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 *AMICI CURIAE* CHILD USA, NATIONAL CENTER FOR VICTIMS OF CRIME, NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, AND ARIZONA VOICE FOR CRIME VICTIMS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

With the joint written consent of the parties filed with the Clerk of the Court, CHILD USA, the National Center for Victims of Crime, the National Crime Victim Law Institute, the National Organization for Victim Assistance, and Arizona Voice for Crime Victims respectfully submit this brief as *amici curiae*.[1]

INTERESTS OF *AMICI CURIAE*

Amicus curiae, **CHILD USA**, a Philadelphia-based nonprofit think tank, draws on the combined expertise of the nation's leading medical and legal academics to reach evidence-based solutions to persistent and widespread problems involving child protection. All child victims deserve justice, and CHILD USA aims to find the path for them.

The **National Center for Victims of Crime** ("**NCVC**"), a Virginia-based nonprofit organization, is the nation's leading resource and advocacy organization for all victims of crime. NCVC is particularly interested in this brief because of its commitment to victims of sexual assault and child abuse.

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[1] Counsel for *amici curiae* authored this brief in whole and no other person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties were given ten days notice and both parties consented to the filing of this brief.

The **National Crime Victim Law Institute** ("**NCVLI**") is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI promotes balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing.

The **National Organization for Victim Assistance** ("**NOVA**") is a nonprofit organization of victim and witness assistance programs, practitioners, agencies, researchers, victims, professionals, and others committed to the recognition and implementation of victim rights and services.

Arizona Voice for Crime Victims, Inc. ("**AVCV**") is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process.

SUMMARY OF ARGUMENT

Until recently, many states have had child sex abuse statutes of limitation that have made it difficult for prosecution to occur. *See generally* Marci A. Hamilton, *Justice Denied: What America Must Do to Protect Its Children* (2012). Victims are cruelly shut out from the system of justice through a combination of the effects of trauma, the power differential with the perpetrator, and a legal system inadequate to the task.

In *Stogner v. California*, 539 U.S. 607 (2003), this Court addressed California's attempt to resolve the

injustice by reviving expired criminal statutes of limitations in all cases of child sex abuse. In a 5-4 decision, this Court held that the California law violated the Ex Post Facto Clause. *Id.* at 633. For a narrow majority of the Court, the blanket revival of criminal claims went too far.

Since *Stogner*, the science of DNA evidence in sex assault cases has become increasingly sophisticated and reliable and states have begun to enact laws to permit prosecution of child rape where conclusive DNA evidence becomes available. *See* DNA Provisions—Fifty State Survey, CHILD USA, (Oct. 2018), www.childusa.org/dnaprovisions. This deeply reliable evidence justifies the reopening of a child sexual abuse case even when the statute of limitations previously expired, because it does not raise the risk of unfairness to the perpetrator. It is also necessary to prevent further abuse by the now-identified perpetrator.

In this case, eight-year-old L.T. was raped in her home in the middle of the night. Evidence was gathered immediately. The wrong man served a decade in prison due to a false conviction. It is now possible, due to a later-discovered DNA match with the actual perpetrator, to hold the right man accountable. This case is a proper vehicle for this Court to consider the appropriate interpretation and limits of *Stogner v. California*. By permitting prosecution of child abuse perpetrators, this Court would not only be providing particular victims access to much-needed justice, but would also be aiding in the incarceration of dangerous sexual predators before they could abuse more

children. Nothing in the Constitution forbids these laudable conclusions.

ARGUMENT

On March 20, 1987, eight-year-old L.T. was raped—orally, vaginally, and anally—in the middle of the night in her home in Billings, Montana. She and her family immediately reported the crime to the police. Police collected physical evidence of the rapist's semen from her. This DNA evidence was preserved.

Based on circumstantial evidence, Jimmy Ray Bromgard was falsely convicted of the crime and was incarcerated for over a decade.

