No. 01-1757

In the Supreme Court of the United States

MARIO REYNOLDS STOGNER, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a law that permits the government to prosecute an offense for which the statute of limitations had expired before the law's enactment violates the Ex Post Facto Clause.

2. Whether such a statute violates the Due Process Clause.

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INTEREST OF THE UNITED STATES

This case involves the constitutionality, under the Ex Post Facto Clause and the Due Process Clause, of a law that permits the prosecution of an offense for which the statute of limitations had previously expired. The United States has a substantial interest in the resolution of those questions.

Congress has recently enacted legislation that eliminates any statute of limitations for terrorism offenses that result in, or create a foreseeable risk of, death or serious bodily injury. See Pub. L. No. 107-56, Tit. VIII, § 809(a), 115 Stat. 379 (18 U.S.C. 3286(b)). That new legislation permits the commencement of terrorism prosecutions that were time-

barred before the statute's enactment. § 809(b), 115 Stat. 380. The Attorney General has also forwarded to Congress proposed legislation to eliminate the statute of limitations for child abduction and felony sexual offenses and to toll statutes of limitations in any felony case in which the perpetrator is identified through DNA evidence. In both cases, the proposals would apply retroactively to offenses for which a prosecution was time-barred before the statute's enactment. The proposal with respect to child abduction and felony sexual offenses has been passed by the House of Representatives, see H.R. 5422, 107th Cong., 2d Sess. § 202 (2002), and a bill embodying both proposals has been introduced in the current Congress, see S. 149, 108th Cong., 1st Sess. § 8 and § 9 (2003). See also Letter from Daniel J. Bryant Asst. Att'y Gen., U.S. Dep't of Justice, to Honorable Joseph R. Biden, Jr., U.S. Senator 7-10 (Nov. 25, 2002) (regarding S. 2513, 107th Cong., 2d Sess. (2002), and discussing both proposals). Because federal legislation is subject to ex post facto and due process limits that parallel the limits on state legislation, the decision in this case could affect the constitutionality of a recent Act of Congress and constrict Congress's authority to enact similar legislation.

STATEMENT

1. In 1984, the California legislature revised its laws governing the time within which a criminal prosecution may be commenced. The 1984 law creates three categories of offenses. First, there is no limitations period for certain serious offenses, such as murder. Cal. Penal Code § 799 (West 1985 & Supp. 2003). Second, for most other serious offenses, a prosecution must be commenced within six years after commission of the offense. *Id.* § 800. Third, for all other offenses, a prosecution must be commenced within three years after commission of the offense. *Id.* § 801. The 1984 law

permits extensions and tolling of the limitations periods in certain circumstances. *Id.* § 803.

In response to increasing evidence that young victims of sex offenses often do not report those offenses in sufficient time to permit prosecution within the limitations period, the California legislature amended the 1984 law. The amendment provides that, effective January 1, 1994, a prosecution for certain sex offenses against persons under the age of 18 may be commenced notwithstanding the expiration of the limitations period if the action is filed within one year of the date of a victim's report to a law enforcement agency, the crime involves substantial sexual conduct, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. Cal. Penal Code § 803(g)(1) and (2)(B) (Supp. 2003). After several California Courts of Appeal held that the amendment did not apply when the otherwise applicable statute of limitations had expired before the amendment's effective date, the California legislature further amended the law. The new amendment provides that Section 803(g) applies to a cause of action arising "before, on, or after, January 1, 1994," and that it operates to "revive any cause of action barred by Section 800 or 801." *Id.* § 803(g)(3)(A) and (B)(i) & Section 803 Law Revision Comm'n Cmt. (Supp. 2003).

In *People* v. *Frazer*, 88 Cal. Rptr. 2d 312, 321-322 (1999), cert. denied, 529 U.S. 1108 (2000), the California Supreme Court held that a prosecution commenced in accordance with the preconditions of Section 803(g) is timely even when the otherwise applicable limitations period expired before January 1, 1994. The *Frazer* court further held that, as so applied, Section 803(g) violates neither the prohibition against ex post facto laws nor due process of law.

Drawing on *Collins* v. *Youngblood*, 497 U.S. 37 (1990), the *Frazer* court held that a statute violates the prohibition against ex post facto laws when it retroactively alters the

definition of any crime or increases the punishment for any criminal act. 88 Cal. Rptr. 2d at 325. The court concluded that statutes of limitations that apply retroactively to revive limitation periods that have expired do not transgress those limits. The court explained that statutes of limitations operate "to insulate from prosecution even those individuals whose conduct otherwise satisfie[s] all elements of a penal statute, and who [are] otherwise subject to criminal punishment, at the time the conduct occurred." *Id.* at 327.

The *Frazer* court rejected the contention that Section 803(g) violates the prohibition against ex post facto laws because it removes a defense that would otherwise defeat a prosecution. 88 Cal. Rptr. 2d at 328. The *Frazer* court reasoned that "ex post facto protection extends only to 'defense[s]' bearing on the 'definition' and 'elements' of proscribed *conduct*, or involving 'excuse or justification' for its *commission*." *Ibid.* (quoting *Collins*, 497 U.S. at 50). Section 803(g) does not exceed those limits, the *Frazer* court explained, because it merely "regulates the time at which child sexual abuse *defined and punished elsewhere in the Penal Code* may be charged." *Ibid.*

The *Frazer* court also rejected the contention that Section 803(g) violates due process. The court noted that in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), this Court held that civil statutes of limitation may be modified retroactively without violating the Due Process Clause. *Frazer*, 88 Cal. Rptr. 2d at 333-334. The *Frazer* court saw "no meaningful basis" for distinguishing criminal statutes of limitation. *Id.* at 335.

