No. 18-444

IN THE

Supreme Court of the United States

STATE OF MONTANA,

Petitioner,

v.

RONALD DWIGHT TIPTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National District Attorneys Association is the oldest and largest association of state and local prosecutors, victims' rights advocates, investigators, and other law-enforcement personnel in the United States. Its approximately 7,000 members are responsible for enforcing the criminal laws of every State and territory. This case involves matters of concern to prosecutors nationwide. DNA evidence plays a crucial role in solving thousands of cold cases, especially crimes of sexual violence. This Court's ruling in *Stogner v. California*, 539 U.S. 607 (2003), barred legislatures from reviving limitations periods for sex abuse crimes, even when new evidence comes to light. This ruling has hindered law enforcement's ability to pursue cold cases and district attorneys' ability to prosecute them. NDAA's members have special expertise in the legal and practical issues relating to the matter at hand. *Amicus* urges this Court to overrule *Stogner* or limit its holding to exclude DNA-based revivals.

INTRODUCTION AND SUMMARY OF ARGUMENT

In March of 1987, an unknown assailant broke into a Montana home and raped an eight-year-old girl. *Tipton*

1. Pursuant to this Court's Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, their members, and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus*'s intent to file and have consented to the filing of this brief.

v. Mont. Thirteenth Judicial Dist. Court, 421 P.3d 780, 782 (Mont. 2018). The police recovered DNA from the victim's underwear, but the sample was not tested because Montana courts did not yet admit DNA evidence. Another man was convicted on the basis of circumstantial evidence. *Id*. After DNA evidence exonerated that man in 2002, police reopened the case. They placed the DNA profile recovered from the crime scene into the Combined DNA Index System (CODIS), a national database used to match known and unknown DNA profiles. *Id*.

The case remained cold until 2014. Then police got the break they had been waiting for. Ronald Tipton submitted to DNA testing as part of an unrelated plea agreement. *Id.* As is routine, his DNA profile was then uploaded into the CODIS database. There was a hit: Tipton's DNA matched the sample recovered from the victim's underwear nearly thirty years earlier. Follow-up testing confirmed the match. *Id.* at 782-83.

Within one year, Tipton was charged with sexual intercourse without consent of a minor under 16 years old. *Id.* at 783. The original statute of limitations for the crime expired in 2001, five years after the child victim turned eighteen. *See* Petition for Certiorari at 6-7. But in 2007, Montana's Legislature enacted Mont. Code Ann. § 45-1-205(9), a law reviving statutes of limitations for sex crimes if a perpetrator "is conclusively identified by DNA testing" and charged within one year. Tipton moved to dismiss, arguing that the revived limitations period violates the *Ex Post Facto* Clause under *Stogner*. The district judge rejected his motion. But the Montana Supreme Court reversed, explaining that while the "State's case against the alleged perpetrator is strong,

and the scientific evidence is compelling," it was bound by this Court's holding in *Stogner*. *Tipton*, 421 P.3d at 787-88.

The State of Montana has petitioned for certiorari. This Court should grant the petition and reconsider its decision in *Stogner* because it is inconsistent with the original meaning of the *Ex Post Facto* Clause and with two centuries of this Court's precedent.

The Framers used "*ex post facto*" as a term of art in discussions at the Constitutional Convention. They drew on similar provisions in state constitutions, which defined *ex post facto* laws as those criminalizing acts *that were innocent when committed*. For example, the Maryland Constitution's *ex post facto* clause read, "Retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* laws ought to be made." Md. Const. art. XV (1776). Similarly, John Dickinson explained to the Convention Blackstone's definition of *ex post facto*, which was "after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts punishment upon the person who has committed it." 1 William Blackstone, *Commentaries* 46.

Moreover, altering statutes of limitations was not within the original public meaning of the *Ex Post Facto* Clause. At the time of the Framing, criminal statutes of limitations were not even in existence. Naturally, then, the *Ex Post Facto* Clause did not contemplate the revival of criminal limitations periods, much less prohibit them.