In 2014, under the terms of a guilty plea for felony drug possession, Montana collected Ronald Tipton's DNA. Utilizing the Combined DNA Index System, or CODIS, police conclusively linked Tipton's DNA to the semen on file from L.T.'s rape. The State of Montana then sought to prosecute Tipton for his rape of L.T. Overruling a detailed decision from the trial court (Pet. App. 21-50), the Montana Supreme Court concluded that his prosecution was barred as a violation of the Ex Post Facto Clause, as interpreted in this Court's opinion in *Stogner v. California*, 539 U.S. 607 (2003). The Montana Supreme Court took no pleasure in letting Mr. Tipton walk free, explaining that "[t]he crime against L.T. . . . was, and remains, a horrific, morally repugnant act that the people of Montana expect will be punished for the protection of the victim and society.

The State's case against the alleged perpetrator is strong, and the scientific evidence is compelling." Pet. App. at 19.

Amici curiae urge this Court to grant certiorari so that it can examine whether *Stogner* is distinguishable from this case. Because *Stogner* is either distinguishable from the facts here—or should be reconsidered in circumstances involving newly-discovered DNA evidence—this Court should allow Mr. Tipton's prosecution for L.T.'s rape to go forward.

I. THE STATUTES OF LIMITATIONS FOR CHILD SEX ABUSE SHOULD BE GUIDED BY THE SCIENCE OF CHILD DEVELOPMENT, WHICH SUPPORTS MONTANA'S LAW PERMITTING REVIVAL OF EXPIRED CRIMINAL STATUTES OF LIMITATIONS WHEN DNA EVIDENCE IS PRESENT.

The lack of prosecution in this case echoes an all-too-common story, where justice for child victims of rape is rarely achieved. The problems are manifold. Although this case involves a child reporting almost immediately, in many cases victims are unable to come forward for decades. In virtually all cases, the crime occurs in secret, making corroboration difficult. These problems play into the danger for children posed by perpetrators. Child molesters often abuse their victims for years, leaving numerous victims in their wake over the course of a lifetime. This reality makes it all the more necessary that sexual assault cases be prosecuted whenever possible.

Child sex abuse is a global and national scourge that has flourished in, among other places, youth-serving organizations and families. On average, one in four girls and one in six boys are sexually abused.[2] Most abuse occurs at the hands of those who are in the family or closely associated with the victim. This case involves the rare instance where abuse was perpetrated by a stranger, but even here the perpetrator was someone from the community.

The adverse affects of childhood trauma are indisputable. As explained by the Center for Disease Control ("CDC"), Adverse Childhood Experiences ("ACEs") "have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity." U.S. Dep't Health & Human Services, CDC, *About Adverse Childhood Experiences*, https://www.cdc.gov/violenceprevention/acestudy/about_ace.html (Apr. 1, 2016).[3] The ACE Study is one of the largest

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[2] NSOPW, Raising Awareness About Sexual Abuse: Facts and Statistics, U.S. Dept. of Justice, https://www.nsopw.gov/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference (last visited Oct. 12, 2018); *see also* CDC, *Preventing Child Abuse & Neglect Fact Sheet*, https://www.cdc.gov/violenceprevention/pdf/CAN-factsheet.pdf (2017) (noting that at least one in seven children experienced abuse or neglect within the past year—a likely underestimate). Other studies have placed the incidence of sexual abuse of boys as low as 1 in 20, but the 20-25% figure for the abuse of girls has remained constant. *See* National Center for Victims of Crime, Child Sexual Abuse Statistics, NCVC, http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics (last visited Oct. 12, 2018).

[3] Vincent J. Feletti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 Am. J. Preventative Med. 4, 245-58 (1998);

investigations of the effects of childhood abuse, definitively showing a strong correlation between Adverse Childhood Experiences and later impairments.[4] Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCH PSYCHIATRY CLIN. NEUROSCIE. 174, 175 (Nov. 2005) ("Numerous studies have established that childhood stressors such as abuse or witnessing domestic violence can lead to a variety of negative health outcomes and behaviors, such as substance abuse, suicide attempts, and depressive disorders.").