2. On April 17, 1998, a criminal complaint was filed against petitioner charging him with two counts of committing a lewd or lascivious act on a child under the age of 14, in violation of California Penal Code § 288(a) (West 1992). J.A. 1-4. The first count alleged that petitioner engaged in lewd conduct on Jane Doe I between January 1, 1955, and Sep-

tember 30, 1964. J.A. 1. The second count alleged that petitioner engaged in lewd conduct on Jane Doe II between January 1, 1967, and September 27, 1973. J.A. 2-3. The complaint further alleged that the counts could be prosecuted under Section 803(g) because the victims were under the age of 18 when the crimes occurred, the complaints had been filed within one year of the date when the victims reported the offenses to a law enforcement agency, the crime involved substantial sexual conduct, and independent evidence clearly and convincingly corroborated the victim's allegations. *Ibid.*

Petitioner demurred to the complaint on the ground that Section 803(g) violates the constitutional prohibition against ex post facto laws. J.A. 6. The Superior Court granted the demurrer and denied a motion to reinstate the complaint. *Ibid.* The Court of Appeal reversed. J.A. 5-8. It held that in *Frazer*, "[o]ur Supreme Court has rejected the argument that section 803(g) constitutes an impermissible ex post facto law." J.A. 6. This Court denied a petition for a writ of certiorari. *Stogner* v. *Califonia*, cert. denied, No. 99-8895 (Oct. 2, 2000). J.A. 9.

A grand jury then issued an indictment charging petitioner with the same crimes as had been alleged in the complaint. J.A. 10-13. Petitioner demurred to the indictment on ex post facto and due process grounds, but the trial court overruled the demurrer. J.A. 14, 34. Relying on *Frazier*, the Court of Appeal affirmed, J.A. 33, and the California Supreme Court denied review. J.A. 37.

SUMMARY OF ARGUMENT

I. This Court has held that the prohibition against ex post facto laws encompasses only the four specific categories of criminal laws identified by Justice Chase in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 385, 390 (1798). A law that permits the prosecution of an offense for which the statute of limitations

had previously expired does not fall within any of those categories.

The first *Calder* category reaches laws that criminalize conduct that was innocent at the time the crime was committed. The statute at issue here does not have that effect. Instead, it removes a barrier to the prosecution of conduct that was criminal when the defendant engaged in it. There is no sound basis for expanding *Calder*'s first category to reach laws that change the legal effect of later acts that have removed the government's ability to prosecute conduct that was criminal when done. Justice Chase's formulation—that the conduct must have been "innocent when done" (*Calder*, 3 U.S. (3 Dall.) at 390)—is supported by all the available historical evidence. It accords with one of the core purposes of the prohibition against ex post facto laws: to assure that statutes give fair warning of their effect, so that persons can conform their conduct to the law. And, over the past 200 years, this Court has repeatedly reaffirmed that test.

The second and third *Calder* categories prohibit laws that either introduce a new punishment or increase the severity of the punishment. A law that permits prosecution of crimes for which the statute of limitations had previously expired does neither of those things. Instead, its permits the prosecutor to seek the same punishment that the law authorized at the time the offense was committed.

Finally, *Calder*'s fourth category covers laws that alter the rules of evidence so as to reduce the amount of evidence required to convict. Laws that permit the prosecution of crimes for which the statute of limitations had previously expired are not rules of evidence. Equally important, such statutes do not have any effect on the government's burden to establish the elements of the crime.

II. There is also no merit to petitioner's due process claims. Under this Court's decisions, if a constitutional claim is covered by a specific constitutional provision, that claim

must be analyzed under the standard drawn from that provision, not under the Due Process Clause. Accordingly, the Constitution's explicit textual restraint on a legislature's enactment of ex post facto laws, rather than generalized notions of due process, supplies the standard for evaluating whether a retroactive criminal statute is constitutional.

Even if a separate due process analysis were warranted, a statute that permits the prosecution of crimes for which the statute of limitations had previously expired does not implicate any right that is fundamental for due process purposes. In *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945), the Court unanimously held that the shelter provided by the expiration of a limitations period has never been regarded as a fundamental right. The Court applied that rule to a civil case, but for purposes of the Due Process Clause, there is no persuasive distinction between a criminal and civil statute of limitations.

Because a statute that revives an expired limitations period does not interfere with a fundamental right, the sole question under the Due Process Clause is whether it is justified by a rational legislative purpose. Based on the increasing evidence that minors who are victims of sexual offenses often fail to report them in time to permit timely prosecution, it was entirely rational for California to apply its new limitations period retroactively.

ARGUMENT

I. A LAW THAT PERMITS THE PROSECUTION OF AN OFFENSE FOR WHICH THE STATUTE OF LIMITATIONS HAD PREVIOUSLY EXPIRED DOES NOT VIOLATE THE EX POST FACTO CLAUSE

Article I, Section 10 of the Constitution provides that "[n]o State shall * * * pass any * * * ex post facto Law." Article I Section 9, places the same restraint on Congress.

In *Calder* v. *Bull*, 3 U.S. (3 Dall.) 385, 389-390 (1798), Justice Chase concluded that the Constitution's prohibition against ex post facto laws reaches four specific categories of criminal statutes:

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

This Court has repeatedly approved that formulation as an accurate statement of the scope of the prohibition against ex post facto laws. See *Carmell* v. *Texas*, 529 U.S. 513, 525 (2000) (citing cases). Because a law that permits the prosecution of an offense for which the statute of limitations had previously expired does not fall within any of the *Calder* categories, such a law does not violate the Ex Post Facto Clause.

