public Safety § 5-133(b)(2). Pet. *i.*

having a value of at least $1,500 but less than $25,000." *Id.* at 73a. In response to a pretrial motion that Mr. Fooks filed, the State further alleged that Mr. Artis had reported the guns stolen after he had asked Mr. Fooks "to move some guns to [a] shed for him" and later asked Mr. Fooks "to retrieve the guns and bring them in the house," but "Mr. Fooks stated that he could not retrieve the guns." *Id.* at 73a-74a. The police investigated the guns' disappearance and discovered that "Mr. Fooks had pawned [Mr. Artis's missing] 13 firearms." *Id.* at 74a.

It was undisputed that Mr. Fooks was prohibited by Public Safety § 5-133(b)(2) from possessing a handgun based on a prior conviction. Specifically, in 2016, he was convicted of constructive criminal contempt, a common-law offense, in connection with a child support matter. App. 6a. For that offense, he was sentenced to a term of imprisonment of four years and six months. *Id.*

From the beginning of this case, Mr. Fooks has persistently claimed that he was "disqualified from possessing firearms *solely* for the *failure* to pay child support." *Id.* at 214a (emphasis added); *see also* Pet. 3 ("Mr. Fooks's prior conviction for constructive criminal contempt [was] for failure to pay child support . . . ."). The Supreme Court of Maryland ultimately observed that in characterizing his disqualifying[2] conviction this way, Mr. Fooks was

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[2] Public Safety § 5-133(b)(1) prohibits a person from possessing a regulated firearm after having been convicted of a "disqualifying crime," a term of art that Public Safety § 5-101(g) defines to include "(1) a crime of violence; (2) a violation classified as a felony in the State; or (3) a violation classified as

"attempt[ing] to trivialize his misconduct." App. 62a. That was because in Maryland, "the legal obligation to pay child support is subject to robust enforcement mechanisms," but criminal contempt and attendant incarceration is reserved for "the most extreme cases," like this one. *Id.* at 63a; *see id.* at 6a, 64a (explaining that Mr. Fooks's constructive criminal contempt conviction was not a result of a mere *failure* to pay child support but, rather, was "attributable to" a "*willful*" and "*egregious refusal to comply with a court order* concerning one of society's most basic obligations, betraying a disrespect for the law and the legitimacy of the courts that enforce it" (emphasis added)).[3]

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a misdemeanor in the State that carries a statutory penalty of more than 2 years." In this brief, the State refers to Mr. Fooks's 2016 conviction as "disqualifying" in the colloquial sense, not as a reference to Public Safety § 5-133(b)(1).

[3] The problem with enforcing child support orders often stems from "the fact that the defendant [is] impecunious because he/she [is] not employed and [has] not actively and in good faith sought employment." *Bryant v. Howard County Dep't of Soc. Servs. ex rel. Costley*, 387 Md. 30, 48 (2005). To facilitate the enforcement of child support orders, the Supreme Court of Maryland adopted Maryland Rule 15-207(e), which prescribes the progressive use of civil and criminal contempt powers. "The thrust" of the rule "is that, where the contemnor's inability to comply with [a] support order is [due to] his/her lack of gainful employment or other access to available funds, the court may address that problem directly by ordering the contemnor to take reasonable steps to obtain such employment or access." *Bryant*, 387 Md. at 49. If the parent is "in need of employment counseling or training" to accomplish that, "the court may order the contemnor to take advantage of them." *Id.* If the parent refuses to comply with such a civil contempt order, a court may use

**Mr. Fooks's Motion to Dismiss**

In February 2021, Mr. Fooks moved to dismiss the firearms-related counts, citing his Second Amendment right to keep and bear arms. *Id.* at 7a, 211a. In response, the State contended, among other things, that Mr. Fooks's conduct was not protected by the Second Amendment because "the guns were not [his]," yet "he sold the guns at a local pawn shop," and that this misconduct was not "within the protected right of law-abiding, responsible citizens." *Id.* at 221a-222a. In a supplemental filing, the State "maintain[ed] that Mr. Fooks [did] not have a Second Amendment right in someone else's guns" and that "he sold the guns, that were not his." *Id.* at 227a. The trial court denied the motion "for the reasons stated in the State's Response." *Id.* at 210a.

**Mr. Fooks's Conditional Guilty Plea and Direct Appeal to the Maryland Intermediate Appellate Court**

On April 27, 2021, Mr. Fooks entered a conditional guilty plea to two counts of possessing a regulated firearm, in violation of Public Safety § 5-133(b)(2), as part of a plea agreement with the State. App. 7a, 69a, 242a-243a. The State entered a

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criminal contempt to "enforc[e] those directives." *Id.* "In a constructive criminal contempt case, the prosecution has the burden of proving, beyond a reasonable doubt, a *deliberate effort* or a *wilful act* of commission or omission by the alleged contemnor *committed with the knowledge* that it would *frustrate the order of the court*." *Id.* at 47 (emphasis added; citation and quotation marks omitted).

nolle prosequi as to all other charges. *Id.* at 240a-246a.

Although the State did not pursue the theft charge, Mr. Fooks nevertheless agreed to pay, and was ordered to pay, almost $10,000 in restitution. *Id.* at 7a n.3, 68a, 75a, 246a.[4]

The "conditional" aspect of Mr. Fooks's plea permitted him to appeal the denial of his Second Amendment challenges, which he did. *Id.* at 68a.[5] On June 29, 2022, the State's intermediate appellate court issued a reported decision, affirming the denial of Mr. Fooks's facial and as-applied Second Amendment challenges. App. 175a-209a.