Trauma affects childhood victims of sexual abuse or assault in a way that is distinct from victims of other crimes. Frequently children are so disabled by the trauma that they cannot disclose the abuse until much later in life. As a direct result of the shame and secrecy historically associated with child sex abuse, victims often remain in the shadows—unable to come forward. *See*, *e.g.*, Judy Cashmore et al., *The Characteristics of Reports to the Police of Child Sexual Abuse and the Likelihood of Cases Proceeding to Prosecution after*

S.R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286 JAMA 24, 3089-96 (Dec. 2001) (explaining that childhood trauma can lead to negative health outcomes).

[4] The findings from the ACE study show a strong graded relationship between adverse childhood experiences and related impairments (e.g., disrupted neurodevelopment; social, emotional, and cognitive impairment; disease; disability; etc.). *See*, *e.g.*, Feletti, *supra* note 3; U.S. Dep't Health & Human Services, CDC, *Adverse Childhood Experiences (ACEs)*, https://www.cdc.gov/violence prevention/acestudy/index.html (Apr. 2016).

Delays in Reporting, 74 INTL. J. CHILD ABUSE & NEGLECT 49, 49-61 (2017) (explaining that delays in disclosing and reporting child sexual abuse to the police are common); Katie Wright et al., *The Australian Royal Commission into Institutional Responses to Child Sexual Abuse*, 74 INTL. J. CHILD ABUSE & NEGLECT 1, 4 (2017) (suggesting that on average it took victims over twenty years to disclose their abuse). At least thirty-three percent of such cases are never reported. *See id.*; *see also* Mary-Ellen Pipe et al., *Child Sexual Abuse: Disclosure, Delay, and Denial* 32 (2013) ("failure to disclose is common among sexually abused children.").

When a report is made, many other barriers to successful prosecution often exist. These problems create ample opportunities for perpetrators.[5] After abuse is reported, "[a]dults tend to protect other adults and the reputation of institutions—even when it comes to an issue as serious as child sexual abuse." Marci A. Hamilton, *The Barriers to a National Inquiry into Child Sexual Abuse in the United States*, 74 CHILD ABUSE & NEGLECT 107, 107 (2017). As a consequence, sexual assault cases are regularly dismissed against perpetrators or never brought in the first place due to

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[5] *See generally* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN MIND AND BODY IN THE HEALING OF TRAUMA (2014); Penelope K. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study*, 23 DEVELOPMENT AND PSYCHOPATHOLOGY, 453-76 (2011); S. Berkowitz et al., *The Child and Family Traumatic Stress Intervention: Secondary Prevention for Youth at Risk Youth of Developing PTSD*, 52 J. CHILD PSYCHOL. PSYCHIATRY 676, 676-85 (Jun. 2011).

the trauma effects, the difficulty of proof, and the statute of limitations. *See*, *e.g.*, Yonat Shimron, *Judge Dismisses Sexual Assault Claims Against Southern Baptist Leader*, RELIGION NEWS, Oct. 18, 2018; Deanna Paul, *Utah Refused to Prosecute Four Sexual Assault Cases, so the Alleged Victims Set Out to Do It Themselves*, WASH. POST, Oct. 22, 2018.

In light of this research, the Court should consider Montana's petition against the backdrop of the harmful consequences whenever a child sexual assault crime is not prosecuted.

II. DNA EVIDENCE CAN BOTH CONVICT THE GUILTY AND SPARE THE INNOCENT OF A FALSE CONVICTION, AS WOULD HAPPEN IN THIS CASE IF THE COURT REVERSES THE DECISION BELOW.

In considering effective prosecution of sexual assault cases, the development of DNA evidence offers a unique remedy. For many cases (such as this one), DNA evidence offers a solution to ensure that the guilty are punished while the innocent are not harmed.

DNA was first used in a 1987 criminal case in Florida, to prove Tommie Lee Andrews guilty of rape.[6] DNA evidence matched Andrews' DNA to the crime's physical evidence. Jeffrey Lee Ashton, *Foundation for DNA Fingerprint Evidence*, 8 AM. JUR. PROOF OF FACTS 3d

[6] It has been approved by the Montana Supreme Court for use in the State since 1994. *Montana v. Moore*, 885 P.2d 457 (Mont. 1994).

