No. 18-444

In the Supreme Court of the United States

MONTANA,

Petitioner,

v.

RONALD DWIGHT TIPTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

BRIEF IN OPPOSITION

ROBERT L. STEPHENS, JR.
Southside Law Center
19 North 25th Street
Billings, Montana 59101
(406) 245-6182

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly@mayerbrown.com

Counsel for Respondent

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BRIEF IN OPPOSITION

Montana asks this Court to review the decision below not because it implicates a split among the lower courts on an important federal issue, but because the federal constitutional question presented in the petition has *already* been decided, and Montana doesn't like the result. The petition is, therefore, an express invitation to overturn constitutional precedent. The Court should decline the request.

More than 15 years ago, this Court held in *Stogner* v. *California*, 539 U.S. 607 (2003), that the *Ex Post Facto* Clause prohibits a legislative act that revives an expired criminal statute of limitations if the limitations period was already expired before the statute's enactment. *Stogner* was correct when it was decided, and it remains correct today. The State sets the rules for determining when conduct is lawful and when it is not, and also when a prosecution may proceed and when it may not. Under the *Ex Post Facto* Clause, the State cannot change those rules with retroactive effect. To conclude otherwise (to hold that the State need not "play by its own rules") would be "unfair and dishonest," inviting arbitrary and vindictive prosecutions. *Stogner*, 539 U.S. at 611 (quoting *Carmell* v. *Texas*, 529 U.S. 513, 533 (2000); *Falter* v. *United* States, 23 F.2d 420, 426 (2d Cir. 1928) (Hand, J.)). Allowing a State to resurrect a time-barred prosecution by reviving a limitations period after its expiration is flatly inconsistent with that general framework.

Montana is wrong to say that *Stogner* has had unforeseeable and unintended consequences. DNA evidence is nothing new, and it had been in use long before *Stogner* was decided. Nor, in any event, is DNA testing the infallible dispenser of truth that Montana holds it out to be.

Even if there were reason to question *Stogner*'s holding today—there is not—the Court would not be justified in overruling it. *Stare decisis* is the foundational principle of our legal system, with constitutional dimensions of its own. It establishes a strong presumption favoring adherence to precedent, which encourages respect for the rule of law and cabins judicial caprice. None of the special circumstances needed to overcome this strong presumption is present here.

To be sure, the crime in this case is a terrible one. It is thus understandable that Montana—no less society at large—should want the perpetrator punished. In the vast majority of cases, *Stogner* is no obstacle to that end. It is only is the sliver-thin range of cases like this one, where the applicable limitations period was already expired before the 2007 enactment of Mont. Code Ann. § 45-1-205(9), that *Stogner* prevents prosecution.

With respect to those cases, "obedience to the [Constitution] always bears [a] cost," even as it "brings with it other benefits." *United States* v. *Carloss*, 818 F.3d 988, 1015 (10th Cir. 2016) (Gorsuch, J., dissenting). It is not the Court's role "to weigh those costs and benefits but to apply the [Constitution] according to its terms and in light of its historical meaning." *Ibid.* Here—as a majority of the Court emphatically held in *Stogner*—the terms and historical meaning of the *Ex Post Facto* Clause forbid respondent's prosecution.

In any event, the petition should be denied because the issue presented arises infrequently. Montana cites just two other cases in which it says *Stogner* has inhibited a prosecution, but both involved associated murders that are not subject to a statute of limitations and for which the offenders will serve the rest of their lives in prison regardless. For their part, the *amicus* States cite just six cases over nearly 15 years—some that are

inapposite civil suits, and others that rest on independent state constitutional law holdings. There is accordingly no need for this Court's intervention.