Shortly after the Founding, this Court confirmed the proper scope of the *Ex Post Facto* Clause in the seminal case of *Calder v. Bull*, 3 U.S. (3. Dall.) 386 (1798). Recounting the abusive legislation enacted by England's pre-Revolution Parliament, Justice Chase set forth a definition of *ex post facto* laws that includes four categories. *Id.* at 390. Properly understood, Justice Chase explained, the Clause prohibits laws that fundamentally alter the character of an offense after it has been committed by (1) creating a new offense; (2) altering the definition of an offense; (3) changing the punishment affixed to an offense; or (4) decreasing the evidentiary burden necessary for conviction. *Id.*

From *Calder* until the beginning of the twenty-first century, this Court consistently limited the Clause to laws falling within these categories. Indeed, Justice Chase's time-tested definition was understood to be "the exclusive definition of *ex post facto* laws." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990).

Two centuries of precedent were upended when this Court decided *Stogner v. California*, 539 U.S. 607 (2003). In *Stogner*, the Court struck down a law that revived previously time-barred prosecutions of child sex crimes, notwithstanding the illegality of the actions at the time they were committed. The *Stogner* Court expanded Justice Chase's narrow definition of *ex post facto* laws, running afoul of the original meaning of the *Ex Post Facto* Clause and this Court's many decisions adhering thereto. Key to the *Stogner* opinion was the Court's concern with reviving prosecutions based on the frailties of human memory, which California used as a trigger for reviving limitations periods.

Because *Stogner* is incompatible with the original meaning of the *Ex Post Facto* Clause and two centuries of precedent, this Court should grant certiorari to reconsider it. But even if the Court does not wish to overrule *Stogner*, it should still grant certiorari to limit *Stogner* and make clear that laws reviving criminal limitations periods based on DNA evidence do not run afoul of the *Ex Post Facto* Clause. Unlike in *Stogner*, where the Court was concerned about faded witness memories, DNA evidence does not become less reliable over time. If anything, the opposite is true. Recent advances in DNA technology combined with a nationwide DNA database allow law enforcement to conclusively identify perpetrators of crimes that occurred before DNA evidence was commonplace. These technological improvements motivated Congress to spend billions of dollars testing DNA samples from cold cases and caused numerous States to revive statutes of limitations for certain offenses when DNA evidence identifies a perpetrator.

In short, the Court should grant certiorari and overrule *Stogner*, or at least limit the decision to exclude revivals based on DNA evidence so that conclusively identified sexual predators do not escape justice.

ARGUMENT

I. This Court Should Overrule *Stogner v. California* Because It Conflicts With The Original Meaning Of The *Ex Post Facto* Clause And Two Centuries Of This Court's Precedent.

When the Court is "convinced" it has "err[ed]," it is willing to overrule its precedent. *Smith v. Allwright*,

321 U.S. 649, 665 (1944). In considering whether to overrule its precedent, the Court carefully evaluates "the quality of its reasoning." *Janus v. AFSCME*, 138 S. Ct. 2448, 2479 (2018). The Court is especially willing to overrule incorrectly decided constitutional questions, because correction otherwise "depends upon amendment and not upon legislative action." *Allwright*, 321 at 665. Here, *Stogner* conflicts with the original meaning of the Constitution and two centuries of this Court's precedent. It was wrong when decided and should be overruled.

A. Founding-Era Evidence Shows That The *Ex Post Facto* Clause Does Not Bar The Revival Of Criminal Limitations Periods.

1. The *Ex Post Facto* Clause Was Modeled After State Constitutional Provisions That Prohibited Criminalizing Acts That Were Innocent When Committed.

State constitutions from the Founding era generally included clauses that outlawed retrospective laws punishing acts that were innocent when committed. Several state provisions referred to such laws as "*ex post facto* laws." A paradigmatic example of this type of provision was found in the Maryland Constitution's Declaration of Rights. The provision reads, "Retrospective law, punishing facts *committed before the existence of such laws*, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made." Md. Const. art. XV (1776) (emphasis added). In other words, legislatures must not criminalize conduct that was innocent when undertaken. Notably, *ex post facto* does not refer to *all* retrospective

laws; it refers only to those retrospective laws that punish acts committed before the existence of such laws.