740, § 2 (2018). In the *Andrews* case (as in many others), DNA evidence made it possible to "determine identity to a virtual certainty." *Id.* at § 4.

This Court underscored the importance and certainty of DNA evidence in *Maryland v. King*, 569 U.S. 435 (2013). In that case, this Court recognized that criminals use name, appearance, and other changes to conceal themselves from the police. *Id.* at 443. They may carry false IDs and their criminal records may be inaccurate. *Id.* In such difficult circumstances, DNA provides "unparalleled accuracy" in identification to help the police do their job and achieve justice for crime victims. *Id.* at 450; *see also National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward* 130 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (explaining that DNA typing is "universally recognized as the standard [against which other techniques are judged . . .] because of its reliability.").

In *King*, this Court raised a theoretical concern about what actually happened in this case, where the innocent Mr. Bromgard was imprisoned while the guilty Mr. Tipton remained free. Often, the Court explained, when DNA evidence is not used, criminals are not arrested and instead are left free to commit additional crimes. *Id.* at 453.

King also noted the importance of DNA evidence to victims, pointing out the dangers of a criminal aware of DNA: "For example, a defendant who had committed a prior sexual assault might be inclined to flee on a

burglary charge, knowing that in every State a DNA sample would be taken from him after his conviction on the burglary charge that would tie him to the more serious charge of rape." *Id.* at 456. Victims remain at risk whenever a person guilty of sexual assault remains free. Indeed, in one study of what happened when a person was wrongfully convicted of a sexual assault, actual offenders who were not arrested for their crimes committed numerous additional crimes. James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 (2013).

Public confidence in the justice system drops dramatically when the innocent are convicted while the guilty go free. Using DNA evidence properly can rebuild confidence in the system and contribute to greater protection for children. For that reason, the "most ardent law enforcement enthusiasts and the most passionate civil libertarians should have no disagreement about the desirability of disabling repeat violent offenders from claiming new victims, or of sparing innocent parties the pains and injustice of wrongful conviction and punishment." *Id.* at 1711.

Bringing sexual assault offenders to justice is uniquely important in the criminal justice system. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse ("Australian Royal Commission"), frequently lauded as the gold standard of national investigations into childhood sexual abuse, emphasizes the importance of testimonial-based

inquiry.[7] In a report derived from hearings by the Commission, Professor Shurlee Swain explains that through listening to testimony from victims and survivors, "the wrongdoing is recognized, victims are repositioned as moral equals, and their right to harbor feelings of anger and resentment is acknowledged." Shurlee Swain, *History of Australian Inquiries Reviewing Institutions Providing Care for Children*, 10 (2014). DNA is the investigative tool that cuts through perpetrators' ready-made false defenses.

By listening to victims, we also learn to recognize manipulative behaviors relied on by predators. DARVO, or Deny, Attack, and Reverse Victim and Offender, is a scientific term regularly used by sexual assault experts to describe common patterns of offender behavior.[8] The strategy is simple: to gain sympathy by claiming to be the true victim, thereby derailing any investigation into the allegations.[9]

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[7] Royal Commission into Institutional Responses to Child Sexual Abuse, Commonwealth of Australia (2017), https://www.childabuseroyalcommission.gov.au/final-report/.

[8] *See* Jennifer Freyd Ph.D., *Violations of Power, Adaptive Blindness & Betrayal Trauma Theory*, 7 J. FEMINISM & PSYCHOLOGY 22 (1997) (explaining the DARVO strategy employed by perpetrators as silencing victims to escape culpability, minimizing or denying the abuse, attacking the victim's credibility, and playing the victim themselves).

[9] Sarah J. Harsey et al., *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26:6 J. AGGRESSION, MALTREATMENT, & TRAUMA, 644, 644-63 (2017) (showing that DARVO "was commonly experienced by individuals who confronted another [] over a wide variety of wrong-doings . . . [and] that DARVO exposure was related to the . . . participants' negative emotions felt about the confrontation when it occurred").