STATEMENT

A. Factual background

1. A young girl, Linda Tokarski Glantz, was raped in the early morning hours of March 20, 1987. Pet. App. 3. The girl told her parents, and the police began an investigation. *Ibid.*

Eight months later, a jury convicted Jimmy Ray Bromgard of the crime. Pet. App. 3. Fourteen years after his conviction, Bromgard requested DNA testing of the biological material recovered from the crime scene. *Id.* at 4. The DNA test exonerated Bromgard, who was released soon thereafter. *Ibid.*

The case remained open until respondent Ronald Tipton submitted to DNA testing after a plea agreement in connection with drug charges. Pet. App. 4. Authorities later matched respondent's DNA with the DNA from the 1987 crime scene. *Ibid.*

2. At the time of the crime in 1987, the applicable statute of limitations was five years. Pet. App. 5. Two years after the crime (that is, within the original five-year period), the state legislature extended the limitations period so that it would expire five years after Glantz's eighteenth birthday. *Ibid.* Glantz turned 18 on May 8, 1996, meaning that the statute of limitations for her rape expired on May 8, 2001. *Ibid.*[1]

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[1] In October 2001, an enlargement of the applicable limitations period took effect, making it ten years after the victim's eighteenth birthday. See Pet. App. 5. The Montana Supreme Court held that "[t]his extension did not go into effect until * * * after the period of limitations applicable to [Glantz's] rape already had expired," describing the point as "undisputed." Pet. App. 5 n.1. In an apparent effort to make the facts appear closer than they are,

In 2007—fully six years after the May 8, 2001 expiration of the then-applicable statute of limitations for the 1987 rape—the state legislature amended the Montana Code so that it revives expired limitations periods for various sexual offenses when a DNA match is discovered. See Mont. Code Ann. § 45-1-205(9). It provides, in particular, that "[i]f a suspect is conclusively identified by DNA testing after [the ordinary limitations period] has expired, a prosecution may be commenced within 1 year after the suspect is conclusively identified by DNA testing." Pet. App. 5 (quoting Mont. Code Ann. § 45-1-205(9)).

B. Procedural background

In November 2015—nearly three decades after the underlying crime was committed but within one year of the DNA match—county prosecutors charged respondent with three violations of Section 45-5-503(3)(a) of the Montana Code. Pet. App. 4.

Respondent moved to dismiss the charges as barred by the statute of limitations. Pet. App. 5.

The trial court denied the motion. Pet. App. 21-50. But the Montana Supreme Court unanimously reversed (Pet. App. 1-20), directing dismissal of the charges against respondent (*id.* at 19).

The Montana Supreme Court's reasoning was straightforward: The question is whether Montana may invoke Section 45-1-205(9) to revive a limitations period that was already expired when the statute was enacted. That is "nearly identical [to the] question in

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Montana now asserts (Pet. 6-8) that the October 2001 extension *did* apply to respondent by operation of a tolling provision, together with the State's own "conservativ[e] estimate[]" of respondent's periodic absences from the State between 1987 and 2001. This is a puzzling shift of course; applicability of the 2001 amendment to the facts of this case is a matter of state law conclusively resolved by Montana's highest court. It is no longer up for debate.

Stogner." Pet. App. 12. Recognizing that a carve-out for positive DNA matches would have to "apply not only in child abuse cases, but in every criminal case" (*id.* at 14), the court found no basis for distinguishing *Stogner*'s holding (*id.* at 15-16). Montana's contrary argument "mirrors the *Stogner* Dissent, which [a majority of] the Supreme Court emphatically rejected." *Id.* at 17.

Thus, although the facts of this case differ in some respects from the facts in *Stogner*, the Montana Supreme Court held that "none of those differences distinguishes the case[] [from *Stogner*] for constitutional purposes." Pet. App. 17-18.

REASONS FOR DENYING THE PETITION

The Court should decline Montana's request to limit or overrule *Stogner*. As an initial matter, there is no logical way to limit *Stogner* in cases like this one; a holding in Montana's favor would ineluctably require overruling *Stogner* altogether. Yet that is plainly uncalled for. *Stogner* is well supported by legal authorities at the time of the Founding, and it accords with Justice Chase's canonical opinion *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798). There has been no groundswell of criticism of *Stogner* since it was decided 15 years ago. Nor have there been any changed circumstances that would justify setting it aside. DNA testing was a well-known evidentiary technique in 2003—and it is hardly infallible, as Montana suggests.

Beyond that, the question presented arises very infrequently. And insofar as any broader societal interests are at stake here, they present an issue for state legislatures, not the courts. The petition accordingly should be denied.