At the time of the Constitutional Convention, at least four states had similar provisions. The North Carolina Constitution used the same language as Maryland. N.C. Const. art. XXIV (1776). In Massachusetts, the prohibition read, "Laws made to punish for actions done before the existence of such laws, and *which have not been declared crimes by preceding laws*, are unjust, oppressive, and inconsistent with principle of a free government." Mass. Const. art. XXIV (1780) (emphasis added). And the Declaration of Rights in the Delaware Constitution similarly invalidated only those "retrospective laws [that] punish[ed] *offenses committed before the existence of such laws*." Del. Decl. Rights § 11 (1776) (emphasis added).

These provisions collectively inspired the insertion of the *Ex Post Facto* Clause into the federal Constitution. As Madison noted in Federalist 44, "[E]x-post-facto laws ... are expressly prohibited by the declarations prefixed to some of the State constitutions." Madison suggested that the Convention "added this constitutional bulwark" to backstop state protections. *Id.*; *see also* James Madison, *Notes of James Madison on Debates at the Federal Constitutional Convention* (Aug. 22, 1787) ("*Madison's Notes*") (noting that Hugh Williamson, a delegate from North Carolina, explained that his State's prohibition on *ex post facto* laws had "done good there & may do good here"). The Framers thus were well aware that state *ex post facto* clauses only prohibited criminalizing acts that were innocent when committed, and they enacted a federal counterpart to implement similar protections nationwide.

2. The Framers Understood "*Ex Post Facto*" As A Legal Term Of Art That Did Not Prevent Reviving Statutes of Limitations.

The Founders recognized "*ex post facto*" laws as referencing a particular kind of distinctly oppressive laws. During discussion of the Clause at the Constitutional Convention, John Dickinson expressly referenced Blackstone's *Commentaries* and confirmed that the Clause had a particular definition: a law is *ex post facto* if, "after an action (indifferent in itself) is committed, the legislature then *for the first time declares it to have been a crime*, and inflicts punishment upon the person who has committed it." 1 William Blackstone, *Commentaries* 46; *Madison's Notes* (Aug. 29, 1787). This definition was treated as authoritative by the Convention and by leading American legal authorities. *See* St. George Tucker, *Blackstone's Commentaries: With Notes of Reference*, 1 App. 292-93 (1803); *Debate of the Virginia Convention* (June 17, 1788). Hamilton also discussed the Clause in Federalist 84. He noted that "the subjecting of men to punishment for *things which, when they were done, were breaches of no law* … ha[s] been, in all ages, the favourite and most formidable instruments of tyranny." Properly understood, then, the *Ex Post Facto* Clause is about prohibiting post-hoc criminalization of acts that were innocent at the time committed.

3. The Ratifying Public Did Not Understand The *Ex Post Facto* Clause As Applying To Changes In Statutes Of Limitations.

Criminal statutes of limitation did not (and do not) exist in England. *See Doggett v. United States*, 505 U.S. 647, 667 (1992) (Thomas, J., dissenting) (quoting 2 J.

Stephen, *A History of the Criminal Law of England* 1, 2 (1883)). This feature of British law is attributed to the long-followed principle, "[*n*]*ullum tempus occurrit regi*," meaning that "time does not run against the king." *Id.* Throughout the Colonial period, the only statute of limitations was the Limitation Act of 1623 which time-barred actions to recover property. 21 JAC I, C. 16. The Act was likely intended to keep inconsequential claims out of the king's court for ease of administration. *Developments in the Law of Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1178 (1950). Unsurprisingly, there were no criminal statutes of limitations at the time of the framing (1787) or at the time of ratification (1788).[2]

In short, the concept of the government voluntarily relinquishing its prosecution power was unknown at the time. It thus is unsurprising that the revival of criminal limitations periods was not mentioned at the Constitutional Convention or at any state ratifying convention. The ratifying public would not—and could not—have understood the *Ex Post Facto* Clause as preventing the revival of criminal limitations periods.

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2. Congress enacted the first criminal statute of limitations in the United States in 1790. The Crimes Act of 1790, which defined federal crimes such as counterfeiting and treason, included certain limits on the Government's ability to prosecute. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 119 (1790). It established no statute of limitations for willful murder, forgery, or pursuing fugitives from justice, but limited prosecution of all other cases to two or three years, depending on the crime. *Id.* New Jersey passed the first state criminal statute of limitations in 1796. N.J. Rev. Stat. § 263 (1820) (enacted in 1796); Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 Wm. & Mary L. Rev. 199, 252 n.233 (1995).