A. A Law That Permits The Prosecution Of An Offense For Which The Statute Of Limitations Had Previously Expired Does Not Criminalize Conduct That Was Innocent When Done And Therefore Does Not Fall Within Calder's First Category

1. A law that permits the prosecution of an offense for which the statute of limitations had previously expired does not fall within *Calder*'s first category because it does not criminalize conduct that was "innocent when done." *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.). Instead, by retroactively

modifying the statute of limitations for an offense, it permits prosecution of conduct *that was criminal when done*.

This case illustrates that fundamental point. The indictment alleges that, between 1955 and 1973, petitioner committed lewd and lascivious conduct against two minors under the age of 14. J.A. 10-13. If those allegations are true, petitioner engaged in conduct that was criminal when done. Indeed, California has prohibited such lewd and lascivious acts since 1901, and the elements of that offense have been established for decades. *People* v. *Frazer*, 88 Cal. Rptr. 2d 312, 327 (1999), cert. denied, 529 U.S. 1108 (2000). Because California had a three-year statute of limitations for lewd or lascivious conduct when petitioner's alleged crime occurred, any attempt to prosecute petitioner for his alleged conduct would have been barred after 1976 absent the enactment of California's new limitations period. J.A. 21-22. But that simply means that the new limitations period eliminates a barrier to the prosecution of conduct that was criminal when done; it does not make criminal what was innocent when done.

The limitation in *Calder*'s first category to statutes that penalize actions that were innocent when done accords with one of the core purposes of the prohibition against ex post facto laws—"to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981); see *Dobbert* v. *Florida*, 432 U.S. 282, 298 (1977). Statutes that penalize conduct that was innocent when done violate that fair warning principle. *Rogers* v. *Tennessee*, 532 U.S. 451, 459 (2001). Statutes that revive the government's authority to prosecute conduct that was criminal, when done, do not.

In this case, for example, if California had criminalized lewd and lascivious acts against minors under the age of 14 for the first time after petitioner's alleged conduct occurred,

petitioner would not have received fair warning that his alleged conduct was criminal. In fact, however, California has prohibited such conduct since 1901, and petitioner therefore received fair warning that such conduct was prohibited. Petitioner cannot reasonably assert that he engaged in such conduct in reliance on a statute of limitations.

2. Petitioner argues (Br. 10-12) that *Calder*'s first category is not limited to statutes that criminalize actions that were innocent when done, but also includes statutes that change the legal significance of "secondary acts" that occur after the criminal conduct has occurred and divest a criminal act of its criminal quality. Petitioner identifies the expiration of a limitations period as such a secondary act.

In its express language, however, *Calder*'s first category encompasses only statutes that criminalize actions that were "innocent when done." 3 U.S. (3 Dall.) at 390. That limitation accords with the understanding of early commentators and scholars. Blackstone stated that a law is ex post facto "when after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts punishment on the person who has committed it." 1 William Blackstone, *Commentaries on the Laws of England* 46 (1765). Wooddeson described what would become *Calder*'s first category as laws that "respect the crime, determining those things to be treason, which by no prior law or adjudication could be or had been so declared." 2 R. Wooddeson, *A Systematical View of the Laws of England* 631 (1792). Story described the first category as laws "whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1339, at 212 (1833). And Kent similarly described the first category as including every law "that made an act done before the passing of the law, and which was innocent when done, criminal." 1 James

Kent, *Commentaries on American Law* 408 (3d ed. 1836) (Lecture 19).

The Founding-era state constitutions expressed their ex post facto prohibitions with similar language. See *Carmell*, 529 U.S. at 535 n.25. Massachusetts prohibited "[l]aws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws." *Ibid.* Likewise, North Carolina and Maryland prohibited "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal." *Ibid.*

This Court has also repeatedly described *Calder*'s first category as confined to statutes that penalize acts that were innocent when done. In *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925) (emphasis added), the Court stated that "[i]t is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, *which was innocent when done* * * * is prohibited as *ex post facto*." Numerous other decisions describe *Calder*'s first category in the same way.[1] Petitioner offers no reason for the Court to

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[1] *E.g.*, *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1866) ("By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed."); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (A law is ex post facto when it imposes a punishment for acts "which were not punishable at the time they were committed."); *Gut* v. *Minnesota*, 76 U.S. (9 Wall.) 35, 38 (1869) (ex post facto law "imposes a punishment for an act which was not punishable at the time it was committed"); *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894) (ex post facto law "imposes a punishment for an act which was not punishable at the time it was committed"); *Hopt* v. *Utah*, 110 U.S. 574, 589 (1884) (law did not "attach criminality to any act previously done, and which was innocent when done"); *Thompson* v. *Missouri*, 171 U.S. 380, 387 (1898) (law did not "make any act involved in [defendant's] offense criminal that was not criminal at the time he committed the murder of which he was found guilty"); *Mallett* v. *North Carolina*, 181 U.S. 589, 597 (1901)

depart from that established understanding of *Calder*'s first category.

3. Petitioner also contends (Br. 14-15) that California's new limitations period violates *Calder*'s first category because the statute of limitations is a material ingredient of an offense in California, and this Court stated in *Miller* v. *Florida*, 482 U.S. 423, 433 (1987) (quoting *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884)), that a law is ex post facto when it "change[s] the ingredients of the offence." That contention is based on a misunderstanding of California law and *Calder*'s first category.