Forceful denials of guilt are textbook for perpetrators of abuse and remain an effective tool for perpetrators to "assume[] the role of 'falsely accused' and attack[] the accuser's credibility" thus blaming "the accuser of being the perpetrator of a false accusation." Jennifer Freyd, Ph.D., Research—DARVO, https://www.jjfreyd.com/research. DARVO poses additional problems for fact-finders because of the way that guilty perpetrators react—shifting blame.

In cases where DNA evidence is available, providing clear scientific proof linking an individual to a crime against a child, an arbitrary procedural deadline should not be permitted to trump science to prevent holding child predators accountable. This countervailing interest in protecting children is a compelling interest of the highest order. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1740 (2017). It is also a matter of fundamental fairness. DNA evidence is admissible to reverse a conviction: defendants are permitted to assert it as a shield against false convictions. *See generally National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward* (2009), *supra*. If a convicted defendant can re-open a conviction upon the discovery of new DNA evidence, fairness demands that a victim should be able to invoke DNA evidence to reopen the possibility of criminal prosecution for sexual abuse.

Here, reliable DNA evidence links Tipton to the rape of L.T. The Court should grant the petition to determine whether its prior precedents truly require the affront to justice that would come for ignoring a

clearly-established scientific link showing who was responsible for this truly heinous crime.

III. THIS COURT SHOULD REVIEW THE IMPORTANT AND RECURRING ISSUE OF WHETHER ALLOWING PROSECUTION IN CASES WITH NEWLY DISCOVERED DNA EVIDENCE VIOLATES THE EX POST FACTO CLAUSE.

Montana's petition asks this Court to review the decision below, which refused to allow application of Montana's duly enacted law allowing for an extension of the statute of limitations based on newly-discovered DNA evidence. This law was designed to bring justice to victims of past sex offenses and to prevent future victimization of other victims. This Court should grant certiorari on this recurring question, which is of crucial importance to child sexual assault victims.

The Ex Post Facto Clause forbids any state from passing "any . . . ex post facto Law." U.S. Const. art. I, § 10, cl. 1. As its language suggests—and as this Court has recognized for more than 200 years—the prohibition is restricted to criminal cases such as this one. *See Calder v. Bull*, 3 U.S. 386, 390 (1798). In *Stogner v. California*, 593 U.S. 607 (2003), this Court applied the Ex Post Facto Clause and held unconstitutional a California law that broadly permitted "resurrection of otherwise time-barred criminal prosecutions, and . . . was itself enacted *after* pre-existing limitations periods had expired." *Id.* at 609.

In this case, four years after *Stogner*, Montana enacted a much narrower law, focusing specifically on situations involving new and conclusive DNA testing: "If a suspect is conclusively identified by DNA testing after a time period prescribed in subsection (1)(b) or (1)(c) has expired, a prosecution may be commenced within 1 year after the suspect is conclusively identified by DNA testing." Mont. Code Ann. § 45-1-205(9). No doubt, the Montana legislature thought it was complying with federal constitutional limits. Montana's law fits within a broad national pattern of comparable legislation. More than half the states have now enacted DNA-triggered criminal child sex abuse statutes of limitation in some form or another.[10] As the national CODIS database has expanded, "cold hits" like the one in this case have increasingly allowed law enforcement to identify criminals who have committed sex offenses.

In its decision below, the Montana Supreme Court interpreted *Stogner* overbroadly to conclude that it could not apply Montana's statute to this case. The Court appeared reluctant to do so, noting that "[t]he State's case against the alleged perpetrator is strong, and the scientific evidence is compelling." Pet. App. 18. Nonetheless, the Court recognized that it was bound to follow *Stogner*: "*Stogner* compels us to hold that the charges against Tipton must be dismissed." *Id.*

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[10] *See* DNA Provisions—Fifty State Survey, CHILD USA, (Oct. 2018), www.childusa.org/dnaprovisions.

Before this remarkable failure of justice is allowed to occur—both in the case at hand and other similar ones that will inevitably follow—this Court should review the decision below. The Court below erred by failing to distinguish the California one-size-fits-all child sex abuse statute from Montana's tailored law that protects the innocent by permitting later prosecution only where there is conclusive DNA evidence. This Court should grant certiorari to either clarify that *Stogner* does not preclude States from enacting the kind of narrowly drawn statute at issue here or overrule *Stogner* to permit application of such statutes in circumstances such as this case.