B. As Justice Chase Explained In *Calder v. Bull*, The *Ex Post Facto* Clause Was Not Meant To Apply To Laws Reviving Criminal Limitations Periods.

Just one decade after ratification, this Court affirmed the narrow set of legislative wrongs the *Ex Post Facto* Clause was intended to prevent. In *Calder v. Bull*, 3 U.S. at 389, Justice Chase noted several pre-Revolution instances where Parliament enacted vindictive and abusive legislation. These illustrative examples of legislative wrongdoing, he observed, motivated the drafters of the Constitution to include the *Ex Post Facto* Clause to guard against similar acts by the federal government. *Id.* He then enumerated what this Court has called "the exclusive definition of *ex post facto* laws," *Youngblood*, 497 U.S. at 42:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punished such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 U.S. at 390. Any law that falls within one of these specific categories is "manifestly unjust," "oppressive," and unconstitutional. *Id.* at 391. Each of these categories

involves laws that fundamentally alter the character of a crime after its commission by changing the legality of an act, the severity of an act, the punishment for an act, or the amount of proof required to convict an actor. These definitions are specific and narrowly circumscribed.

Justice Chase explained the distinction between retrospective laws and *ex post facto* laws. "Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law." *Id.* While all retrospective laws affect offenses or events that occurred prior to their enactment, some retrospective laws are constitutional: "there are cases in which laws may justly, and for the benefit of the community … relate to a time antecedent to their commencement." *Id.* In Justice Chase's view, the *Ex Post Facto* Clause is an important but narrow provision designed to prevent the Government from "punish[ing] a citizen for an innocent action." *Id.* at 388. It is not a coverall statute prohibiting all retrospective legislation. *Id.* at 390. It is no accident that Justice Chase adopted specific definitions for *ex post facto* laws, leaving retrospective laws undefined. The laws that the *Ex Post Facto* Clause prohibits are cabined by specific criteria; all other retrospective laws are not *ex post facto*.

Finally, were there any doubt about whether the *Ex Post Facto* Clause acts upon the retrospective extension of limitations periods, Justice Chase's opinion in *Calder* should resolve it. He specifically noted that statutes retrospectively tolling limitations periods were permissible, explaining that the *Ex Post Facto* Clause permits laws that "save time from the statute of limitations." *Calder*, 3 U.S at 391; *see Black's Law Dictionary* 1063 (1st ed. 1891) ("save" defined in part to

mean "[t]o toll, or suspend the running or operation of; as to 'save' the statute of limitations"). Justice Chase thus *explicitly sanctioned* tinkering with criminal limitations periods—including by retrospectively lengthening limitations periods by way of tolling. *Calder*, 3 U.S. at 391. As Justice Chase's opinion in *Calder* confirms, the *Ex Post Facto* Clause was not meant to apply to laws that retrospectively extend criminal limitations periods.

C. This Court Faithfully Applied The Original Meaning Of The *Ex Post Facto* Clause For Over Two Centuries.

Before *Stogner*, this Court's decisions consistently and faithfully adhered to Justice Chase's definition of the proper scope of the *Ex Post Facto* Clause. Only laws that clearly fell within his four categories were invalidated. For example, in *Cummings v. Missouri*, 71 U.S. 277, 279-80 (1866), this Court invalidated Missouri's postbellum "ironclad oath," which prohibited professionals from resuming their craft until they swore they had not engaged in pro-Confederacy conduct. This Court held the oath violated the *Ex Post Facto* Clause because "some of the acts to which the expurgatory oath [was] directed were not offences at the time they were committed." *Id.* at 327. In other words, the oath punished individuals for acts that, when taken, were legal—precisely the type of law within Justice Chase's first category of laws prohibited by the *Ex Post Facto* Clause.