As the California Supreme Court has explained, California's limitations period is not an element of the crime itself. *Frazer*, 88 Cal. Rptr. 2d at 328-329 n.22. Instead, it operates "to insulate from prosecution even those individuals whose conduct otherwise satisfie[s] all elements of a penal statute, and who [are] otherwise subject to criminal punishment, at the time the conduct occurred." *Id.* at 327. The status of the limitations period under California law is reflected in the burden of proof on that issue. Under California law, "guilt" must be established beyond a reasonable doubt, while other issues in a criminal case are resolved under a preponderance of the evidence standard. *People* v. *McGill*, 51 P.2d 433, 435 (Cal. Dist. Ct. App. 1935). Because the limitations period is not an element of the defendant's "guilt" under California law, that issue is resolved under a preponderance standard. *Ibid.* See *People* v. *Zamora*, 134 Cal. Rptr. 2d 784, 802 n.27 (1976). The California Supreme Court has held that, while a timely filed charge is not an element of the crime itself, it is

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(law in question "did not make that a criminal act which was innocent when done"); *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990) ("The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause."); *id.* at 52 ("The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done.").

"is an essential element in the final power to pronounce judgment." *People* v. *Crosby*, 25 Cal. Rtpr. 847, 853 (1962). But that does not mean that a change in the limitations period alters the elements of the offense.

Regardless of the status of a limitations period under California law, a violation of category one occurs, as discussed above, only when a statute penalizes conduct that was innocent when the defendant engaged in the conduct. It follows that a law impermissibly changes "the ingredients of an offense" within the meaning of *Calder*'s first category only when it changes the elements of the crime itself. As the Court explained in *Collins*, 497 U.S. at 43, under *Calder*'s first category, "[l]egislatures may not retroactively alter the definition of crimes." Only changes in the elements of the crime itself can have the prohibited effect of criminalizing conduct that was innocent when done. And only changes in the elements of the crime itself can violate the fair warning principle that animates *Calder*'s first category. Changes in what the prosecution must prove with respect to matters other than the elements of the crime, such as the applicable limitations period or the appropriate venue, neither penalize conduct that was innocent when done nor deprive a defendant of fair warning. See *Gut* v. *Minnesota*, 76 U.S. (9 Wall.) 35, 37-38 (1869) (retroactive change in venue does not violate Ex Post Facto Clause). They therefore fall outside *Calder*'s first category.

4. Amici National Association of Criminal Defense Lawyers, *et al.* contend (Br. 11) that *Calder*'s first category, "[p]roperly understood," prevents the government from retroactively eliminating the need to prove any fact when that action is "tantamount to eliminating an element of the offense." The limitations period is tantamount to an offense element, Amici argue, because it must be proved to obtain a conviction. The limitations period, however, is not "tantamount" to an element of the offense within the meaning of

Calder's first category. An elimination of one of the elements of the offense penalizes conduct that was innocent when done; a change in the limitations period does not.

Amici seek support for their theory (Br. 11) in Justice Chase's statement that category one extends to laws that "inflicted punishments, where the party was not, by law, liable to any punishment." *Ibid.* (quoting *Calder*, 3 U.S. (3 Dall.) at 389). In the context of the opinion as a whole, that statement must be understood to refer to laws that inflicted punishments, where the party was not, by law, liable to any punishment *when the alleged criminal conduct occurred*. Indeed, immediately following the statement cited by Amici, Justice Chase gave as an example of the kind of law to which he was referring the case of the Earl of Strafford. *Calder*, 3 U.S. (3 Dall.) at 389 n. (a). As explained by Wooddeson, in that case, Parliament punished as treason conduct that was innocent when done. 2 Wooddeson, *supra*, at 629-631. Moreover, on the very next page of the opinion, Justice Chase described the first category as including only laws that penalize conduct that was innocent when done. *Calder*, 3 U.S. (3 Dall.) at 390.

Amici also attempt to draw support for their theory from Justice Chase's reference to laws that "save time from the statute of limitations." Br. 12 (citing *Calder*, 3 U.S. (3 Dall.) at 391). In Amici's view, that reference shows that Justice Chase viewed laws that shorten the limitations period as outside the Ex Post Facto Clause because they are ameliorative. By implication, they argue, Justice Chase necessarily viewed laws that extend the limitations period as a violation of the Ex Post Facto Clause.

Amici misread Justice Chase's reference to laws that save time from the limitations period. The relevant passage is as follows:

> Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be.

Calder, 3 U.S. (3 Dall.) at 391. In that passage, laws that save time from the statute of limitations most likely refers to laws that retroactively *extend* the limitations period, not laws that shorten it. See *Davis* v. *Ballard*, 24 Ky. (1 J.J. Marsh.) 563, 579 (1829) (interpreting the passage in that way); *Davis* v. *Minor*, 2 Miss. (1 Howard) 183, 191-193 (1835) (same); see also *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 503-505 (1870) (characterizing laws reviving time-barred actions as deducting time from that provided by statute of limitations); *Blacks's Law Dictionary* 1063 (1st ed. 1891) ("save" defined in part to mean "[t]o toll, or suspend the running or operation of; as to 'save' the statute of limitations"). By stating that such laws "may be proper or necessary, as the *case may be" (Calder*, 3 U.S. (3 Dall.) at 391), Justice Chase was suggesting, if not stating directly, that such laws, while retrospective, are outside the scope of the ex post facto prohibition. *Davis* v. *Ballard*, 24 Ky. (1 J.J. Marsh.) at 579. At best, Justice Chase's reference to laws that save time from a statute of limitations is somewhat cryptic. What is clear is that Justice Chase did not say that a law that revived an expired limitations period would violate the ex post facto prohibition, and any such statement would have been inconsistent with his definition of ex post facto laws.