**The Supreme Court of Maryland's Decision**

Mr. Fooks timely petitioned the Supreme Court of Maryland for certiorari review, which the court granted. While the case was pending, this Court granted certiorari in *United States v. Rahimi*, 602 U.S. 680 (2024). The Supreme Court of Maryland, on

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[4] Mr. Fooks was ordered to pay the restitution to Marilyn Murray-Artis. App. 7a n.3. "The transcript of the plea hearing," however, "does not explain Ms. Murray-Artis's role." *Id.* In a concurring opinion, Justice Watts inferred that "Ms. Murray-Artis was clearly connected by a spousal or familial relationship to Mr. Artis, the complaining victim, who was likely deceased when Mr. Fooks entered his guilty plea, given that she became the restitution payee." *Id.* at 74a (footnote omitted).

[5] *See* Md. Rule 4-242(d) (permitting defendants, with the consent of the court and State, to "enter a conditional plea of guilty," which allows defendants to enjoy the benefits of a plea bargain while "reserv[ing] the right to appeal one or more issues specified in the plea").

the State's motion, stayed Mr. Fooks's case pending the outcome of *Rahimi*. After *Rahimi* was decided, the parties submitted supplemental briefing.

On June 6, 2025, the Supreme Court of Maryland issued its decision. Six of the seven justices agreed that Mr. Fooks's conviction under Public Safety § 5-133(b)(2) did not run afoul of the Second Amendment, and they offered various rationales for rejecting his facial and as-applied challenges.

### The Majority Holds That the Statute Is Presumptively Lawful Under *Heller* and Also Passes Muster Under a *Bruen* Historical Analysis

The majority opinion, written by Chief Justice Fader, concluded that Public Safety § 5-133(b)(2) was constitutional on two grounds. First, the majority observed that in *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court stated that "nothing in [its] opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons," and that such prohibitions were "presumptively lawful regulatory measures." App. 10a (quoting *Heller*, 554 U.S. at 626-27 & n.26). The majority further observed that this Court "referred back to its list of 'presumptively lawful regulatory measures' at least five times in the remainder of the [*Heller*] opinion, each time characterizing those measures as limitations on or exceptions to the Second Amendment right, rather than as open issues left for future consideration." *Id.* at 11a. The majority concluded that this Court had "implied" in *Heller* that "although its explanation for *how* it identified those measures to

be lawful would be delayed, it had already determined that they were." *Id.* at 13a.

The majority further observed that in *McDonald v. Chicago*, 561 U.S. 742, 786 (2010), this Court reiterated *Heller*'s "assurances" that prohibitions on the possession of firearms "by felons" were presumptively lawful. App. 14a. And again, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), Justices in the majority offered similar assurances that the Court was not disturbing what it said in *Heller* about presumptively lawful regulatory measures. App. 23a-24a (quoting *Bruen*, 597 U.S. at 72 (Alito, J., concurring); *id.* at 80 (Kavanaugh, J., concurring)). Finally, in *Rahimi*, "the Court once again reaffirmed the validity of the categories of presumptively lawful regulations." App. 45a.

The majority below considered and rejected the notion that this Court's repeated "identification of a set of presumptively lawful regulatory measures" was merely dicta intended to avert a "rush to judgment that its rulings . . . spelled the end of all firearms regulations." *Id.* at 43a. Rather, the majority concluded that this Court had determined that the categories of "presumptively lawful" prohibitions on firearms possession it identified in *Heller* "are generally consistent with the right to keep and bear arms codified in the Second Amendment." *Id.* at 45a-46a. The Supreme Court of Maryland reasoned that by adding the modifier "presumptively," the Court in *Heller* was not signaling that its assessment of these regulatory measures was tentative but, rather, was "simply . . . acknowledg[ing] that regulations that deviate from the generally accepted contours of the

categories such that they do not operate in the same way remain subject to an 'as-applied challenge' on that basis." *Id.* at 46a (footnote omitted) (quoting *Bruen*, 597 U.S. at 80 (Kavanaugh, J., concurring)).

The majority below then addressed Mr. Fooks's core argument, namely, that the hallmark of a valid felon-in-possession regulation is one that sweeps within its ambit only those who are "dangerous." *Id.* at 46a-47a. On that score, the majority observed that this Court had "not limited those statements" about presumptively lawful regulatory measures "to prohibitions on possession of firearms by violent felons or by individuals who have committed crimes of violence or by individuals found to be dangerous," *id.* at 47a (footnote omitted), but, rather, had blessed felon-in-possession bans generally as presumptively lawful.

Because the court had concluded that prohibitions on the possession of firearms "by felons" are per se facially constitutional under *Heller* and its progeny, the question then became whether Public Safety § 5-133(b)(2) was "a law falling within the category of those establishing 'prohibitions on the possession of firearms by felons.'" App. 37a. The majority noted that constructive criminal contempt is "an unclassified common law crime" that is neither inherently a felony nor inherently a misdemeanor. *Id.* at 39a. Thus, the nature of Mr. Fooks's disqualifying offense provided little insight as to whether he should be considered a "felon." Nevertheless, the majority rejected Mr. Fooks's contention that "because constructive criminal contempt is not classified as a felony, he is not a felon and therefore § 5-133(b)(2) is not presumptively lawful as to him." *Id.*

Conducting a broad survey of crime classification systems employed in other jurisdictions across the nation, *id.* at 39a-41a, the majority observed that the "common thread" was "not any magic afforded to the use of the word 'felony' but a general intent to prohibit the possession of firearms by individuals who have committed offenses the respective legislative body has deemed serious enough to be eligible for a significant term of imprisonment," *id.* at 41a. It concluded that Public Safety § 5-133(b)(2), which prohibited the possession of firearms by those who had been convicted of a common-law offense and sentenced to more than two years, "fit[] squarely within that framework." App. 41a. That is, the statute was "the equivalent of a 'prohibition[] on the possession of firearms by felons,' as that phrase has been employed by [this] Court." *Id.* at 42a (quoting *Heller*, 554 U.S. at 626). Accordingly, the majority held that Public Safety § 5-133(b)(2) was, as a categorical matter, facially constitutional based on this Court's "repeated references to such prohibitions as presumptively constitutional" and that there was "no need for felony-by-felony litigation regarding the constitutionality of" the statute. App. 49a (quoting *United States v. Jackson* ("*Jackson II*"), 110 F.4th 1120, 1125 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 2708 (2025)).