In contrast, this Court has consistently upheld laws that work retrospective changes without crossing into *ex post facto* territory. In *Gut v. Minnesota*, 76 U.S. 35, 37-38 (1869), for example, this Court held that a law allowing a

judge to transfer a trial to another county did not violate the *Ex Post Facto* Clause, even though this law was not in effect when the defendant committed his crime. And in *Hopt v. Utah*, 110 U.S. 574, 588-90 (1884), this Court upheld a law that allowed a convicted murderer to testify in a criminal trial, even though convicted murderers were prevented from testifying when the crime at issue occurred. These laws might seem similar to Justice Chase's category four, because they retrospectively altered rules of evidence and procedure. But in both cases, this Court hewed closely to Chase's categories. Because the laws did not change procedural rules to "receive less, or different, testimony than the law required at the time of the commission of the offense *to convict the offender*," *Calder*, 3 U.S. at 390 (emphasis added), this Court held that they did not violate the *Ex Post Facto* Clause.

The Court continued to faithfully apply Justice Chase's definition of the *Ex Post Facto* Clause well into the twentieth century. In *Beazell v. Ohio*, 269 U.S. 167, 168-69 (1925), this Court upheld a law that subjected defendants to a joint trial, despite the fact that when the defendants committed their crimes the law guaranteed separate trials. Echoing Justice Chase, this Court noted that the *Ex Post Facto* Clause "was intended to secure substantial personal rights against arbitrary and oppressive legislation, … not to limit the legislative control of remedies and procedure which do not affect matters of substance." *Id.* at 171.

In *Dobbert v. Florida*, 432 U.S. 282, 288 (1977), the State of Florida revised its death penalty sentencing procedures. Under the old law, which applied at the time of Dobbert's crime, a capital felony was punishable

by death unless a majority of the jury recommended mercy. The new law said that a jury's recommendation of non-execution did not bind judges. *Id.* at 290-92. A jury recommended life in prison for Dobbert, but the judge overruled the recommendation and sentenced him to death. *Id.* at 287. Then-Justice Rehnquist, relying upon the nearly two centuries of case law supporting Justice Chase's conception of the *Ex Post Facto* Clause, held that the Florida law did not violate that Clause, because it did not levy a greater punishment than before, it simply changed the methods by which a punishment was levied. *Id.* at 294. Despite the law's retrospective application, this Court upheld the law against an *Ex Post Facto* challenge because it did not fall within any of Justice Chase's four categories.

To be sure, the Court on a few occasions in the late nineteenth century strayed from Justice Chase's canonical interpretation of the *Ex Post Facto* Clause. *See Kring v. Missouri*, 107 U.S. 221, 235 (1883); *Thompson v. Utah*, 170 U.S. 343, 355 (1898). But in both instances, subsequent decisions of this Court ignored their reasoning, and the cases were explicitly overruled in *Youngblood*, 497 U.S. at 47-52, for "depart[ing] from the meaning of the Clause as it was understood at the time of the adoption of the Constitution." *Youngblood* affirmed that *Calder* and its four categories provided the "exclusive definition of *ex post facto* laws." *Id.* at 42.

In short, when *Stogner* reached this Court, Justice Chase's conception of the *Ex Post Facto* Clause had withstood the test of time. Only laws that fall within one of Justice Chase's four categories are *ex post facto* and void, while all other retrospective laws are permissible.

D. *Stogner* Should Be Overruled Because It Is Inconsistent With The Original Meaning Of The *Ex Post Facto* Clause And Two Centuries Of This Court's Jurisprudence.

In 1993, California revised its statute of limitations governing child sex crimes. *Stogner*, 539 U.S. at 609. This new law allowed for the prosecution of previously time-barred sexual offenses in certain limited circumstances. *Id.* The California legislature adopted this change in response to the growing awareness that victims of child sexual abuse do not report their crimes for many years. *Id.* at 649 (Kennedy, J., dissenting). Because the limitations period for these offenses was only three years, prosecutors were powerless to pursue many sex offenders before this legislative change. *See People v. Frazer*, 982 P.2d 180, 183-84 (Cal. 1999). While the California law was clearly retrospective, it did not re-define child sex abuse crimes, aggravate the crimes, increase punishment, or lower the evidentiary requirements for conviction. In other words, the law did not fit within any of Justice Chase's four *Calder* categories. It was a retrospective law, but it was not an *ex post facto* law within the original meaning of the Clause.

Nonetheless, the *Stogner* majority invalidated California's law. In so doing, the Court deviated from *Calder*'s interpretation of the *Ex Post Facto* Clause and two centuries of this Court's jurisprudence. The *Stogner* Court made several serious errors.