Noting that Justice Chase relied on Wooddeson in creating his four categories, Amici also seek to draw support for

their theory from Wooddeson. Specifically, they rely on Wooddeson's description of acts of Parliament that inflicted the pains of attainder on those who had levied war against the King, and had fled from justice, provided they did not surrender by a certain future date. Br. 12-13 (citing 2 Wooddeson, *supra*, at 625-626). Amici assert that Wooddeson's treatment of the surrender date as an innovation in the offense shows that category one is not limited to changes in the elements of the crime.

The example cited by Amici, however, was not an ex post facto law. The addition of a surrender date was an ameliorative change in the prohibition against treason. Moreover, because the surrender date was a future one, the change was prospective rather than retroactive. Consistent with that understanding, Wooddeson did not describe the example as an ex post facto law. And while Justice Chase recited *all* of Wooddeson's other examples of bills of attainder as examples of ex post facto laws (*Carmell*, 529 U.S. at 522-524), he did not use that one. In any event, in the example cited by Amici, the failure to surrender *was* an element of the crime. As Wooddeson described it, the failure to surrender "consummated" a "new treason." 2 Wooddeson, *supra*, at 625-626. That example therefore cannot show that category one includes something other than changes in the elements of the crime.

5. While petitioner and his Amici purport to find support for their theories in *Calder*'s first category, in reality, they seek to create an entirely new category of ex post facto laws. Indeed, Amici admit as much, stating that *Calder*'s categories are merely "illustrative." Br. 11. But in *Collins*, the Court emphatically rejected the contention that the Ex Post Facto Clause extends beyond *Calder*'s four categories, explaining that "the prohibition which may not be evaded is the one defined by the *Calder* categories." 497 U.S. at 46. In

Carmell, the Court reaffirmed that "it [is] a mistake to stray *beyond Calder*'s four categories." 529 U.S. at 539.

B. A Law That Permits The Prosecution Of An Offense For Which the Statute Of Limitations Had Previously Expired Does Not Remove A Defense Within The Meaning Of Calder's First Category

There is also no merit to petitioner's contention (Br. 20-25) that the State's new limitations period for sexual offenses violates *Calder*'s first category because it eliminates a defense to prosecution. Under *Collins*, the elimination of a defense can violate *Calder*'s first category only when the defense is "related to the definition of the crime," or to "the matters which might be pleaded as an excuse or justification for the conduct" that has been charged as a crime. 497 U.S. at 50. *Collins*'s formulation harmonizes the Court's previous statements that alterations in a defense can violate the Ex Post Facto Clause, see *Beazell* v. *Ohio*, 269 U.S. 167, 170 (1925), with the established understanding that *Calder*'s first category encompasses only changes that penalize conduct that was innocent when done.

The Court's approval of *United States* v. *Hall*, 26 F. Cas. 84 (C.C. D.Pa. 1809) (No. 15,285), and its overruling of *Kring* v. *Missouri*, 107 U.S. 221 (1883), illustrates the distinction between defenses that implicate the prohibition against ex post facto laws and those that do not. In *Hall*, the United States charged a vessel owner with failure to deliver cargo. The owner pleaded as a defense that a severe storm had disabled the vessel at sea, forcing him to land in Puerto Rico, where the government forced him to sell the cargo. 26 F. Cas. at 84. Justice Washington stated that at the time of the owner's conduct, an unavoidable accident was an affirmative defense to a charge of failure to deliver cargo. He further stated that, if applied in the vessel owner's case, a change in the defense requiring proof that the cargo was lost at sea

would be an invalid ex post facto law. *Id.* at 86. In *Collins*, the Court stated that Justice Washington had reached the correct conclusion. The Court explained that "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." 497 U.S. at 49.

In *Kring*, the defendant pleaded guilty to second degree murder and obtained a reversal of his conviction on appeal. On remand, Kring was convicted of first degree murder and sentenced to death. 107 U.S. at 222. At the time of Kring's criminal conduct, a plea of guilty to second degree murder constituted an acquittal of first degree murder even if the defendant successfully challenged his conviction for second degree murder on appeal. By the time Kring pleaded guilty to second degree murder, however, the law had changed, and the plea did not constitute an acquittal to first degree murder if the defendant subsequently obtained a reversal of his conviction for second degree murder on appeal. In *Kring*, the Court held that the change impermissibly deprived the defendant of a defense he had possessed to first degree murder at the time he engaged in his criminal conduct. *Id.* at 228-229. In *Collins*, the Court overruled *Kring*, explaining that "Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge." 497 U.S. at 50.

Under *Collins*, as illuminated by its approval of *Hall* and disapproval of *Kring*, a statute of limitations defense is not the kind of defense that implicates the prohibition against ex post facto laws. Like the defense at issue in *Kring*, a statute of limitations defense does not relate to an element of the crime itself; it does not operate as an excuse or justification for alleged criminal conduct; and it does not show that the charged conduct was innocent when done.

C. A Law That Permits The Prosecution Of An Offense For Which The Statute Of Limitations Had Previously Expired Does Not Violate Any Of The Other Calder Categories

1. A law that permits the prosecution of an offense for which the statute of limitations has expired also does not fall within either category two or three. Such a law does not "aggravate[] a crime, or make[] it greater than it was, when committed," and it does not "change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. (3 Dall.) at 390. As the Court explained in *Carmell*, categories two and three apply only to statutes that affect punishment. 529 U.S. at 524. Category two encompasses statutes that create a new form of punishment, while category three encompasses statutes that increase the severity of the punishment. *Id.* at 523 & n.12. A law that permits the prosecution of an offense for which the statute of limitations had previously expired does neither of those things. Instead, it permits the prosecutor to seek the same forms and amount of punishment that the law authorized at the time the offense was committed.