The majority also provided a second, alternative, rationale for rejecting Mr. Fooks's Second Amendment challenges. Applying the historical analysis prescribed in *Bruen* and refined in *Rahimi*, the majority concluded that, even setting aside the presumptive constitutionality of prohibitions on felons' possession of firearms, "felon dispossession laws like § 5-133(b)(2) are consistent with our

Nation's historical tradition of firearm regulation." App. 50a.

In reaching that conclusion, the majority observed that this Court had made clear that the Second Amendment right is not without limitation. *Id.* (citing *Heller*, 554 U.S. at 626, for the proposition that "the right secured by the Second Amendment is not unlimited"; and *Rahimi*, 602 U.S. at 698, for the proposition that this Court has never said that the Second Amendment "prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse"). Drawing heavily from the historical analyses conducted by the Eighth Circuit in *Jackson II*, 110 F.4th 1120, and the Ninth Circuit in *United States v. Duarte*, 137 F.4th 743 (2025) (en banc), *petition for cert. filed* (U.S. Oct. 6, 2025) (No. 25-425), Pet. App. 51a-58a, the majority found that, historically, states had categorically disarmed members of groups "thought to present a special danger unrelated to whether they had previously engaged in or demonstrated a propensity for violence," App. 50a. On the other hand, the majority found "no historical support for the proposition that a legislature lacks authority to" prohibit the possession of firearms "by a category of individuals characterized by their disrespect for and unwillingness to follow the law—to such an extent that they have received significant sentences of incarceration—in the absence of an individualized determination of dangerousness." *Id.* at 58a-59a (footnote omitted). Accordingly, it held that Public Safety § 5-133(b)(2) passed muster under the *Bruen-Rahimi* historical test. *Id.* at 60a.

The majority then turned to Mr. Fooks's as-applied challenge and rejected it for the same reasons. That is, Mr. Fooks's disqualifying offense was sufficiently serious to be considered equivalent to a felony based on the significant punishment he incurred for that offense; prohibitions on the possession of firearms by felons were deemed presumptively lawful by *Heller* (a principle that was repeatedly reaffirmed by Justices of this Court in subsequent decisions); and such laws are consistent with the Nation's historical tradition of firearm regulation. *Id.* at 61a-64a.

**Justice Watts Concludes That the Second Amendment Does Not Protect the Possession of Stolen Firearms**

Justice Watts wrote a concurring opinion and offered an additional basis to reject Mr. Fooks's Second Amendment challenges. She observed that the "first step of the *Bruen* inquiry requires ascertaining whether 'the Second Amendment's plain text covers an individual's conduct,'" which, in her view, was a "threshold question." App. 90a n.12 (quoting *Bruen*, 597 U.S. at 17). She would have rejected Mr. Fooks's Second Amendment challenges on the ground that his "conduct of possessing and pawning stolen firearms [fell] outside of the protections of the Second Amendment." *Id.* at 66a-67a. Thus, in her view, an "exhaustive historical analysis" was "unnecessary to conclude that no one in the Founding Era would have believed that the Second Amendment protected a person's right to possess a firearm for the purpose of, or in the course of, committing a crime." *Id.* at 84a.

Observing this Court's "pattern" of characterizing the right as belonging to "law-abiding citizens," *id.* at

76a, Justice Watts declared that "this much is clear: the Second Amendment does not protect firearms possession for criminal purposes," *id.* at 78a. More specifically, whatever the scope of the Second Amendment may be, "possession of a stolen firearm was not among the rights intended to be protected." *Id.* at 83a.

Justice Watts reviewed the trial-court record and concluded that although the "State agreed to not prosecute the theft charge as part of the plea bargain" that Mr. Fooks accepted, the record below was sufficiently clear that Mr. Fooks "unlawfully possessed, *i.e.*, stole or possessed as stolen property, the firearms at issue"; he sold those firearms to a pawn shop "without permission" from their "rightful owner"; and he "paid restitution to a victim of his crime to compensate for the theft of the firearms." *Id.* at 82a, 85a. She observed that "restitution is a criminal sanction" under Maryland law that may only be ordered when, "*as a direct result* of the crime or delinquent act, property of the victim was stolen . . . , converted, or unlawfully obtained." *Id.* at 85a-86a (citation omitted) (emphasis added by Watts, J.); *see* Md. Code Ann., Crim. Proc. § 11-603(a). Because Mr. Fooks had "agreed to pay restitution for his conduct of possessing stolen firearms," she reasoned, "the only conclusion is that Mr. Fooks's possession was some form of theft, and therefore criminal, not lawful, conduct." App. 88a.

Justice Watts therefore concluded that Mr. Fooks "had no Second Amendment right to possess the firearms in this case, because his unsanctioned possession of firearms belonging to another person was not lawful conduct[,] and his possession of firearms

was not consistent with [this Court's] description of the Second Amendment Right as applying to law-abiding people." *Id.* at 67a. Accordingly, she would have affirmed Mr. Fooks's convictions at the first step of the *Bruen* analysis, without proceeding to the second-step historical analysis. *Id.* at 84a, 90a n.12.