First, it concluded that the California law "threaten[ed] the kinds of harm that ... the *Ex Post Facto* Clause seeks to avoid": the imposition of laws with "'manifestly *unjust and oppressive*' retroactive effects." *Stogner*, 539 U.S.

at 611 (citing *Calder*, 3 U.S. at 391). But "unjust and oppressive" was not the standard applied by Justice Chase in *Calder* to determine *whether* a law was *ex post facto*; it was a description that Chase applied to laws that *were ex post facto*. *Calder*, 3 U.S. at 391. Changing a description of outcomes into a rule of decision divorces the Constitution from the substance ratified by the People. Such a move harkens back to *Youngblood*, 497 U.S. at 45-46, where this Court warned against using the phrase "substantial protections," devoid of Founding-era context, to understand the meaning of the *Ex Post Facto* Clause.

Second, the *Stogner* Court argued that the California statute fell "literally within the categorical descriptions of *ex post facto* laws set forth by Justice Chase." *Stogner*, 539 U.S. at 611. But the *Stogner* majority did not show that the law actually fit into one of the four categories. Instead, it took the position that the California law fell within Justice Chase's supposed "alternative description" of the second category of *ex post facto* laws: a law that "inflicted punishments, where the party was not, by law, liable to any punishment." *Id.* at 612-13. The Court derived these "alternative categories" from a portion of Justice Chase's opinion where he described various parliamentary abuses and explained that the *Ex Post Facto* Clause was enacted in reaction to these injustices. *Calder*, 3 U.S. 389.

The *Stogner* Court erred in suggesting that Chase's dicta describing examples of parliamentary abuse carried the same weight as the categories themselves. As Justice Kennedy noted in dissent, Justice Chase's descriptions do not expand his four categories; "they are a description of the category's historical origins." *Stogner*, 539 U.S. at

641 (Kennedy, J., dissenting). Indeed, before *Stogner*, no decision of this Court "based [its] holding on the language of Justice Chase's alternative description." *Id.*

Lastly, the *Stogner* Court said that "numerous legislators, courts, and commentators have long believed it well settled that the [*Ex Post Facto*] Clause forbids resurrection of a time-barred prosecution." *Id.* at 616. The four dissenting justices vigorously contested the majority's reliance on these sources. *See id.* at 633-40 (Kennedy, J., dissenting). Of the twenty-two "cases cited by the Court," only four required deciding "whether a revival of expired prosecutions was constitutional," *id.* at 633, and all of these cases failed to rely on *Calder*'s four categories, *id.* at 635-36. Perhaps more importantly, the *Stogner* majority cited no Founding-era evidence that the *Ex Post Facto* Clause applied to statutes of limitations. *See id.* at 616-621. Disputed state court decisions and commentators' musings ought not trump the original meaning of the Constitution, reinforced by extensive precedent.

* * *

Stogner was a stark departure from this Court's *Ex Post Facto* Clause jurisprudence. Its expansion of the *Ex Post Facto* Clause disregarded the original meaning of the Clause and ran roughshod over two centuries of precedent. This Court should grant certiorari to overrule *Stogner* and restore order to its *Ex Post Facto* Clause jurisprudence.

II. Even If This Court Does Not Overrule *Stogner*, It Should Grant The Petition To Limit *Stogner* And Allow DNA-Based Revivals Of Criminal Limitations Periods.

Modern DNA evidence can now solve crimes decades after law enforcement's best efforts have failed. Recognizing this powerful tool, twenty-six States, with Congressional funding, have passed legislation reviving criminal limitations periods on the basis of new DNA identifications. Because of the high reliability of DNA evidence, these statutes—including the Montana statute at issue here—are much different than the one invalidated by the Court in *Stogner*. Accordingly, if the Court is disinclined to overrule *Stogner*, it should nonetheless limit *Stogner* and hold that DNA-based revival statutes are not *ex post facto* laws within the meaning of the Clause.

A. Reviving Limitations Based On Conclusive DNA Evidence Does Not Pose The Same Risks As The Law In *Stogner*.

Unlike the conclusive DNA evidence that Montana's revival statute requires, the law in *Stogner* required only that a child sex abuse prosecution begin within one year of a victim first coming forward, so long as there was some corroborating evidence. *Stogner*, 539 U.S. at 609. As a result, California prosecuted Stogner for sexually abusing his daughters twenty-two years prior. *Id.* at 610; *id.* at 649 (Kennedy, J., dissenting).