A. *Stogner* was correctly decided

1. The petition should be denied first and foremost because *Stogner* was correctly decided. This Court has

said that *Calder* "provid[es] an authoritative account of the scope of the *Ex Post Facto* Clause." *Stogner*, 539 U.S. at 611. In that case, the Court recognized four categories of laws that amount to *ex post facto* violations. The passage of a law to revive a prosecution that was already time-barred when the law was adopted fits neatly within two of those categories: the second and fourth.

a. *Calder*'s second category provides that a law violates the *Ex Post Facto* Clause if it "inflict[s] punishments, where the party was not, by law, liable to any punishment" at the time of his conduct. *Stogner*, 539 U.S. at 612 (quoting *Calder*, 3 U.S. at 389). This category covers the prototypical *ex post facto* law—one that makes conduct unlawful that was lawful when undertaken. According to *Calder*, such laws may not apply retroactively under the *Ex Post Facto* Clause.

But it is not just a binary change in the law's proscriptions (from legal to illegal) that is encompassed in this category; included as well is "any 'law that aggravates a crime, or makes it greater than it was, when committed.'" *Id.* at 613 (quoting *Calder*, 3 U.S. at 390; citing 2 R. Wooddeson, *A Systematical View of the Laws of England* 638 (1792)). Laws of this sort—those, for example, that increase the punishment authorized for a crime—likewise may not apply retroactively.

The passage of a law to revive an already-expired limitations period fits within this category in two respects. *First*, an individual "[is] not, by law, liable to any punishment" for a crime once the statute of limitations has lapsed. To resurrect a limitations period by statute after the period already has expired is therefore to create a criminal liability that did not exist at the time of the law's enactment. *Stogner*, 539 U.S. at 613. That is a clear *ex post facto* violation. *Ibid.*

Second, the magnitude of a crime is measured by more than just the term of imprisonment authorized; it is measured, too, by the period of time in which a prosecution may be brought. As the Montana Supreme Court recognized (Pet. App. 16), the seriousness of the sexual offense at issue here is reflected in the "repeated extensions of the statute of limitations" applicable to it. Thus, for a legislature to revive a limitations period after the original period's expiration is to "aggravate[]" the crime and make it "greater than it was," with retroactive effect. *Stogner*, 539 U.S. at 613 (quoting *Calder*, 3 U.S. at 390). This, too, violates the second *Calder* category.

b. *Calder*'s fourth category recognizes that laws altering the rules of evidence, making it easier for a State to prove its case, also violate the *Ex Post Facto* Clause when they have retroactive effect. *Stogner*, 539 U.S. at 612 (quoting *Calder*, 3 U.S. at 389). Permitting States to legislatively resurrect time-barred prosecutions after they already have expired fits within this prohibition as well.

As the Court put it in *Stogner*, "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." 539 U.S. at 615 (citing *United States* v. *Marion*, 404 U.S. 307, 322 (1971)). That is because a statute of limitations "typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." *Ibid.* (citing *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979)). Thus, the Court has previously described statutes of limitations "as creating 'a presumption which renders proof unnecessary.'" *Id.* at 616 (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879)). "Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is

to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient." *Ibid.*[2]

2. Apart from these two *Calder* categories, permitting States to resurrect time-barred prosecutions by passage of a law after the limitations period had already expired would be "manifestly unjust and oppressive," violating the core purpose of the *Ex Post Facto* Clause. *Stogner*, 539 U.S. at 611 (emphasis omitted) (quoting *Calder*, 3 U.S. at 391).

a. The State has sovereign authority to determine not only what conduct is permitted and what conduct is forbidden, but also when a prosecution may proceed and when it may not. To allow the State to establish those rules and then retroactively change or abandon them whenever convenient would mean that the State does not have to "play by its own rules." *Stogner*, 539 U.S. at 611 (quoting *Carmell*, 529 U.S. at 533). That, in turn, would be "unfair and dishonest," inviting arbitrary and vindictive prosecutions. *Ibid.* (quoting *Falter*, 23 F.2d at 426 (Hand, J.)). Statutes of limitations would be revocable at will, even with respect to long-past conduct. As a practical matter, this would "deprive[] the defendant of the 'fair warning' that might have led him to preserve exculpatory evidence." *Ibid.* (quoting *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981)).