Petitioner contends (Br. 26-27) that California's law violates category two because it increases the limitations period, the class of persons subject to prosecution, and the jurisdiction of the courts. None of those asserted effects, however, introduces any new form of punishment. They therefore provide no basis for a finding that California's law violates category two.

Petitioner similarly errs in contending (Br. 29-30) that the new limitations period violates category three because he was subject to *no* punishment before the statute was enacted, while he is subject to at least some punishment now. As stated by Justice Chase, the third category is triggered only when a statute imposes more punishment "than the law annexed to the crime, *when committed.*" *Calder*, 3 U.S. (3

Dall.) at 390 (emphasis added). Consistent with Justice Chase's formulation, the Court has repeatedly held that the amount of punishment raises ex post facto concerns only when it is increased "beyond what was prescribed *when the crime was consummated.*" *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (emphasis added).[2]

2. A law that permits the prosecution of an offense for which the statute of limitations had previously expired also does not "alter[] the legal rules of evidence, and receive[] less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder*, 3 U.S. (3 Dall.) at 390. In *Carmell*, the Court explained that *Calder*'s fourth category encompasses rules of evidence that reduce either "the burden of proof" or "the quantum of evidence required to convict an offender," and thereby "subvert[] the presumption of innocence." 529 U.S. at 532.

The Court has invalidated two laws as category four violations—a law that retroactively required a class of persons to prove that they did not commit an offense, *Cummings*, 71 U.S. (4 Wall.) at 327-328, and a statute that retroactively eliminated the rule that the testimony of the victim of a sexual offense is insufficient by itself to prove that crime.

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[2] *Garner* v. *Jones*, 529 U.S. 244, 249-250 (2000) ("One function of the Ex Post Facto Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission."); *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997) ("The bulk of our *ex post facto* jurisprudence has involved claims that a law has inflicted 'a greater punishment, than the law annexed to the crime, when committed.'"); *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981) ("The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"); *Beazell*, 269 U.S. at 169 (A law violates the Ex Post Facto Clause when it "makes more burdensome the punishment for a crime, after its commission.").

Carmell, 529 U.S. at 530. The Court has also described as a category four violation a law that retroactively eliminated the requirement that the testimony of two witnesses was necessary to obtain a conviction for treason *Id.* at 526. In contrast, the Court has held that category four did not bar retroactive application of a law permitting felons to testify, *Hopt* v. *Utah*, 110 U.S. 574, 589-590 (1884), or a law allowing the introduction into evidence of expert handwriting testimony, *Thompson* v. *Missouri*, 171 U.S. 380 (1898).

Under those decisions, a law that does nothing more than permit the prosecution of an offense for which the statute of limitations had previously expired does not fall within category four. Indeed, such a law is not a "rule[] of evidence" at all. *Calder*, 3 U.S. (3 Dall.) at 390. Instead, it addresses the time within which it is permissible to commence a prosecution. The forms of evidence that may be introduced to prove that a prosecution has been timely commenced and the standard for measuring whether such evidence is sufficient are left to prior law.

Statutes that do nothing more than establish a new limitations period also do not implicate category four because they do not relate to the evidence that is necessary to establish the elements of the crime itself. Only evidentiary rules that reduce the burden of proving the crime itself "subvert[] the presumption of innocence." *Carmell*, 529 U.S. at 532. Just as category one violations are limited to changes in the definition of the crime itself, category four violations are limited to evidentiary rules that reduce the burden of establishing those elements. Both prohibitions work together to ensure that a statute does not penalize conduct that was innocent when done. *Ibid.* (explaining the interrelationship between changes in the elements of the offense and reducing the quantum of evidence necessary to convict).

In one respect, California's new law does more than establish a new limitations period. It conditions application of

the new period on proof that the crime involved substantial sexual conduct, and independent evidence that clearly and convincingly corroborates the victim's allegations. Because that component of California's law actually *increases* the quantum of evidence that the government must establish, and because such proof is a precondition to application of the new limitations period, rather than an element of the crime itself, it does not implicate category four.

D. Additional Precedent Supports The Constitutionality Of Laws That Permit The Prosecution Of Offenses For Which The Statute Of Limitations Had Previously Expired

1. *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), further supports the conclusion that a law that permits prosecution of an offense for which the statute of limitations had previously expired does not violate the prohibition against ex post facto laws. *Stewart* involved a challenge to federal legislation that tolled the statute of limitations applicable in both civil and criminal cases for the period during which exigencies of the Civil War prevented service of process. The Court rejected the claim that the law exceeded Congress's power as applied to state law actions in state courts. Before doing so, however, the Court first concluded that the statute's tolling provision applied retroactively in both civil and criminal cases even "where the action was barred at the time of its passage," and that "[t]here is no prohibition in the Constitution against retrospective legislation of this character." *Id.* at 504.

Stewart involved a civil suit, so its conclusion with respect to criminal cases is dicta. But the Court's statement that there is no constitutional barrier to a law that permits the prosecution of an offense for which the statute of limitations had previously expired suggests that the conclusion was not viewed as controversial at the time.