**Justice Gould Concludes That Imposing Consequences for Criminal Conduct—Including the Forfeiture of Second Amendment Rights—Is a Proper Exercise of the State's Police Powers That Does Not Offend the Second Amendment or Implicate the *Bruen* Test**

Justice Gould also wrote a concurring opinion, offering a fourth basis for rejecting Mr. Fooks's Second Amendment challenge. In his view, the *Bruen* analysis was not even applicable to this case because the real "issue here" was "whether the State's felon-in-possession statute is a proper exercise of the State's police power." *Id.* at 91a-92a.

Justice Gould perceived a tension between this Court's *Heller* and *Bruen* decisions: "under *Heller*, state felon-in-possession laws are *presumptively* constitutional, and under *Bruen*, state felon-in-possession statutes are *presumptively* unconstitutional." *Id.* at 93a (emphasis in original). Observing that "[b]oth cannot be true," he reasoned that the "only way to square that circle is to conclude that *Bruen*'s test does not apply to state felon-in-possession laws." *Id.* In his view, the *Bruen* test did not apply because it did not account for "a state's authority to impose consequences—here, the forfeiture of Second Amendment rights—for a violation

of that state's criminal code." *Id.* at 94a. "That question," he continued, "implicates a different constitutional question altogether, namely, the nature and scope of a state's police power under the federalist principles embedded in the United States Constitution." *Id.* "Indeed, applying *Bruen* to a state felon-in-possession statute is a *non sequitur*," he remarked, "because, as the Court in *Heller* stated, the Second Amendment was originally understood to apply 'only to the Federal Government'" but was "made applicable to the states through the Fourteenth Amendment, ratified in 1868." *Id.* at 94a (quoting *Heller*, 554 U.S. at 620 n.23).

Thus, in Justice Gould's view, the pertinent question was not whether "states historically exercised their police power to punish criminal conduct with a forfeiture of Second Amendment rights" but, rather, whether "people—at the time of the country's founding or in 1868—believed that the state had the power to do so under its police powers." *Id.* Noting that "Mr. Fooks [made] no claim that section 5-133(b)(2) of the Public Safety Article [was] not a proper exercise of the State's police power," Justice Gould would have affirmed on that ground. *Id.* at 91a-92a, 98a.

**Justice Biran Concludes That the Statute Is Unconstitutional**

Justice Biran dissented. He first concluded that "felons and felon-equivalents are part of the 'national community' for the purpose of Second Amendment coverage," and thus, even if a felon, Mr. Fooks was not per se excluded from its protection. *Id.* at 117a. He

agreed with Justice Watts that the "Second Amendment does not protect a person's knowing possession of a stolen firearm, nor does it apply to a person who possesses a firearm for an unlawful purpose," *id.* at 118a, but he found the record insufficient to reject Mr. Fooks's challenge on that basis because "there was no judicial finding, nor did Mr. Fooks admit, that he stole the firearms in question," *id.* at 119a.

Justice Biran then challenged the majority's reliance on this Court's statement in *Heller* that felon dispossession laws were "presumptively lawful." *Id.* at 128a. He concluded that this passage was "dicta" and surmised that "some members" of this Court would likely view the "'presumptively lawful' regulations to which the *Heller* Court alluded . . . in a different light." *Id.*

Justice Biran then conducted his own *Bruen* historical analysis. *Id.* at 129a-155a. From that, he concluded that Public Safety § 5-133(b)(2) was facially constitutional because "[t]here is at least one circumstance in which application of [Public Safety] § 5-133(b)(2) would be consistent with the Nation's historical tradition of firearms regulation: where a person is disqualified based on a prior sentence for the common law offense of affray." *Id.* at 156a.[6]

Justice Biran, however, diverged from his colleagues in the majority with respect to Mr. Fooks's

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[6] Under Maryland common law, "[a]ffray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people." App. 156a (quoting *Nottingham v. State*, 227 Md. App. 592, 602 (2016)).

as-applied challenge. He concluded that Public Safety § 5-133(b)(2) was unconstitutional as applied to Mr. Fooks because, in his view, to satisfy its burden under *Bruen* and *Rahimi*, the State must show that the "predicate conviction was for an offense that is violent in nature." *Id.* at 172a. Mr. Fooks's disqualifying conviction was for a non-violent offense, so Justice Biran would have reversed Mr. Fooks's convictions. *Id.* at 174a.

## REASONS FOR DENYING THE PETITION

Mr. Fooks argues that his case "provides an ideal vehicle for this Court to address [several] important questions and provide critically missing guidance to the lower state and federal courts grappling" with the constitutional validity of statutes that prohibit the possession of firearms by individuals with criminal convictions. Pet. 14. To the contrary, this case is anything but straightforward and is therefore a poor vehicle to explore the boundaries of the Second Amendment as it relates to firearm dispossession laws.

The question whether felon-in-possession laws are consistent with the Nation's historical tradition of firearm regulation is undoubtedly an important and pressing issue percolating through the lower courts. But impeding that analysis here is the threshold question whether Mr. Fooks even enjoys the protection of the Second Amendment under the circumstances, considering that the firearms at issue were evidently stolen. Although the record on that matter is subject to interpretation, that is all the more reason to pass on this case in favor of one with a clearer and better developed record.

Beyond that thorny threshold question lies the unusual nature of both the state firearm statute in question and Mr. Fooks's specific disqualifying conviction. Mr. Fooks was convicted under Public Safety § 5-133(b)(2), which prohibits the possession of firearms based on the length of the sentence the defendant received for a prior common-law offense. And Mr. Fooks was disqualified from firearm possession under that statute based on his prior conviction for the unusual offense of constructive criminal contempt, which "defies categorization," according to Mr. Fooks. Pet. 26 n.3. The court below upheld Public Safety § 5-133(b)(2) on the ground that it was the "equivalent" of a felon-in-possession statute and that such statutes are not unconstitutional. App. 42a. Mr. Fooks now asks this Court to decide both (1) "whether there is such a thing as a 'felon equivalent'"; and (2) whether it is constitutional to predicate firearm dispossession on the severity of the sentence actually received rather than on the sentence that theoretically could have been received or the labeling of offenses as "felonies." Pet. 19, 27. But this Court has yet to decide whether even traditional felon-in-possession laws, such as 18 U.S.C. § 922(g)(1), are constitutional under the *Bruen-Rahimi* analysis. Simply put, this unusual case is hardly the "ideal" vehicle to settle the central question whether felon-in-possession statutes are constitutional.