The majority in *Stogner* struck down California's statute in part because of the unreliability of witness testimony years after the fact. *Id.* at 631 ("Memories fade"

and "recollection after so many years may be uncertain."). The Court has long considered uncertain memories a primary justification for statutes of limitations: "[s]tatutes of limitation ... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). But the law at issue here does not present this risk because it does not rely on faded memories to revive statutes of limitations; it relies only on conclusive DNA evidence. *See* Mont. Code Ann. § 45-1-205(9).

DNA evidence is highly reliable, whereas witnesses' memories are not. In a prominent study, one third of eyewitnesses picked an innocent person out of a police lineup. Gary L. Wells, *Eyewitness Identification*, 39 L. & Hum. Behav. 99 (2015). And that study did not involve a time lapse. As time passes, a witness's memory fades even more. For example, researchers studied individuals' memories of September 11 one year, two years, and ten years after the attack. William Hirst et al., *A Ten-Year Follow-Up of a Study of Memory for the Attack of September 11, 2001*, 144 J. Exper. Psychol. 604 (2015). The study "showed a considerable level of inconsistency in [participants'] long-term retention." *Id.* at 620. In contrast, DNA evidence is accurate no matter how many years have passed. This Court has previously described DNA evidence as "an advanced technique superior to fingerprinting." *Maryland v. King*, 569 U.S. 435, 459 (2013). And for good reason. The chances of a standard DNA test incorrectly identifying an unrelated individual is 1 in 100 trillion. *Id.* at 445 (quoting John M. Butler,

Fundamentals of Forensic DNA Typing 270 (2009)). In short, witnesses are prone to mistakes, especially with the passage of time, but DNA evidence is not.

A law reviving limitations periods based on conclusive DNA evidence does not pose the same risks the revival in *Stogner* posed. Since Montana's law is limited to cases in which DNA evidence is conclusive, the risk of wrongful convictions is virtually nonexistent.

B. Limiting *Stogner* Will Benefit The Community By Allowing District Attorneys To Prosecute Sexual Offenders Conclusively Identified By DNA Evidence.

DNA testing has expanded law enforcement's ability to identify perpetrators of sexual crimes. It has also played a vital role in ensuring that the innocent go free. *See* Innocence Project, *DNA Exonerations in the United States*, https://bit.ly/2yJC1w7. In 1987, the year the rape in *Tipton* occurred, a state convicted a man based on DNA evidence for the first time. Randy James, *A Brief History of DNA Testing*, Time (June 19, 2009), https://ti.me/2xhjyY1. However, at that point DNA evidence was not widely used. Montana courts did not admit DNA evidence until 1994. *Tipton*, 421 P.3d at 782.

Also in 1994, the FBI "created [CODIS], which allows federal, state, and local crime laboratories to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders." Nat'l Res. Council, *Strengthening Forensic Science in the United States* 40 (2009). As part of this system, the FBI identified thirteen indicators, known as loci, that scientists examine

when creating a DNA profile, thus establishing a uniform database through which laboratories nationwide can meaningfully share information. Nat'l Inst. Just. (NIJ), *Using DNA to Solve Cold Cases* 6 (2002). CODIS contains over thirteen million DNA profiles and has assisted in over 400,000 investigations. *CODIS - NDIS Statistics*, FBI, https://bit.ly/2yGkIME. CODIS has enabled federal, state, and local law enforcement to working cooperatively and solve previously unsolvable crimes.

However, this cooperation has not reached its full potential because there is a "substantial backlog of unanalyzed DNA samples ... especially in sexual assault and murder cases." *Advancing Justice Through DNA Technology*, DOJ Archives, https://bit.ly/2EmmRhn. Over the last fifteen years, Congress has poured money into DNA testing to address this issue. Congress has invested almost $2 billion in testing backlogs since 2004. Gregory D. Totten, *Senate Must Approve Justice Served*, The Hill (July 18, 2018), https://bit.ly/2xooVUL. Since 2008, Congress has provided the Justice Department with more than $100 million each year to upgrade laboratory capacity and test backlogs. Gov't Accountability Off., GAO-13-605, *Justice Grants Programs* 1 (2013). And recognizing that testing without prosecution is meaningless, Congress has provided sizeable financial grants to help States prosecute DNA-linked cold cases. *See* 34 U.S.C. § 20982 (2018); Totten, *supra*.

