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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. *Stogner*'s Unnecessarily Broad Holding Is Allowing Rapists Identified by DNA To Evade Prosecution 2

II. *Stogner* Is An Outlier in this Court's *Ex Post Facto* Jurisprudence, and if it Cannot Be Narrowed, the Court Should Overrule it 7

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Beazell v. Ohio,
269 U.S. 167 (1925) 9

Calder v. Bull,
3 U.S. 386 (1798) 2, 8, 9, 10

Carmell v. Texas,
529 U.S. 513 (2000) 8, 9, 10

Chase Securities Corp. v. Donaldson,
325 U.S. 304 (1945) 5, 6

Collins v. Youngblood,
497 U.S. 37 (1990) 8

Dist. Attorney's Office v. Osborne,
557 U.S. 52 (2009) 4

Kring v. Missouri,
107 U.S. 221 (1883) 7

Maryland v. King,
569 U.S. 435 (2013) 4

Payne v. Tennessee,
501 U.S. 808 (1991) 7, 11

South Dakota v. Wayfair,
__ U.S. __, 138 S. Ct. 2080 (2018) 10

Stogner v. California,
539 U.S. 607 (2003) . . . . . *passim*

Thompson v. Utah,
170 U.S. 343 (1898) 7

United States v. Lovasko,
431 U.S. 783 (1977) 11

United States v. Marion,
404 U.S. 307 (1971) 4

United States v. McHan,
101 F.3d 1027 (4th Cir. 1996) 10

United States v. Raines,
362 U.S. 17 (1960) 6, 7

CONSTITUTION

U.S. Const. art. I, § 10, cl. 1 . . . . . *passim*

INTRODUCTION

Montana demonstrated in its petition that *Stogner* bars the prosecution of cold cases like Linda Tokarski Glantz's and allows rapists who have evaded identification to avoid prosecution. Tipton's response: "So it does." BIO 18. According to Tipton, "practical consequences" like rapists avoiding prosecution must give way to "history, case law, and constitutional purposes." BIO 18 (quoting *Stogner v. California*, 539 U.S. 607, 631 (2003)).

Perhaps Tipton is correct in some cases, but not here. On the contrary, history, case law, and the constitutional purposes of the *Ex Post Facto* Clause support narrowing or overruling *Stogner*. The *Stogner* majority ignored its longstanding interpretive rules by issuing a broad constitutional ruling that extended far beyond the facts presented. Indeed, the Montana Supreme Court below noted that the facts of this case differed in important respects from *Stogner*'s, but felt bound by *Stogner* nonetheless.

Significantly, a narrow law like Montana's—which allows prosecutions to be revived only for certain sexual crimes and only where DNA conclusively identifies a suspect—does not implicate the concerns underlying the *Ex Post Facto* Clause, namely protecting defendants from arbitrary, vindictive legislation and providing fair warning. That is particularly true in a case like this one, where the rape victim immediately reported to law enforcement who immediately initiated an investigation.

Moreover, *Stogner* erred when it departed from the authoritative understanding of the *Ex Post Facto* Clause as set forth by Justice Chase in *Calder v. Bull*, 3 U.S. 386 (1798). In the past, the Court has overruled ex post facto decisions that strayed beyond the four factors identified by Justice Chase as encompassing the universe of ex post facto laws.

In short, neither history, case law, nor the constitutional purposes of the *Ex Post Facto* Clause support *Stogner*. If *Stogner* cannot be limited, the policies underlying stare decisis do not support retaining the decision, and it should be overruled.

I. *Stogner*'s Unnecessarily Broad Holding Is Allowing Rapists Identified by DNA To Evade Prosecution.

1. Tipton does not deny that *Stogner* cripples law enforcement's ability to prosecute rapists conclusively identified by DNA—even though that situation is far removed from the factual situation at issue in *Stogner*. Tipton tries to downplay the number of cases affected, but as Montana and amici show, unless the case involves murder, a prosecutor will not even bring charges because of *Stogner*. *See* Pet. 9; Amicus Br. of National District Attorneys Ass'n 1, 22-23; Amicus Br. of Virginia and 17 States 3, 9. *Stogner*'s negative impact on prosecutions overlaps with an unprecedented increase in breaks in cold cases due to collaborative efforts among state and federal governments. Pet. 17-19. Rather than the few suspects that Tipton suggests, the reality is that hundreds if not thousands of rapes will not be prosecuted because of *Stogner*'s unnecessarily broad holding. Tipton's characterization of the unsolved rapes that cannot be prosecuted

because of *Stogner* as only "sliver thin" (BIO 2) is cold comfort to the rape victims, their families, and the states that seek to prosecute those unsolved rapes.