In any event, the majority of the Supreme Court of Maryland undertook the historical analysis that *Bruen* prescribed and that *Rahimi* refined. The court reviewed the historical sources presented by the parties and by courts in other cases. From those, it

gleaned that legislatures historically disarmed groups thought to present a special danger of misuse of firearms, without the need for an individualized determination of dangerousness. The majority found this historical practice to be sufficiently analogous to the Maryland legislature's determination, through its enactment of Public Safety § 5-133(b)(2), that individuals who have been convicted of a common-law offense and sentenced to incarceration for more than two years pose a special danger of misuse and should not possess firearms. Because the statute was supported by an analogous historical principle, the majority correctly held that it was constitutional. Further review is unnecessary.

## I. THIS CASE IS A POOR VEHICLE TO ADDRESS THE SECOND AMENDMENT VALIDITY OF PROHIBITIONS ON THE POSSESSION OF FIREARMS BASED ON PRIOR CONVICTIONS.

### A. This Case is a Poor Vehicle Because Mr. Fooks's Conduct of Possessing Someone Else's Guns Was Not Protected by the Second Amendment.

This case is an exceptionally poor vehicle to explore the boundaries of the Second Amendment because, even before reaching the more consequential question whether felon-in-possession statutes are constitutional, the Court would need to resolve a threshold dispute over whether Mr. Fooks's conduct was even covered by the Second Amendment. That question, in turn, hinges on a poor record that is subject to interpretation. Specifically, the State accused Mr. Fooks of stealing the firearms that he

later claimed a Second Amendment right to possess. Although he ultimately did not plead guilty to the theft charge, he nevertheless agreed to pay nearly $10,000 in restitution and thus tacitly acknowledged that the firearms at issue were stolen. This wrinkle was a major point of contention below and makes the case particularly unsuitable for certiorari review.

As Justice Watts explained in her concurring opinion, the issue whether the Second Amendment protected Mr. Fooks's possession of firearms "that were stolen and fenced at a pawn shop," App. 84a, was a "threshold question," *id.* at 90a n.12. Indeed, the first step of the analysis defined by this Court in *Bruen* requires a reviewing court to determine whether "the Second Amendment's plain text covers an individual's conduct." *Bruen*, 597 U.S. at 24. If it does, "[t]he government must *then* justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* (emphasis added). Justice Watts emphasized that this Court has made clear that the Second Amendment right covers only those who are "'law-abiding' in the moment of possession." App. 84a. She concluded that Mr. Fooks did steal and sell the firearms at issue, *id.* at 85a, so his "challenge in this case must fail before even reaching the issue of the constitutionality of the statute in question," *id.* at 82a.

Justice Biran, in dissent, agreed with Justice Watts that the "Second Amendment does not protect a person's knowing possession of a stolen firearm, nor does it apply to a person who possesses a firearm for an unlawful purpose." *Id.* at 118a. Nevertheless, he found the record insufficient to reject Mr. Fooks's

claim on that ground because Mr. Fooks negotiated a nolle prosequi of the theft charge and the payment of restitution was, in Justice Biran's view, too ambiguous to suggest Mr. Fooks had engaged in criminal activity. *Id.* at 119a. Justice Biran's analysis therefore presupposed that Mr. Fooks's challenge satisfied the first step of the *Bruen* inquiry and required a full historical analysis. *Id.*

The majority below, for its part, avoided the issue altogether. *Id.* at 64a n.38. It acknowledged that the "record suggest[ed]" that "the firearms [Mr. Fooks] was convicted of possessing were stolen and the purpose for which he possessed them was to illegally pawn them." *Id.* But because the trial-court record was murky as to that issue, it "decline[d] to reach" it, *id.*, and instead resolved the case on other grounds.

Justice Watts's observation that to enjoy the protection of the Second Amendment, "the person asserting the right [must] be 'law-abiding' in the moment of possession," App. 84a, is firmly grounded in this Court's decisions. *Heller* stresses that the Second Amendment right belongs to the "law-abiding" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 625-26; *id.* at 635 ("[W]hatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). And *McDonald* explains that the "central holding in *Heller*" was that "the Second Amendment protects a personal right to keep and bear arms for *lawful purposes*." 561 U.S. at 780 (emphasis added).

Although Mr. Fooks's plea proceeding did not flesh out the allegations of theft, at the earlier time when the parties litigated Mr. Fooks's Second Amendment challenges in the trial court, those allegations were pending and, indeed, were central to the State's argument for why Mr. Fooks's Second Amendment challenge should be rejected. App. 67a-68a. The trial court denied Mr. Fooks's Second Amendment motion to dismiss "for the reasons stated in the State's Response," *id.* at 210a, those reasons being primarily that Mr. Fooks did not enjoy the protection of the Second Amendment when the firearms he possessed were stolen for the purpose of unlawfully pawning them, *id.* at 221a-222a, 227a-228a. Mr. Fooks then agreed to pay a substantial amount of restitution, *id.* at 68a, 246a, thereby tacitly admitting that the firearms he possessed were stolen and accepting responsibility for his misconduct.