The invitation for abuse is apparent. For example, expired limitations periods for long-since-passed tax

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[2] In light of *Stogner*'s express analysis under these two *Calder* categories, the State's insistence (at 27-28) that the *Stogner* majority "adopted an expanded view of the *Ex Post Facto* Clause" that "eschewed Justice Chase's four part framework" is manifestly wrong.

violations could be revived to allow prosecutions of political opponents. They could, indeed, be revived to permit prosecutions of public figures for virtually any alleged misdeed, no matter how trivial or long in the past it occurred. These are precisely the kinds of abuses the *Ex Post Facto* Clause was meant to forbid.

b. Statutes of limitations also protect the presumption of innocence 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." *Marion*, 404 U.S. at 322 n.14. That is, indeed, a fundamental purpose of statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence." *Wood*, 101 U.S. at 139.

It has been universally understood in the criminal context that lapsed limitations periods afford "repose" that act as "a conclusive bar" to prosecution. *Wood*, 101 U.S. at 139. Accord *Kubrick*, 444 U.S. at 117 (limitations periods are "statutes of repose"). A well-known nineteenth century treatise, for example, described criminal statutes of limitations as granting permanent amnesty from the possibility of prosecution:

> Here, the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offence to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offence; that the offender shall be at liberty to return to his country and resume his immunities as a citizen, and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. * * * [T]he very existence of the statute is a recognition

> and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt.

Francis Wharton, *A Treatise on the Criminal Law of the United States* § 444 (7th ed. 1874) (quoted in *Lamkin* v. *People*, 94 Ill. 501, 504-505 (Ill. 1880)).

If a State could pass a law to authorize a prosecution that was already time-barred at the time of the law's enactment, statutes of limitations would be meaningless. Parties could be stripped at any time of the amnesty previously granted to them by law, and the repose afforded them would be wholly illusory. As Judge Learned Hand put it, that "seems to most of us unfair and dishonest." *Sogner*, 539 U.S. at 611 (quoting *Falter*, 23 F.2d at 426).

"[L]ikely for the reasons just stated, numerous legislators, courts, and commentators have long believed it well settled that the *Ex Post Facto* Clause forbids resurrection of a time-barred prosecution." *Stogner*, 539 U.S. at 616 (detailing early American sources). And "[g]iven the apparent unanimity" of state and federal case law on the point, "legal scholars have long had reason to believe this matter settled." *Id*. at 619 (detailing scholarly treatment of the question). Montana's contrary approach, like the dissent's in *Stogner*, "is too narrow; it is unsupported by precedent; and it would deny liberty where the Constitution gives protection." *Id*. at 621-622. These points are settled and do not warrant re-litigation.

B. There is no logical basis for holding *Stogner* inapplicable to cases involving DNA evidence

Montana asks the Court to "limit *Stogner*'s application" in cases like this one (Pet. 3, 23) by "clarify[ing]" that *Stogner* does not bar prosecutions in which the

suspect is identified by DNA evidence collected during the initial investigation (Pet. 14, 19-20). There is no logical basis for such a limitation.

Montana appears to suggest that such a limitation is appropriate because DNA evidence is "irrefutable evidence of [the suspect's] identity." Pet. 14. It points to recent "[a]dvances in DNA technology" since *Stogner* was decided (Pet. 13), asserting that the *Stogner*'s concerns to ensure "fair warning" and avoid "arbitrary" treatment of offenders are not present when a limitations period is revived because of a DNA match using modern technology (Pet. 14, 19-20). That is so, in Montana's view, because "there is nothing arbitrary about DNA testing," it "does not lend itself to vindictive investigation," and DNA testing "is safeguarded from human bias." Pet. 19-22.

That line of reasoning is seriously misguided both legally and factually.