A. Montana's Narrow DNA Statute Allowing Revival of Claims for a Limited Period of Time is Distinguishable from the Broad Statute at Issue in *Stogner*.

When the Montana Supreme Court interpreted *Stogner*, it attempted to apply the Ex Post Facto principles explained by this Court. The Court below stated that the "Clause protects liberty by prohibiting statutes with manifestly *unjust and oppressive* retroactive effects." Pet. App. at 9. The Clause prevents "unfair and dishonest" legislation that deprives people of "fair warning" that they may be subject to prosecution and that they need to preserve evidence of their innocence. *Id.* at 13. It thus protects against "arbitrary and potentially vindictive legislation." *Id.* (citing *Stogner*, 539 U.S. at 611). Allowing Montana's DNA law to be applied in this case does none of these things. It does not

manifest unjust and oppressive retroactive effects, deprive people of fair warning, or apply arbitrarily and vindictively. To the contrary, the law based on conclusive DNA evidence cuts through all these concerns.

At its core, an ex post facto law is a law which, in its operation, makes criminal an act which was not so when it was performed, which increases the punishment for such an act, or which, relative to the act, changes the position of a party to his or her disadvantage. In *Stogner v. California*, this Court acknowledged that all discussions of ex post facto laws return to Justice Chase's definition in *Calder v. Bull*, 3 U.S. 386 (1798), a case that "this Court has recognized as providing an authoritative account of the scope of the *Ex Post Facto* Clause." *Stogner*, 539 U.S. at 611. In *Stogner*, the majority and the dissent debated the meanings of Chase's definitions and disagreed about their application to the California statute that resurrected time-barred criminal prosecutions for all child sex abuse cases. Ultimately, *Stogner* hinged on the second category offered by Justice Chase, which was that ex post facto laws included "*[e]very law that aggravates a crime, or makes it greater than it was, when committed*." *Calder*, 3 U.S. at 390–91 (emphasis added). The *Stogner* majority concluded that this category included California's broad law. 539 U.S. at 620-21. The dissent disagreed. *Id.* at 639-41 (Kennedy, J., dissenting).

But whatever the competing merits of these respective positions in that case (a subject discussed below), this case stands on different factual footing. These differences were clearly explained by the trial

court, which compared the statute at issue in *Stogner* with the statute at issue here:

> *Stogner*, decided in 2003, was based on a California statute that resurrected old sex crimes. The California statute was originally amended in 1993 and specifically dealt with delayed reporting by alleged victims, usually family members. *Stogner* never mentioned DNA evidence in relation to the statute of limitation nor did it address any amendment to a statute of limitation dealing directly with DNA evidence like the 2007 DNA amendment to Mont. Code Ann. § 45-1-205. This is a key difference between the 1993 California statute and the 2007 Montana amendment.

Pet. App. at 42-43. The trial court carefully analyzed why *Stogner* did not prevent application of the Montana provision. The trial court explained that "[t]he Montana legislature, unlike California's legislature in *Stogner*, did not allow for the revival of any and all previous causes of actions that would have been time barred under a statute of limitation." *Id.* at 46. Instead, Montana had revived a very limited class of cases: DNA cases. As the court explained, "This DNA law differs completely from the law reviving all causes of actions in *Stogner*—Montana's law is highly specific and requires a conclusive DNA match before prosecution can occur." *Id.* at 47. As an additional safeguard against ex post facto concerns, the trial court noted "the 2007 amendment restricts the time the State has to initiate prosecution to one year." *Id.*

The trial court further explored possible prejudice to Mr. Tipton from application of the new law, finding none. The trial court explained that "Mr. Tipton has not been deprived of any defense available under the law at the time the act was committed." *Id.* at 47. Moreover, while *Stogner* "discussed lack of evidence and concerns about problems with the memories of witnesses" in cases that were revived, in this case "DNA and its scientific validation" provided conclusive evidence and "[t]he law enforcement records and witness statements from March of 1987 have been maintained." *Id.*