In sum, that the firearms in question did not belong to Mr. Fooks and that he evidently possessed them wrongfully is a standalone basis for rejecting Mr. Fooks's Second Amendment challenges. And it is a threshold issue with which this Court would have to grapple before addressing the weightier question whether felon-in-possession laws are constitutional under the *Bruen-Rahimi* historical analysis. There is no reason for this Court to grant certiorari here, rather than in any of the numerous, more straightforward cases that do not involve disputes over whether the Second Amendment even protects the defendant's conduct.

### B. The Idiosyncratic State Statute at Issue and Mr. Fooks's Unusual Disqualifying Conviction Also Make This Case a Poor Vehicle for Certiorari Review.

This case is also a poor vehicle to explore the contours of the Second Amendment because it involves the intersection of an unusual disqualifying conviction—the common-law offense of constructive criminal contempt—and an idiosyncratic state firearm dispossession law that is applicable only to those who have received a sentence of more than two years for a common-law offense.

The Supreme Court of Maryland determined that a constructive criminal contempt conviction for which an individual receives a sentence of more than two years is the equivalent of a felony for firearm dispossession purposes, even though Maryland law does not expressly classify it as such. Mr. Fooks nevertheless maintains that his conviction was "not a state felony." Pet. 13. He asserts that "contempt of court is a common law crime which otherwise defies categorization as either a felony or misdemeanor," Pet. 26 n.3, and insists that "this Court must address whether there is such a thing as a 'felon equivalent' for purposes of excluding a person from the guarantee of the Second Amendment," Pet. 19.

With respect to the operation of Public Safety § 5-133(b)(2), Mr. Fooks contends that the statute is "flaw[ed]" because it "captures both felonies and misdemeanors, and the sentence 'received' does not inform whether the offense is a felony or misdemeanor, as it does in the federal system, or otherwise inform whether the offense or offender was

violent or dangerous." Pet. 17. He argues that the "Court must resolve [this] matter" as well. Pet. 27.

Mr. Fooks contends that certiorari is warranted because the federal "circuits are openly split—with *en banc* rulings on both sides—over the constitutionality of § 922(g)(1)." Pet 25 (citation omitted). But there is no split in authority over the constitutionality of statutes like Public Safety § 5-133(b)(2), which predicates disqualification on the seriousness of the penalty the defendant actually received rather than the classification of the disqualifying offense or the maximum penalty prescribed (or other such classification). Indeed, the State has found no reported decision of any appellate court, state or federal, that has undertaken the *Bruen* analysis for a statute like Public Safety § 5-133(b)(2).

Before deciding a peculiar case like this one, the more sensible approach would be to first take up a more straightforward case to decide whether the Second Amendment prohibits the government from categorically prohibiting firearm possession by persons convicted of felonies. Mr. Fooks himself identifies one such case in which a petition is pending before the Court: *Vincent v. Bondi*, No. 24-1155 (petition filed May 8, 2025), in which the petitioner presents the following question: "Whether the Second Amendment allows the federal government to permanently disarm Petitioner Melynda Vincent, who has one seventeen-year-old nonviolent felony conviction for trying to pass a bad check." Pet. 24-25. There is also *Duarte v. United States*, in which the petitioner raises an as-applied challenge to his conviction under 18 U.S.C. § 922(g)(1) based on prior

felony convictions that included possession of a firearm as a felon, possession of a controlled substance for sale, and evading a peace officer. Petition for Writ of Certiorari 3, 5 (Oct. 6, 2025) (No. 25-425). Either one of those cases would more meaningfully advance Second Amendment jurisprudence without the need to address threshold questions like whether there is such a thing as a "felon equivalent" or whether firearm dispossession may be predicated (as here) on a sentence actually received rather than (as with § 922(g)(1)) the potential sentence for the disqualifying crime.

## II. FURTHER REVIEW IS UNWARRANTED BECAUSE THE SUPREME COURT OF MARYLAND PROPERLY APPLIED *BRUEN* AND *RAHIMI*.

Mr. Fooks's overarching thesis is that there is a lack of "consensus among lower courts on how to apply *Bruen* and *Rahimi* to both facial and as-applied Second Amendment challenges to modern criminal disarmament statutes that predicate disarmament upon a prior criminal conviction." Pet. 12. Although lower courts have disagreed over whether historical practices and principles are sufficiently analogous to uphold a wide array of modern firearm regulations, the Supreme Court of Maryland properly applied the *Bruen-Rahimi* test and reached the correct result here. No further review is necessary.

### A. Mr. Fooks Asserts a Facial Challenge But Fails to Refute the Consensus Below That His Facial Challenge Is Meritless.

Mr. Fooks's facial Second Amendment challenge is meritless. In *Rahimi*, this Court explained that to

prevail on a facial challenge, "a defendant [must] establish that no set of circumstances exists under which the [challenged regulation] would be valid. That means that to prevail, the Government need only demonstrate that [the challenged regulation] is constitutional in some of its applications." 602 U.S. at 693 (citation and quotation marks omitted). In that case, the Court found support for 18 U.S.C. § 922(g)(8) in the existence of historical "going armed" laws, which were a "subset of the ancient common-law prohibition on affrays." *Rahimi*, 602 U.S. at 697. "[T]he law punished these acts with forfeiture of the arms . . . and imprisonment." *Id.* (citation and quotation marks omitted). Citing Maryland common law, among other sources, this Court observed that "prohibitions on . . . affrays were incorporated into American jurisprudence through the common law." *Id.* (citing *Hickman v. State*, 193 Md. App. 238, 253-255 (2010), and other sources).

Here, none of the justices of the Supreme Court of Maryland found Public Safety § 5-133(b)(2) facially unconstitutional. Even the dissenting justice rejected Mr. Fooks's facial challenge on the ground that firearm dispossession predicated upon a conviction for the common-law offense of affray "is at least one circumstance in which application of [Public Safety] § 5-133(b)(2) would be consistent with the Nation's historical tradition of firearms regulation." App. 156a.