Legally, an "irrefutability" standard would be no standard at all. To begin with, it would not stop at DNA evidence. Videotape evidence, for example, is also often described as "irrefutable," particularly following the Court's decision in *Scott* v. *Harris*, 550 U.S. 372 (2007). See, *e.g.*, *Kindl* v. *City of Berkley*, 798 F.3d 391, 399 (6th Cir. 2015) (citing *Scott* and describing "clear video footage" as "irrefutable"). And some sex offenders are known to make and collect videotapes of their and others' crimes, even circa 1987. See *Child Molesters: A Behavioral Analysis* 17-18, Nat'l Ctr. for Missing & Exploited Children (1986), perma.cc/BX6L-NGDD. Would not Montana's request for an "irrefutable evidence" carve-out extend also to the discovery of videotape evidence?

And as long as Montana's argument would extend to *any* "irrefutable" evidence, it surely also would apply

to cases involving crimes other than sexual offenses. See Pet. App. 14. Often, less egregious crimes like thefts and burglaries are caught on videotape; they are also frequently supported with fingerprint or DNA evidence. What logical basis would there be for preventing state legislatures from authorizing prosecutions of these other crimes as well, even after their limitations periods have run?

Indeed, if a State could sidestep the *Ex Post Facto* Clause on the basis of the reliability of the evidence of guilt, every new criminal enactment would include a provision authorizing retroactive application so long as the evidence against the defendant were "irrefutable." And every prosecutor's office would assert that their evidence against every suspect met that standard, obtaining indictments and extracting plea deals in most such cases. Cf. Emily Yoffe, *Innocence Is Irrelevant*, The Atlantic (Sept. 2017), perma.cc/X8L2-G677 (explaining that 94% of convictions at the state level and 97% percent at the federal level result from plea deals). The exception would swallow the rule, and the *Ex Post Facto* Clause would come to mean nothing.

Worse still, Montana's logic would spill over onto other constitutional rights. If the supposed "irrefutability" of DNA evidence were enough to override the right against retroactive criminal prosecutions, why not also the Sixth Amendment right to confront witnesses or to be tried by a jury—on Montana's reasoning, those rights would have no practical role to play in the face of "irrefutable" DNA evidence, either. That is an absurd but unavoidable result of Montana's logic.

Factually, Montana is wrong in any event that a DNA match is foolproof evidence of guilt. "DNA typing has long been held up as * * * an infallible technique rooted in unassailable science." Matthew Shaer, *The False Promise of DNA Testing*, The Atlantic (June

2016), perma.cc/96PS-NBV8. "The problem, as a growing number of academics see it, is that science is only as reliable as the manner in which [laboratory analysts] use it." *Ibid.* And, in fact, the manner in which biological samples are handled and analyzed in American crime labs is often deeply flawed: Crime labs are beset with shoddy chain-of-custody procedures, substandard analytical protocols that risk cross-contamination of samples, and other examples of "gross incompetence." See *ibid.*

In one case of systemic misconduct, "Houston police technicians were routinely misinterpreting even the most basic samples," leading to false convictions. Shaer, False Promise, *supra.* Questionable computer code used in the analysis of biological samples in New York State has called into doubt verdicts in thousands of criminal cases. Lauren Kirchner, *Thousands of Criminal Cases in New York Relied on Disputed DNA Testing Techniques*, ProPublica (Sept. 4, 2017), perma.cc/7FX9-RPEF. And just last year, "Massachusetts state crime lab chemist Annie Dookhan made national headlines after investigations and lawsuits over her misconduct prompted the state's Supreme Judicial Court to order the largest dismissal of criminal convictions in U.S. history." Michelle Malkin, *The Crisis in America's Crime Labs*, Nat'l Rev. (July 12, 2017), perma.cc/C5BT-NC5B.

"Law journals and scientific publications are filled with similar horror stories that have spread from the New York City medical examiner's office and Nassau County, N.Y.'s police department forensic evidence bureau to the crime labs of West Virginia, Harris County, Texas, North Carolina, and jurisdictions in nearly 20 other states." *Ibid.* See also, *e.g.*, Douglas Starr, *Forensics Gone Wrong: When DNA Snares the Innocent*, Sci.

(Mar. 7, 2016), perma.cc/782C-NLLA (detailing examples).