Tipton's view that states should not be able to prosecute rapes like Linda's because it is logically impossible to limit *Stogner*'s holding ignores that the decision was rooted in the "the nature of the harms that California's law create[d]." 539 U.S. at 620. Those harms were distinct: allowing commencement of a "long-dead prosecution" where the defendant "lacked notice that he might be prosecuted" and was "unaware . . . for any need to preserve evidence of innocence" because there had been no previous charge, investigation, or even victim report until twenty-two years after the statute of limitations had run. *Id.* at 630-31. Further, the case was based on recovered memory, which *Stogner* noted was notoriously unreliable. *Ibid*. Under those facts, the Court concluded that the statute implicated the *Ex Post Facto* Clause's dual concerns of providing defendants fair warning and avoiding arbitrary and vindictive legislation. *Id.* at 611.

Rape cases involving DNA identification do not pose these harms, and Tipton's arguments to the contrary are wrong for at least three reasons. First, when a victim immediately reports a crime and a suspect is later identified by DNA, the suspect cannot credibly claim that he lacked fair warning. Notably, Tipton does not make that claim for himself. Instead, he attempts to recast Montana's argument as promoting an "irrefutability" standard. BIO 11. That is not what Montana argued. Rather, *Stogner*'s concern about fair warning simply does not apply when a rape victim reports without delay and DNA evidence is collected

during the initial investigation. Pet. 19-24. There should be no surprise because the state has not "neglected to prosecute," *Stogner*, 539 U.S. at 629 (quotation omitted), or surprised a defendant through "revival of claims that have been allowed to slumber." BIO 9 (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971)).

Second, Tipton's castigation of DNA evidence as potentially arbitrary conflicts with science, law enforcement experience, and this Court's repeated recognition of DNA's unparalleled ability to both identify suspects and exonerate the wrongly accused. *See Maryland v. King*, 569 U.S. 435, 442 (2013); *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009). That is not to say that DNA evidence is infallible or "irrefutable." Rather, rape suspects have fair warning that they will be prosecuted once they are identified, and legislatures are not acting arbitrarily by recognizing DNA's unique reliability.

Tipton argues that DNA does not automatically establish guilt and that labs can make mistakes, and that is true enough. But Montana has never taken the contrary position. What DNA did in this case, as in others, is identify a suspect. But DNA identification does nothing to remove a suspect's presumption of innocence; nor does it lower the State's burden to prove guilt beyond a reasonable doubt. Further, any competent attorney will test the DNA evidence, just as Tipton's attorney did below. Tipton's attorney questioned the crime lab analyst about everything from the quality of the DNA sample to the lab's analysis to the lab's verification procedures and certification. *See*, *e.g.*, Mot. To Dismiss Hr'g (Hr'g Tr.), 70-82, 90-92.

Third, Tipton's objections about fair warning and vindictive legislation—the hallmarks of ex post facto laws—are little more than makeweight. Instead, the core of his argument rests on the presumption that the *Ex Post Facto* Clause is intended to protect a criminal suspect's "right to repose." *See*, *e.g.*, BIO 8-9. But Justice Kennedy rightly recognized that suspects do not calendar the passage of a limitations period. *Stogner*, 539 U.S. at 650 (Kennedy, J., dissenting). Although the *Stogner* majority referenced that interest, its concerns were rooted in the defendant's complete lack of notice of any allegation of a decades-old child sex abuse claim. *See*, *e.g.*, 539 U.S. at 630-31.[1]

Contrary to Tipton's view, the Court has never understood the *Ex Post Facto* Clause as guaranteeing a right to repose, and Tipton's case illustrates why it is a poor fit for criminal law. *See* Pet. 29-30. A suspect evading identification in an active rape investigation cannot credibly argue that he acted in reliance on a statute of limitations. *Cf. Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 316 (1945) (recognizing that a party "could hardly say [] that it sold unregistered stock depending on a statute of limitation for shelter from liability").