Continuing advances in DNA technology augment efforts to clear the backlog and conclusively identify criminals. The original form of DNA testing, restriction fragment length polymorphism, required a large quantity of DNA, and dirt or mold in a sample could cause the test to

fail. NIJ, *supra*, at 5. New technologies do not suffer from these flaws—labs can analyze DNA evidence even when it is microscopic or degraded. *See id.* at 5-6. For example, in 1994 investigators needed a nickel-sized blood or semen sample to extract DNA; today an amount the size of a pin head is sufficient. Michael Kaplan, *These Advances in DNA Research Could Change Crime-Fighting Forever*, N.Y. Post (Jan. 27, 2018), https://nyp.st/2GsbZ3T. Also, when no direct match is found, labs can perform a less stringent test to find a perpetrator's relatives. *Id.* These advances in DNA technology have improved law enforcement's ability to test older samples. Indeed, labs can extract a DNA profile from evidence collected decades ago. NIJ, *supra*, at 3.

Tests of backlogged rape kits are conclusively identifying many rapists. A non-profit tracked three jurisdictions that discovered and tested backlogged kits. In Cuyahoga County, Ohio, 5,712 newly tested kits led to 527 indictments. Ilse Knecht, *Test Rape Kits. Stop Serial Rapists*, https://bit.ly/2eNZJ3C. Wayne County, Michigan, tested 10,000 kits. This resulted in over 2,500 matches. *Id.* And when Memphis, Tennessee, tested 9,754 kits, it led to over a thousand new investigations. *Id.* A CRS report on Detroit, Michigan's testing backlog found that after testing 1,595 rape kits, authorities conclusively identified the rapist in 455 cases. Lisa N. Sacco & Nathan James, CRS R44237, *Backlog of Sexual Assault Evidence* 7 (2015). Aided by federal funds, States are continuing to work through their backlogs and are prosecuting newly identified offenders.

In addition to Montana, twenty-five states have enacted statutes like the one at issue, allowing prosecution

based on new DNA identifications.[3] If this Court does not act, all of these laws may be subject to invalidation. This would allow perpetrators conclusively identified by DNA evidence to go free based on a misreading of the Constitution and a break from two centuries of this Court's precedent.

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3. Ark. Code Ann. § 5-1-109(i)-(j) (2018); Cal. Penal Code § 803(g) (2018); Colo. Rev. Stat. § 16-5-401(8)(a.5) (2018); Conn. Gen. Stat. § 54-193b (2018); Del. Code Ann. tit. 11 § 205(i) (2018); Fla. Stat. Ann. § 775.15(15)-(16) (2018); Ga. Code Ann. § 17-3-1(d) (2018); Haw. Rev. Stat. Ann. § 701-108(3)(c) (2018); 720 Ill. Comp. Stat. 5/3-5(a) (2018); Ind. Code Ann. § 35-41-4-2(b) (2018); Iowa Code Ann. § 802.10 (2018); Kan. Stat. Ann. § 21-5107(c) (2018); La. Code Crim. Proc. Ann. art. 572(B) (2018); Mich. Comp. Laws Ann. § 767.24(3)(b) (2018); Minn. Stat. Ann. § 628.26(f), (n) (2018); N.J. Stat. Ann. § 2C:1-6(c) (2018); N.M. Stat. Ann. § 30-1-9.2 (2018); N.D. Cent. Code Ann. § 29-04-03.1(2) (2018); Ohio Rev. Code Ann. § 2901.13(D) (2018); Okla. Stat. Ann. tit. 22, § 152(C)(2) (2018); Or. Rev. Stat. Ann. § 131.125(10) (2018); 42 Pa. Stat. and Cons. Stat. Ann. § 5552(c.1) (2018); Utah Code Ann. § 76-1-302(2)(a) (2018); Wash. Rev. Code Ann. § 9A.04.080(3) (2018); Wis. Stat. Ann. § 939.74 (2018).

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for certiorari and reverse the judgment of the Montana Supreme Court.

Respectfully submitted,

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