Against this backdrop, Montana is plainly mistaken to suggest that DNA evidence is an evidentiary silver bullet that will ensure that previously-expired limitations periods are reopened under statutes like Section 45-1-205(9) only when guilt is essentially assured. In fact, forensic DNA analysis, like all other evidence, is an imperfect tool—not because the science is questionable, but because science is only as good as the people performing it.

For similar reasons, Montana is wrong that *Stogner*'s fair-notice concern is not implicated here, simply because "a DNA profile does not diminish over time." Pet. 23. See also Pet. 15 (DNA "does not fade like a memory"). The concern underlying *Stogner*'s fair-notice rationale is not that the defendant's *accuser*'s account will necessarily grow stale, but that the *defendant* will be unable to mount a complete defense as memories fade, documents are lost, and witnesses move away or die. See *Stogner*, 539 U.S. at 615. These concerns are real in light of the crime-lab deficiencies just described—and they are exacerbated by the expiration of the limitations period, which conveys to the individual that "he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out." *Lamkin*, 94 Ill. at 505.

In short, as the Montana Supreme Court recognized (Pet. App. 15-16, 18), there is no logical basis for recognizing exceptions to the *Ex Post Facto* Clause based on the reliability of DNA evidence in sexual offense cases. A ruling for Montana in this case would thus require *Stogner*'s overruling.

C. *Stare decisis* weighs decisively against granting the petition

Even if there were a basis for questioning the merits of *Stogner*'s holding (there is not), its overruling would be uncalled for.

1. The petition does not to identify any special circumstance that would justify setting Stogner *aside*

a. *Stare decisis*, "the idea that today's Court should stand by yesterday's decisions[,]is a foundation stone of the rule of law." *Kimble* v. *Marvel Entm't*, *LLC*, 135 S. Ct. 2401, 2409 (2015) (quotation marks omitted).

That respect accorded to precedent, one of the law's "favourite and most fundamental maxims," ensures that legal rules are not "uncertain and fluctuating" or "liable to change with every change of times and circumstance." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 87 (1807). The Framers themselves recognized that

> [t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.

The Federalist No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Adhering to precedent is essential to maintain "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). See also *Payne* v. *Tennessee,* 501 U.S. 808, 827 (1991) (*stare decisis* "contributes to the actual and perceived integrity of the judicial process"). It demonstrates "the wisdom of this Court as an institution transcending the moment" (*Green* v. *United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting))—affirming that the

Court's decisions are "founded in the law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986).

Stare decisis also furthers the practical interest in doctrinal stability—it enables citizens seeking to conform their conduct to the law to base their decisions on existing rules. "It is by the notoriety and stability of such rules that professional men can give safe advice * * * and people in general can venture with confidence to buy, and to trust, and to deal with each other." 1 James Kent, *Commentaries on American Law* 476 (2d ed. 1932). In Blackstone's words, *stare decisis* "keep[s] the scale of justice even and steady." 1 William Blackstone, *Commentaries* *69.

For these reasons, "even in constitutional cases," *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some special justification." *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (quotation marks omitted). Thus, mere disagreement with the prior holding is insufficient to justify its overruling. "Even when the prior judicial resolution seems plainly wrong to a majority of the present Court," adhering to precedent often is appropriate because it "can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a law which binds [it] as well as the litigants." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 752 (1988) (quotation marks omitted).

In a context like this, therefore, the precedent would have to be "egregiously wrong" and, in turn, "significantly harm[] our criminal system." See *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

b. Montana fails to identify any special circumstances that would justify setting *Stogner* aside. It does not suggest that *Stogner* is egregiously wrong, nor does it suggest that its reasoning has been undercut by more recent legal developments. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997) ("The doctrine of *stare decisis* does not preclude [the Court] from recognizing the change in [its] law" or a prior holding's "inconsisten[cy] with [its] more recent decisions.").[3]

Montana instead focuses on supposedly changed circumstances, broadly asserting (Pet. 13) that *Stogner* "has had unforeseeable and likely unintended consequences for cold cases" involving DNA evidence. It thus suggests that developments in DNA technology warrant revisiting *Stogner*.