Although Mr. Fooks maintains that Public Safety § 5-133(b)(2) is facially unconstitutional, Pet. 14, 16, he fails to address the dissent's identification of the common-law offense of affray as a basis for rejecting his facial challenge. Public Safety § 5-133(b)(2) is

facially constitutional, and no further review of the facial challenge is warranted.

### B. The Majority Below Properly Rejected Mr. Fooks's As-Applied Challenge.

With respect to his as-applied challenge, Mr. Fooks misapplies *Bruen* and *Rahimi*. He contends that the Supreme Court of Maryland failed to "point to any sufficiently relevant law or laws that historically prohibited possession of a firearm by one who 'has been convicted of a violation classified as a common law crime and received a term of imprisonment of more than 2 years.'" Pet. 16. But *Rahimi* made clear that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." 602 U.S. at 691-92. For a court to uphold a regulation that implicates the Second Amendment, the *Bruen-Rahimi* analysis requires "analogous" historical "principles," not a "dead ringer or a historical twin." *Id.* at 692 (citation and quotation marks omitted). Even "when a challenged regulation does not precisely match its historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* (citation and quotation marks omitted). Thus, a historical doppelganger is not required, i.e., for Public Safety § 5-133(b)(2) to pass muster, the State need not identify a founding-era law that prohibited the possession of firearms by individuals who were convicted of common-law offenses and sentenced to more than two years.

Applying the correct analytical lens—analogous historical *principles*, not a historical statutory twin—the majority below was correct to conclude that the

"historical record suggests that legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence." App. 57a (quoting *Jackson II*, 110 F.4th at 1127). In so concluding, the majority largely adopted the historical analyses conducted by the Eighth Circuit in *Jackson II*, 110 F.4th 1120, and the Ninth Circuit in *Duarte*, 137 F.4th 743. App. 51a-58a. It concurred with those courts' assessment that there is historical precedent for categorically disarming groups based on a perceived danger of misuse of firearms:

> Both in England and the United States leading up to and surrounding the ratification of the Bill of Rights, distrusted religious minorities were sometimes categorically disarmed based solely on their religion or, in England, their refusal to submit to a different religion.[7] States also disarmed racial

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[7] For example, the majority cited the 1689 English Bill of Rights, which *Heller* described as "the predecessor to our Second Amendment." App. 52a n.26 (quoting *Heller*, 554 U.S. at 593). That act "provided that Protestants, but not Catholics, 'may have Arms for their Defence suitable to their Conditions,' and even then, only 'as allowed by Law[.]'" *Id.* (quoting *Heller*, 554 U.S. at 593 (quoting 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 441)).

> minorities[8] and those who refused to declare an oath of loyalty.[9]

*Id.* at 52a-53a (original footnotes omitted).

Mr. Fooks disagrees that these historical precedents support the constitutionality of Public Safety § 5-133(b)(2). He asserts that the historical practice of disarming "distrusted" groups identified by race, ethnicity, or religion is "now repugnant," and that the majority below misused this historical precedent "to sanction the permanent stripping of Second Amendment rights on the basis of criminal convictions, generally." Pet. 18 (record citation omitted). To the contrary, the majority's analysis was a faithful application of *Bruen*, which instructs courts "to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding" by identifying "a well-established and representative historical analogue." 597 U.S. at 26, 30 (emphasis omitted). The court identified multiple historical analogues, all of which show that legislatures could, and did, categorically disarm groups thought to pose a special danger of

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[8] For instance, the majority cited early American "restrictions on selling arms to Native Americans and prohibitions on Native American firearm possession." (citing, among other sources, Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 Law & Hist. Rev. 567, 578-79 (1998)).

[9] The majority cited (among other sources) the Pennsylvania Act of June 13, 1777, ch. 756, §§ 2-4, 1777 Pa. Laws 110, 111-13, as an example of a founding-era statute that "disarm[ed] loyalists without any reference to an exception for non-dangerousness." App. 53a-54a n.28.

misusing firearms without regard to any individualized determination of dangerousness. Granted, several of the ways legislatures historically used that authority would be repugnant to Americans today and would run afoul of the Equal Protection Clause. The majority below acknowledged this "discomfort[ing]" feature of the "text, history, and tradition" test that *Bruen* prescribed. App. 51a n.25. But the majority below was correct that those historical practices are nevertheless "relevant" to the *Bruen* analysis, and it is "the fact that disarming categories of distrusted individuals was viewed as consistent with the right to keep and bear arms that is most relevant, not necessarily the categories themselves." *Id.*

Mr. Fooks nevertheless maintains that the majority failed to identify a "properly focused principle," which, in his view, should be based on "demonstrated dangerousness." Pet. 19, 22. He interprets *Rahimi* to "suggest[] that demonstrated dangerousness is a threshold for constitutionally barring Second Amendment rights through modern criminal statutory disarmament laws." Pet. 15-16.

Mr. Fooks misconstrues *Rahimi*, mistaking its articulation of just *one* principle that may justify firearm regulations for a statement of the *only* applicable principle. *Rahimi* held that the Nation's "tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." 602 U.S. at 700. The Court did not say that the Second Amendment permits governments to disarm individuals *only* based on demonstrated dangerousness.