2. The courts of appeals have also uniformly rejected ex post facto challenges to federal legislation extending the limitation period for crimes committed before their enactment where a prosecution was not already time-barred.[3] One of the early decisions explained that such a statute does not violate the prohibition against ex post facto laws because it does not "render a previously innocent act criminal," "aggravate or increase the punishment for the crime[]," or "alter the rules of evidence." *Clements* v. *United States*, 266 F.2d 397, 399 (9th Cir.), cert. denied, 359 U.S. 985 (1959). A more recent decision similarly explained that such a statute does not "criminalize[] previously innocent conduct," "enhance[] the punishment for an existing crime," or eliminate a defense "related to the definition of the crime, or to the matters which a defendant might plead as justification or excuse." *United States* v. *Brechtel*, 997 F.2d 1108, 1113 (5th Cir. 1993). The analysis in those decisions is equally applicable to statutes that permit the prosecution of offenses for which the statute of limitations had previously expired.

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[3] *United States* v. *De La Mata*, 266 F.3d 1275 (11th Cir. 2001) (increasing limitations period from five to seven years for financial institution offenses); *United States* v. *Grimes*, 142 F.3d 1342 (11th Cir. 1998) (increasing limitations period from five to seven years for crimes involving explosives), cert. denied, 525 U.S. 1088 (1999); *United States* v. *Brechtel*, 997 F.2d 1108 (5th Cir. 1993) (increasing limitations period from five to ten years for participation in unlawful savings and loans transaction); *United States* v. *Taliaferro*, 979 F.2d 1399 (10th Cir. 1992) (increasing limitations period from five to ten for false statements to insured banks); *United States* v. *Knipp*, 963 F.2d 839 (6th Cir. 1992) (increasing limitations period from five to ten years for scheme to defraud federally insured institution); *Clements* v. *United States*, 266 F.2d 397 (9th Cir.) (increasing limitations period from three to five years for transportation of females for purposes of prostitution), cert. denied, 359 U.S. 985 (1959); *Falter* v. *United States*, 23 F.2d 420 (2d Cir.) (increasing limitations period from three to six years for conspiracy to defraud the United States), cert. denied, 277 U.S. 590 (1928).

3. In *Falter* v. *United States*, 23 F.2d 420 (2d Cir.), cert. denied, 277 U.S. 590 (1928), the court, in an opinion by Judge Learned Hand, held that a statute that extended the limitations period for the prosecution of an offense committed before the statute's enactment did not violate the prohibition against ex post facto laws where the effect of the statute was to give the prosecution "a longer lease of life," rather than "to revive a prosecution already dead." *Id.* at 425. The court went on to suggest that the result might well be different if the earlier limitations period had expired before the statute's enactment. *Id.* at 425-426. The court explained that, in its view, the question under the Ex Post Facto Clause "turns upon how much violence is done to our instinctive feelings of justice and fair play." *Id.* at 426. That analysis is unsound.

First, as this Court has recognized, "[r]etroactive provisions often serve entirely benign and legitimate purposes," such as "to correct mistakes," "to prevent circumvention of a new statute in the interval immediately preceding its passage," or "to give comprehensive effect to a new law [the legislature] considers salutary." *Landgraf* v. *USI Films Prods.*, 511 U.S. 244, 267-268 (1994). Those legitimate reasons can also support extending the period within which to commence a prosecution on which the statute of limitations had previously expired.

For example, the statute discussed in *Stewart* permitted the prosecution of criminal offenders who would have otherwise escaped prosecution solely because of the exigencies of war. A bill pending in Congress that would toll the limitations period retroactively where a perpetrator is identified through DNA evidence ensures that persons demonstrably guilty of offenses will not escape prosecution simply because such evidence was not previously available. See p. 2, *supra*. And California's law ensures that sex offenders do not escape prosecution simply because their victims were reluctant to report the offenses while under their influence or control.

As those examples demonstrate, a law that permits the prosecution of an offense for which the statute of limitations had previously expired can be entirely consistent with "justice and fair play." *Falter*, 23 F.2d at 426.

More fundamentally, under this Court's decisions, a violation of the prohibition against ex post facto laws does not depend on "instinctive feelings of justice and fair play." *Falter*, 23 F.2d at 426. Instead, "the prohibition which may not be evaded is the one defined by the *Calder* categories." *Collins*, 497 U.S. at 46. Because a law that permits the prosecution of an offense for which the statute of limitations had previously expired does not violate any of the *Calder* categories, it does not violate the Ex Post Facto Clause.

II. A LAW THAT PERMITS THE PROSECUTION OF AN OFFENSE FOR WHICH THE STATUTE OF LIMITATIONS HAD PREVIOUSLY EXPIRED DOES NOT DENY DUE PROCESS OF LAW

A. The Constitutionality Of Retroactive Criminal Laws Is Governed By The Ex Post Facto Clause, Not The Due Process Clause

There is also no merit to petitioner's contention (Br. 31-50) that extending an expired limitations period violates the Due Process Clause. Under this Court's decisions, if a constitutional claim is covered by a specific constitutional provision, that claim must be analyzed under the standard provided by that provision, not under the Due Process Clause. For example, in *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), the Court held that the Fourth Amendment, rather than the Due Process Clause, supplies the standards for deciding whether a seizure of a free citizen is constitutional. The Court reasoned that, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion

of 'substantive due process,' must be the guide for analyzing these claims." *Ibid.*

Similarly, in *Sattazahn* v. *Pennsylvania*, 123 S. Ct. 732 (2003), the Court held that where a jury deadlocked at the defendant's capital sentencing hearing, a judge imposed a life sentence without making a finding concerning the presence or absence of aggravating factors, and the defendant succeeded in having his conviction set aside on appeal, the Double Jeopardy Clause did not bar the imposition of a capital sentence after a retrial. The Court then summarily rejected the defendant's due process claim, holding that "[w]e decline petitioner's invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause." *Id.* at 742.