The trial court also discussed particular facts "distinguish[ing] this case from *Stogner* and highlight[ing] the manifest injustice which would result" if the 2007 amendment were not allowed to apply. *Id.* at 48. First, the victim and the State "believed her perpetrator was behind bars from 1988 through 2002." As a result, neither the victim nor the police were looking for another suspect during that time—meaning the case went cold, even after the original suspect was released. *Id.*

Second, Mr. Tipton's decision to commit an additional crime led to the discovery that he had perpetrated the crime. In 2014, Tipton was convicted of the felony of Criminal Possession of Dangerous Drugs. *Id.* As a result of that conviction, Tipton had to provide a DNA sample to be kept in the CODIS database. As the trial court explained, "But for Mr. Tipton's new criminal conduct the State may never have located him and L.T.'s case would have remained cold." *Id.* at 49.

In light of all these circumstances, the trial court found that this Court's decision in *Stogner* did not control. As the trial court explained, "It is hard to believe these facts are the type contemplated by the *Stogner* Court as it addressed the California law allowing resurrection of *any and all* previous rapes having been time barred. These facts are wholly different from the *Stogner* facts." *Id.* at 49. The trial court's ultimate conclusion: "Fairness dictates this matter proceed to trial." *Id.*

It is true, of course, that the trial court's conclusion can be disputed. For example, the Montana Supreme Court disagreed, believing its hands were tied because *Stogner* "leaves no room to balance the State's and the victim's interests against the defendant's constitutional right to be free from *ex post facto* laws." *Id.* at 17. This very disagreement reveals the existence of serious arguments about the scope and reach of *Stogner*—arguments that this Court should fully consider by granting certiorari before a terrible injustice is allowed to occur in this and similar cases.

B. To the Extent that Dicta in *Stogner* Require Holding that Application of the Montana Law is Barred by the Ex Post Facto Clause, the Court Should Consider Overruling that Dicta as Applied to DNA-Triggered Child Sex Abuse Statutes of Limitations.

Even if this Court were to read dicta in *Stogner* as preventing application of Montana's DNA law in this case—and by implication similar DNA-triggered statutes in many other states—the Court should still grant certiorari and reconsider that particular aspect of *Stogner*, overruling *Stogner* to permit justice here and in other comparable cases. This Court has not hesitated to overrule other decisions that have prevented justice for crime victims. Most notably, in *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court overruled two earlier decisions barring the use of victim impact statements in capital cases. This Court explained that those decisions "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." *Id.* at 828-29.

Of course, exactly the same can be said here. Justice Kennedy's "spirited" dissent (joined by three other justices) challenged the "basic underpinnings" of *Stogner*. Justice Kennedy explained that the Court's decision "disregards the interests of those victims of child abuse who have found the courage to face their abusers and bring them to justice. The Court's opinion harms not only our *ex post facto* jurisprudence but also these and future victims of child abuse, and so compels

my respectful dissent." *Stogner*, 539 U.S. at 653 (Kennedy, J., dissenting).

In *Payne*, the Court was also concerned that "[j]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Payne*, 501 U.S. at 827); *see also id.* at 833 (Scalia, J., concurring) (noting the "injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence"). In an effort to "keep the balance true," *Payne* overruled an *evidentiary* limitation in a criminal prosecution that was already moving forward. In this case, however, the injustice is far more serious than a mere debate over what evidence can be admitted. If *Stogner* is allowed to block application of Montana's law (and many similar DNA provisions in other states), justice will be entirely denied for L.T. and others who have been the victims of child sex abuse in similar circumstances. The scales of justice will have tipped entirely towards child sexual abusers who can succeed in running out the clock.

Justice Kennedy presciently warned of such dangers in his dissent in *Stogner*. He noted the importance of extending statutes of limitations in cases such as this one, because "young victims often delay reporting sexual abuse because they are easily manipulated by offenders in positions of authority and trust, and because children have difficulty remembering the crime or facing the trauma it can cause." *Stogner*, 539 U.S. at 650 (Kennedy, J., dissenting).