Mr. Fooks complains that, rather than requiring a showing of dangerousness before an individual could be disarmed, the Supreme Court of Maryland's majority instead set up an "an overly expansive" virtue-based litmus test predicated on "respect for legal norms." Pet. 19. The dissent below made a similar argument, which the majority refuted. The majority clarified that the principle it drew from the historical record was not that "there is a historical tradition of permitting disarmament for any deviation from any legal norm, no matter how small or unconnected to dangerousness." App. 58a n.33. Rather, addressing the potential for misuse of firearms (i.e., dangerousness) was, and remains, the core purpose of firearm dispossession laws, and the authority to identify and disarm groups that present such a risk of misuse has historically rested with the legislature:

> [T]he historical tradition referenced in *Jackson II* was of the dispossession of categories of people possessing firearms to "address a danger of misuse" of those firearms, based on the belief that the particular deviations gave rise to such a danger. In other words, the perceived deviations gave rise to the perception of danger; they were not disassociated from it. In line with that historical tradition, the Maryland General Assembly has determined that there is a danger of misuse of firearms by the category of individuals who have been convicted of common law crimes based on conduct so severe that a judge imposed a sentence of more than two years of imprisonment for it. That determination echoes those of the United

> States Congress and state legislatures in laws dispossessing categories of individuals from owning firearms based on the severity of sentences available or imposed for crimes they committed. It is that determination we are reviewing today, not a counter-factual, straw-man determination that anyone who violates a legal norm or jaywalks may be dispossessed from future ownership of firearms.

App. 58a n.33 (citation omitted).

Even as Mr. Fooks criticizes the majority's decision for, in his view, sanctioning firearm dispossession "irrespective of any determination of individualized dangerousness of the offense or offender," Pet. 18, he also complains that the "sentence received" mechanism for firearm disqualification under Public Safety § 5-133(b)(2) amounts to a "burden-shifting subjective 'virtue test' that is essentially unreviewable and impermissible under *Bruen*." Pet. 19. He argues that this threshold cuts against the statute's constitutionality because a "judge's sentencing decision"—like the permit officer's subjective determination whether an applicant has "proper cause" that this Court condemned in *Bruen*—"requires the 'appraisal of facts, the exercise of judgment, and the formation of an opinion.'" Pet. 20 (quoting *Bruen*, 597 U.S. at 38 n.9). His assessment is wrong, and his reliance on *Bruen* is misplaced.

The constitutional problem in *Bruen* was not that states were curtailing applicants' right to keep and bear arms based on an individualized assessment of their character, but rather, that a handful of states, including New York, had adopted licensing schemes

"under which authorities [had] discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." 597 U.S. at 14-15. Indeed, in listing the many other licensing schemes that *did* comport with the Second Amendment, the Court approvingly observed that, even though Connecticut's system affords government officials "discretion to deny a concealed-carry permit to anyone who is not a 'suitable person,' the 'suitable person' standard preclude[d] permits *only to those individuals whose conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon*." *Id.* at 13 n.1 (emphasis added; citations and quotation marks omitted). Likewise, it observed that, even though Rhode Island has a "suitability requirement," "the Rhode Island Supreme Court has flatly denied that the '[d]emonstration of a proper showing of need' is a component of that requirement." *Id.* (citations omitted). *Bruen*'s disapproving discussion of "the appraisal of facts, the exercise of judgment, and the formation of an opinion," was in the context of juxtaposing presumptively constitutional "shall-issue" licensing schemes that nonetheless require applicants to be "law-abiding, responsible citizens," with unconstitutional schemes that require law-abiding citizens to convince a government official that they have a special need for a permit before they can exercise their Second Amendment rights. *Id.* at 38 n.9.

Thus, *Bruen* does not stand for the proposition that "virtue tests" are per se unconstitutional. To the contrary, it reaffirms that states may restrict the

possession and carrying of firearms to those who are law-abiding and have the "essential character of temperament necessary to be entrusted with a weapon." *Id.* at 13 n.1, 38 n.9 (citation omitted).

Mr. Fooks also overlooks *Rahimi*, which treated the requirement in 18 U.S.C. § 922(g)(8) of a judicial determination of a "credible threat," a prerequisite to disarmament, as a factor that supported the constitutionality of the statute. *Rahimi*, 602 U.S. at 699-700 (contrasting the licensing scheme invalidated in *Bruen*, which "effectively presumed that no citizen had . . . a right [to publicly carry a weapon], absent a special need," with § 922(g)(8)(C)(i), which "presumes" that "the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others").

In stark contrast to the New York licensing scheme addressed in *Bruen*, but in a manner consistent with the firearm disarmament provision upheld in *Rahimi*, Public Safety § 5-133(b)(2) requires the State to prove beyond a reasonable doubt, to a neutral factfinder, that the defendant committed criminal conduct. Further, a court must have found that the defendant's misconduct was so egregious that it warranted a punishment of more than two years' incarceration. And both the disqualifying conviction and the sentence would be reviewable, both on direct appeal and through various postconviction procedures afforded to defendants under state and federal law.[10]

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[10] *See* Md. Code Ann., Cts. & Jud. Proc. § 12-301 (establishing the right to appeal a final judgment in a criminal

As the majority below reasoned, "[i]f anything, a law that premises disqualification on the length of a sentence *received* for an offense, rather than the length of a sentence that may theoretically be imposed for the offense, is more, not less, tailored to the defendant's individual circumstances and the severity of the underlying conduct." App. 49a. Predicating firearm dispossession on the length of a sentence the defendant has received is not unconstitutional.

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case); Md. Code Ann., Crim. Proc. § 8-102 (affording any "person convicted of a crime by a circuit court and sentenced to serve a sentence that exceeds 2 years in a correctional facility" the right to "sentence review by a review panel"); Md. Code Ann., Crim. Proc. §§ 7-101 – 7-109 (establishing the right of any person "confined under sentence of imprisonment" to postconviction review, and setting forth procedures for such review); Md. Rule 4-345(e) (granting the sentencing court "revisory power over [a] sentence" if the defendant timely moves for a sentence reduction); 28 U.S.C. § 2254 (governing federal habeas review of state judgments of conviction).

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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