To be sure, the Court has occasionally expressed willingness to overrule precedent where changing factual circumstances have eroded the case's logical foundation. See*, e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 326 (2010). But that does not remotely describe this case. Use of DNA evidence to solve cold cases was readily foreseeable when *Stogner* was decided in 2003. The first verdict in a case using DNA evidence was returned in 1987. See *Andrews* v. *State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988). "By 1991, DNA evidence had been considered in hundreds of *Frye* hearings involving felony prosecutions in more than 40 states," and "[t]he overwhelming majority of trial courts ruled that such evidence was admissible." *See DNA Technology in Forensic Science* 21-22, Nat'l Research Council, (1992), perma.cc/B9ND-RYM4. See also Pet. App. 3 (confirm-

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[3] This was the basis upon which the Court, in *Collins* v. *Youngblood*, 497 U.S. 37 (1990), overruled *Kring* v. *Missouri*, 107 U.S. 221 (1883), and *Thompson* v. *Utah*, 170 U.S. 343 (1898). It is inapplicable here.

ing that DNA evidence has been in use in Montana since 1994). Forensic use of DNA evidence was therefore well-known when *Stogner* was decided in 2003, and its potential utility for solving cold cases was readily foreseeable. It would make no sense to say to *Stogner* is outdated in light of technology that was already well known and in frequent use at the time it was decided.

In truth, Montana's bid to overrule *Stogner* boils down to its concern that the *Ex Post Facto* Clause (as construed in *Stogner*) stands as an obstacle to prosecution in a very narrow range of cases. So it does. But when it comes to constitutional interpretation, "appeal to practical consequences," regardless of how compelling, cannot overcome "history, case law, and constitutional purposes," which here forbid prosecution. *Stogner*, 539 U.S. at 631. And even if there were grounds for disagreement concerning the constitutional question, mere disagreement with a prior precedent is insufficient to justify overruling it. See, *e.g.*, *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

2. Overruling Stogner *would cast doubt on other settled rules of law*

Overruling *Stogner* would be particularly problematic because it would disrupt settled law in other areas. For starters, it would appear to permit retroactive abrogation of other statutory defenses that accrue after alleged criminal conduct has occurred and that have always been thought to be irrevocable, such as legislative grants of amnesty or immunity in exchange for cooperation with a government investigation See, *e.g.*, *Brown* v. *Walker*, 161 U.S. 591, 601-602 (1896) (discussing congressional and state legislative grants of amnesty); *Frisby* v. *United States*, 38 App. D.C. 22 (D.C. Cir. 1912) (holding that retroactive application of a law abrogating an immunity statute violated *Ex Post*

Facto Clause). The effectiveness of these methods of obtaining cooperation depends on affording witnesses "protection * * * against prosecution for crime disclosed by [them]" that is "in law, equivalent to [their] legal innocence of the crime disclosed." *Brown*, 161 U.S. at 602 (quoting *State* v. *Nowell*, 58 N.H. 314, 315-316 (N.H. 1878)). "[O]therwise, the statute[s] would be ineffectual." *Ibid*. Yet if an expired limitations period, which operates as an amnesty from criminal liability (*Lamkin*, 94 Ill. at 504-505), can be revoked by a state legislature, why not also grants of immunity for cooperation with the government?

Allowing revival of criminal limitations periods by statute after their expiration would also upset well-established Fifth Amendment precedent. This Court has long held that witnesses may not invoke the Fifth Amendment privilege against self-incrimination after the statute of limitations has run because there is no longer any danger of prosecution. *Hale* v. *Henkel*, 201 U.S. 43, 66-67 (1906); *Brown*, 161 U.S. at 598-599. That established rule could not stand if statutes of limitations could be revived or eliminated by legislatures, even after they had already expired. Witnesses could never be assured that their testimony would not be used against them in a future prosecution.

These peripheral rules of law, which have built up around *Stogner*'s reasoning, would also be disrupted by *Stogner*'s overturning. This counsels further in favor of caution—and thus denying the petition.