Justice Kennedy also addressed whether child sex abusers had any sort of "reliance" interest that would somehow be disrupted by extending statutes of limitations. Justice Kennedy powerfully dismissed such concerns, explaining (with supporting studies) that "[w]hen a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime." *Stogner*, 539 U.S. at 651 (Kennedy, J., dissenting).

Justice Kennedy wrote eloquently of the pain of children who have been sexually victimized, who have suffered "deep and lasting hurt." 539 U.S. at 652 (Kennedy, J., dissenting). Against that backdrop of suffering, the "only poor remedy is that the law will show its compassion and concern when the victim at last can find the strength, and know the necessity, to come forward. When the criminal has taken distinct advantage of the tender years and perilous position of a fearful victim, it is the victim's lasting hurt, not the perpetrator's fictional reliance, that the law should count the higher." *Id.* (Kennedy, J., dissenting).

Justice Kennedy expressed grave concern about the outcome in *Stogner*, noting that child sexual abuse victims "have reported the crimes so that the violators are brought to justice and harm to others is prevented. The Court now tells the victims their decision to come forward is in vain." *Id.* at 651-52 (Kennedy, J., dissenting). In this case, L.T. has come forward—seeking justice for herself and to prevent others from suffering as she has. This Court should, at least, grant the petition for certiorari to evaluate whether DNA-triggered statutes present a new circumstance that *Stogner* did not have the opportunity to evaluate.

The science is clear as to why so few child predators are prosecuted. Child victims of sexual abuse often delay reporting as a result of the trauma associated.[11] Indeed, the average age of reporting is 52. One-third of victims never disclose their abuse.[12] The barriers to disclosure are compounded by the defendants' tactics to deny culpability, e.g., the approach whereby abusers deny, attack, and try to reverse the roles of victim and aggressor. When a child victim is able to report immediately and DNA can be gathered and preserved, proving conclusively who has committed a terrible crime, nothing in the Constitution prevents Montana and other states from deciding that they want to make justice possible. Indeed, this Court has quite recently recognized that "protecting children from abuse is a compelling state interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1740 (2017).

The fact that Montana (and many other states) have enacted DNA-triggered statutes permitting prosecutions in cases such as this one, even after *Stogner*, suggests ex post facto prohibitions are not commonly understood in the same wooden fashion as *Stogner* appears to have understood them. In similar circumstances, "when this Court has confronted a wrongly decided, unworkable precedent calling for

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[11] *See*, *e.g.*, S. Berkowitz et al., *The Child and Family Traumatic Stress Intervention: Secondary Prevention for Youth at Risk Youth of Developing PTSD*, 52 J. CHILD PSYCHOL. PSYCHIATRY, 676-85 (Jun. 2011).

[12] CHILD USA, *Average and Median Age of CSA Disclosure*, (2018), www.childusa.org/law.

some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent." *Payne*, 501 U.S. at 842-43 (Souter, J., concurring). The Court should do that same thing here.

By granting certiorari and overturning the decision below, this Court can permit Montana prosecutors to try to respond to the "deep and lasting hurt" that L.T. faced when she was raped at eight years old. Sadly, the interests at stake in this case extend far beyond L.T. They include many other children who will not see justice if DNA-triggered statutes involving sexual predators whose guilt can be conclusively proven are not allowed to operate. Indeed, at a fundamental level, what is at stake is whether to leave unreviewed a "decision contrary to the public sense of justice," which will inevitably "operate[] . . . to diminish respect for the courts and for law itself." *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

The Court below explained that "[t]he crime against L.T. more than thirty years ago was, and remains, a horrific, morally repugnant act that the people of Montana expect will be punished for the protection of the victim and society." Pet. App. at 19. And yet the Court reluctantly concluded that *Stogner* required it to let Mr. Tipton walk free. This Court should review that decision, as justice will not be served if the decision below is allowed to stand. This Court should not interpret the Constitution to require such manifest injustice.

CONCLUSION

This Court should grant certiorari, reverse the decision below, and permit Montana's and other states' laws to extend child sex abuse statutes of limitations based on later-identified DNA evidence.

Respectfully submitted,

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