Statutes of limitations may generally advance an interest in repose, but only as a matter of policy, not

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[1] Tipton quibbles with the State's math concerning when the statute of limitations expired in his case. BIO n.1. It is undisputed that the limitations period expired before the DNA revival statute was enacted. The State's point was that the limitations period had barely expired because it was tolled when Tipton fled the State after the crime. *See* Hr'g Tr. 156-161.

constitutional command. Statutes of limitations are "good only by legislative grace," "subject to a relatively large degree of legislative control," and rooted in "expedients, rather than principles." *Ibid*. Moreover, they are a modern invention and not part of our common law tradition, which only buttresses the point that the Framers would not have had them in mind when drafting the *Ex Post Facto* Clause. *See* Amicus Br. of National District Attorneys Ass'n 8-9.

2. This Court has long "rigidly adhered" to the rule "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *United States v. Raines*, 362 U.S. 17, 21 (1960) (quotation omitted). Yet *Stogner* did just that. The *Stogner* majority could have addressed its concerns about fair warning in late-disclosed allegations of child sex abuse in a narrow decision. Instead the Court went far beyond those facts to prohibit any criminal prosecution that was previously time-barred. *Stogner*, 539 U.S. at 610.

As the district court below recognized, the facts in this case "are wholly different from the *Stogner* facts," and it "is hard to believe that these facts are the type contemplated by the *Stogner* Court as it addressed the California law . . . ." Pet. App. 49. The Montana Supreme Court agreed, noting that the facts here "differ in important respects from the facts in *Stogner*." Pet. App. 17. The court nevertheless held that "*Stogner* offers no latitude to distinguish this case," and it dismissed the case against Tipton. Pet. App. 18-19; *see also* Pet. 17. This would not have happened if *Stogner* had limited its ruling to the "precise facts to which it is

to be applied." *Raines*, 362 U.S. at 21 (quotation omitted).

In summary, *Stogner*'s majority opinion was unnecessarily broad, and it is being interpreted to bar prosecutions of rape suspects identified by the DNA they left at the crime scene. Prosecutions of these types of cases do not implicate the concerns of the *Ex Post Facto* Clause. The Court should take the opportunity to clarify that *Stogner* does not reach laws that allow revival of a limitations period based on a suspect's identification from DNA collected in the initial investigation.

II. *Stogner* Is An Outlier in this Court's *Ex Post Facto* Jurisprudence, and if it Cannot Be Narrowed, the Court Should Overrule it.

1. If *Stogner* cannot be narrowed, then the Court should overrule it because the policies underlying stare decisis do not support retaining the decision. Stare decisis promotes a number of important social policies, but it is not an "inexorable command," and the Court is not constrained to follow decisions that "are unworkable or are badly reasoned." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Moreover, the doctrine is weakest in cases involving constitutional interpretation because, in those cases, it is "practically impossible" for a legislative body to remedy an incorrect decision. *Id*. at 828.

Significantly, the Court has not hesitated to overrule decisions that strayed from the original understanding of the Clause, which this Court demonstrated by overruling *Kring v. Missouri*, 107 U.S. 221 (1883), and *Thompson v. Utah*, 170 U.S. 343

(1898). *Collins v. Youngblood*, 497 U.S. 37, 50-52 (1990). Though Tipton says the Court's overruling of these cases is "inapplicable" here (BIO 17 n.3), the fact is the Court overruled them because they "stray[ed] *beyond Calder*'s four categories." *Carmell v. Texas*, 529 U.S. 513, 539 (2000) (emphasis in original). That is exactly what the *Stogner* majority did when it relied upon an alternate formulation of the *Calder* factors.

2. Tipton's defense of *Stogner* only highlights the decision's flaws. Tipton, just as the *Stogner* majority did, expands Justice Chase's "authoritative" formulation to reach this case. Indeed, in his description of the second category, Tipton skips Justice Chase's main formulation altogether, and instead replaces it with the "alternate" formulation as if it is the second category. BIO 6. Then, citing *Stogner*, Tipton characterizes the authoritative *Calder* category as simply a subset of the alternative. BIO 6. Tipton's inversion of the categories validates the *Stogner* dissent's warning that the majority was making Justice Chase's "alternative description as the independent operative definition of that category." 539 U.S. at 641 (Kennedy, J., dissenting).