3. Montana's arguments are suited for the state legislature, not the courts

Montana complains (Pet. 17) that, under *Stogner*, a suspect "will likely never be prosecuted if he evades identification and capture past the limitations period." But that is not a complaint about *Stogner*; it is a com-

plaint about statutes of limitations generally. It is, after all, precisely the point of a statute of limitations to ensure that the State may not commence a prosecution after the passage of a certain period of time.

If Montana is concerned with that result, the forum better suited to its argument is the state legislature, not this Court. Montana implicitly acknowledges this when it notes (Pet. 17) that there is no statute of limitations for murder, and thus a murder prosecution can never be foreclosed by passage of time. Twenty-seven States similarly have no statute of limitations for forcible intercourse with a minor. See Brittany Ericksen, *Statutes of Limitations for Sexual Assaults* (Aug. 21, 2013), perma.cc/E4US-F57L. In those States, such offenses are prosecutable in perpetuity, ensuring that Montana's concern about late-identified offenders evading prosecution never comes to pass.

Insofar as Montana's concerns have purchase, the solution lies with the Montana state legislature, which is free to follow the lead of these other States.

D. The question presented affects few cases

Review is particularly unwarranted because the question presented affects very few cases. The statute of limitations for rape is lengthy in every State. In Montana today, it is 10 years if the victim is in the age of majority; and if the victim is a minor, the limitations period is longer still: 20 years past the victim's eighteenth birthday. Mont. Code Ann. § 45-1-205(1)(b).

This case does not present the question whether a law like Section 45-1-205(9) is unconstitutional when used to revive a limitations period that was not yet expired when the statute was enacted. The question is only whether Section 45-1-205(9) may be constitutionally applied to revive those very few limitations periods that expired *before* the law's enactment, with respect to

crimes that were necessarily committed long, long ago. See Pet. App. 12.

The range of cases meeting this description is vanishingly small. So narrow is the range that Montana is unable to cite more than two in addition to this one. See Pet. 18-19 (discussing the case of Joseph DeAngelo); Pet. 24 (discussing the case of John Miller). But in each of those cases, the perpetrator also committed murder and (if convicted) will likely be incarcerated for the rest of his natural life regardless. Thus, even in those cases, the question presented has no practical effect on the outcome.

Virginia and its sister States' effort to provide additional examples falls flat. See States' *Amicus* Br. 8 n.10 (citing cases). For example, *In re Enterprise Mortgage Acceptance Co.*, 391 F.3d 401 (2d Cir. 2004), is a civil case, not a criminal case involving DNA. And the decisions in *State ex rel. Nicholson* v. *State*, 169 So. 3d 344 (La. 2015), and *State* v. *E.W.*, 992 A.2d 821 (N.J. Super. Ct. App. Div. 2010), both involved alternative state constitutional holdings, meaning that a reversal of *Stogner* would not have changed the outcome in either case. That leaves just three cases decided over 15 years where the outcome of the case was affected by *Stogner*. An issue that arises once every five years is not worthy of this Court's limited resources.

Undeterred, Montana asserts that there has been a recent "uptick" in positive DNA matches in cold cases, citing federal appropriations and new DNA matching techniques. See Pet. 18-19. But the State does not claim that *Stogner* will apply to all, or even many, such cases.

If there were a troubling number of prosecutions at stake here, Montana surely would have cited them in the petition. It tellingly did not. There is therefore no

practical need for the Court to engage with the question presented.

* * *

There is no justification for further review. Application of the *Ex Post Facto* Clause in cases like this one was conclusively resolved in *Stogner*, which correctly reflects the historical understanding and purposes of the Clause. Montana has not offered any special reason warranting a reexamination *Stogner*, except to say that it would prefer to be free from the constitutional limitations that *Stogner* recognized. That is no basis for granting the petition, particularly given that the issue arises so infrequently. If the State would like to avoid operation of statutes of limitations in cases like this moving forward, it must make its argument to the Montana state legislature.

CONCLUSION

The petition should be denied.

Respectfully submitted.

ROBERT L. STEPHENS, JR.
Southside Law Center
19 North 25th Street
Billings, Montana 59101
(406) 245-6182

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
mkimberly
@mayerbrown.com

Counsel for Respondent

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