The analysis used in *Graham* and *Sattazahn* is also applicable here. The Constitution contains an explicit textual restraint on a legislature's enactment of ex post facto laws. That specific constitutional prohibition, rather than generalized notions of due process, supplies the standard for evaluating whether a retroactive criminal statute is constitutional. The Court should "decline petitioner's invitation to hold that the Due Process Clause provides greater [ex post facto] protection than does the [Ex Post Facto Clause]." *Sattazahn*, 123 S. Ct. at 742.

B. The Benefit Of An Expired Limitations Period Is Not A Fundamental Right

Even if a separate due process analysis were warranted, a law that permits prosecution of an offense for which the statute of limitations had previously expired does not implicate any right that is fundamental for due process purposes. In *Chase Securities Corp* v. *Donaldson*, 325 U.S. 304, 314 (1945), the Court unanimously held that "the shelter provided by the expiration of a limitations period has never been regarded as what is now called a 'fundamental' right or

what used to be called a 'natural' right of the individual." The Court further held that while a defendant "may, of course, have the protection of the policy while it exists, * * * the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Ibid.* In reaching that conclusion, the Court emphasized that "[s]tatutes of limitations find their justification in necessity and convenience rather than in logic," and represent "expedients, rather than principles." *Ibid.* The Court also emphasized "[t]his is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability." *Id.* at 316. The Court accordingly reaffirmed its holding in *Campbell* v. *Holt*, 115 U.S. 620, 627-628 (1885), that reviving an expired civil cause of action does not violate Due Process. See also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (reaffirming that statutes of limitations "can be extended, without violating the Due Process Clause, after the cause of action arose and even after the statute itself has expired"); *Electrical Workers* v. *Robbins & Meyers*, 429 U.S. 229, 243 (1976) (upholding constitutionality of an Act of Congress that revived a cause of action that was time-barred before its enactment).

Chase and *Campbell* involved civil actions, but the Court's analysis applies equally to criminal cases. Criminal statutes of limitations, like civil statutes of limitations, reflect pragmatic public policy judgments, rather than personal entitlements. Indeed, the Court has concluded that the policies that underlie criminal statutes of limitations largely track the policies that underlie civil limitations periods. *United States* v. *Marion*, 404 U.S. 307, 322-323 & n. 14 (1971) (noting that statutes of limitations are designed to promote societal repose, to guard against the dangers of a trial where mate-

rial evidence has been lost or has become stale, and to encourage the filing of actions promptly). Equally important, just as the defendants in *Chase* who where charged with securities fraud could not legitimately claim that they did so in reliance on the limitations period, here, those who commit crimes cannot legitimately claim that did so in reliance on the existing limitations period. Thus, like a civil defendant, a criminal defendant does not have a fundamental right to the benefit of an expired limitations period.

When a retroactive statute does not impinge on a fundamental right, the relevant inquiry under the Due Process Clause is whether "the retroactive application of the legislation is itself justified by a rational legislative purpose." *United States* v. *Carlton*, 512 U.S. 26, 31 (1994). California's statute satisfies that standard. California extended its limitations period for sexual offenses prospectively based on evidence that minors who are victims of sexual offenses often fail to report them in time to permit timely prosecution because they are under the influence or control of the offenders. *Frazer*, 88 Cal. Rptr. 2d at 316-317. It was entirely rational for California to conclude that the same rationale justified extending its new limitations period to crimes committed before the statute's enactment.

C. Petitioner's Remaining Contentions Are Unpersuasive

Petitioner's remaining contentions are all without merit. Petitioner seeks to analogize his claim (Pet. 36) to one where the government fails to honor a plea agreement. But a statute of limitations bears no resemblance to a plea agreement. In a plea agreement, the government promises to do something to assist the defendant, and the defendant, in turns, agrees to do something of value to the government—plead guilty. In contrast, a statute of limitations does not contain any promise from the government, and a person does not

agree to do anything of value for the government in order to obtain the benefits of the limitations period. Accordingly, the principle that the government is obliged to honor its plea agreements, see *Santobello* v. *New York*, 404 U.S. 257, 262-263 (1971), has no application here.

Petitioner's reliance (Br. 47) on *Raley* v. *Ohio*, 360 U.S. 423, 437-438 (1959), is also misplaced. There, the government assured the defendant that he was not required to answer certain questions, and then prosecuted him for failing to answer those very questions. The Court held that the government's conduct constituted "active misleading" and "the most indefensible sort of entrapment." *Id.* at 438. In the present context, there is neither active misleading nor entrapment. A statute of limitations contains no assurance that it will not be retroactively modified, and a person who engages in criminal conduct is not entrapped into doing so by the existing limitations period.

Finally, petitioner's concern (Pet. 47) that a person may not preserve information material to a defense after a limitations period has expired does not lead to the conclusion that extending an expired limitations period violates due process. The same concerns could be voiced with respect to civil liability, yet the Court's rulings in *Campbell* and *Chase* reject a per se due process rule. Rather, in a criminal case, the government's delay in bringing a prosecution implicates the Due Process Clause only when there is evidence of "actual prejudice" from the delay. *Marion*, 404 U.S. at 324. Even actual prejudice is insufficient by itself to establish a due process violation. In addition, a court must consider the government's reasons for the delay. *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). Here, petitioner has failed to assert, much less show, that the State's delay in filing charges against him has prejudiced his defense.

CONCLUSION

The judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted.

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