Tipton does not contest that *Stogner* is the only non-overruled case to stray beyond Justice Chase's main formulation of ex post facto laws. By expanding Justice Chase's main formulation, Tipton, just as the *Stogner* majority, implicitly acknowledges that extending a statute of limitations does not fit within Justice Chase's second category, which prohibits "aggravat[ing] a crime, or mak[ing] it greater than it was, when committed." *Calder*, 3 U.S. at 390-91. That is because changing the timeframe within which a prosecution

must be brought does not "affect the criminal quality of the act charged by changing the legal definition of the offense." *Stogner*, 539 U.S. at 640 (Kennedy, J., dissenting) (quoting *Beazell v. Ohio*, 269 U.S. 167, 170 (1925)) (internal quotation marks omitted). Tipton's defense of *Stogner*'s "new definition not only distorts the original meaning of the second *Calder* category, but also threatens the coherence of the overall *ex post facto* scheme." *Id*. at 641.

Though *Stogner*'s ex post facto ruling is already unnecessarily broad, Tipton stretches the decision to its outer limits. In addition to arguing that this case fits within the second category, Tipton claims that a law reviving a time-barred prosecution also "fits neatly" (BIO 17) within Justice Chase's fourth category prohibiting altering the rules of evidence to convict an offender. *Stogner* mused, without holding, that California's law may also fit the fourth category. 539 U.S. at 615-16. But Justice Chase's second category prohibiting a law that aggravates a crime by creating a new form of punishment is distinct from the fourth category, which prohibits altering the evidentiary rules to convict the accused. *Calder*, 3 U.S. at 390-91; *see also Carmell*, 529 U.S. at 523 & n.11 (recognizing Justice's Chase's second and third categories of laws involving punishment as distinct from the fourth category involving evidentiary rules). To say that reviving a statute of limitations could fit within either category is to admit that it fits comfortably in neither. Indeed, before *Stogner*, no precedent of this Court had indicated that a law could fit either category.

A law like Montana's DNA revival statute is not a rule of evidence, nor does it relate to the evidence necessary to establish the elements of a crime. *Carmell*, 529 U.S. at 532. Tipton's arguments that it fits within *Calder*'s fourth category further underscore *Stogner*'s errors.

3. In determining whether to follow or overrule a previous decision, the Court has considered changing factual circumstances that highlight previous errors. *E.g.*, *South Dakota v. Wayfair*, __ U.S. __, 138 S. Ct. 2080, 2097 (2018) (overruling decision and noting that "the Internet revolution has made its earlier error all the more egregious and harmful."). The increasing prevalence of DNA to solve cold cases and the fact that *Stogner* bars prosecutions and investigations of newly-identified suspects only makes the Court's error "all the more egregious and harmful." *Id.* at 2097. Tipton dismisses these developments, arguing that DNA technology was around when the Court decided *Stogner*. BIO 17. True enough, but *Stogner* had no reason to weigh in on DNA because that was not at issue, and Tipton's argument only highlights the impact of the unnecessarily broad decision.

Nor will overruling or limiting *Stogner* cast doubt on other settled rules of law as Tipton suggests. First, Tipton is simply wrong that cases predating *Stogner* by more than a century could somehow be "built up around *Stogner*'s reasoning." BIO 19. Second, grants of immunity are based on statute and contract law, which provide their own remedies. *See, e.g., United States v. McHan*, 101 F.3d 1027, 1034 (4th Cir. 1996). Third, and more importantly, *Stogner* itself concluded that Fifth

Amendment case law did not support one side or the other. *Stogner*, 539 U.S. at 619-21.

Tipton also claims that limiting or overruling *Stogner* will result in a litany of abuses, like vindictive bills targeting political opponents, states opening the floodgates of laws that revive statutes of limitations to allow stale prosecutions, and bills revoking amnesty. But Tipton's argument is belied by the simple fact that none of those things happened before 2003 when *Stogner* was decided. Nor have they happened since in the context of statutes of limitations extended before they expire, which *Stogner* left untouched.

4. As a final matter, Tipton complains that *Stogner* is necessary to protect the loss of evidence from stale prosecutions (BIO 9), but that is the work of the Due Process Clause, not the *Ex Post Facto* Clause. The Due Process Clause serves as a backstop to protect against fundamental unfairness in criminal proceedings, including unreasonable delay in prosecutions. *See United States v. Lovasko*, 431 U.S. 783, 789 (1977) (Due Process Clause protects against oppressive pre-indictment delay); *Payne*, 501 U.S. at 825 (Due Process Clause provides mechanism for relief if trial is fundamentally unfair). The Court should not distort the *Ex Post Facto* Clause to accomplish what is better suited to the Due Process Clause. If a case lingers so long that evidence is lost or witness memories fade, a defendant may claim prejudice and seek a due process remedy, which fully resolves Tipton's concerns. Notably, Tipton has made no such claim here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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