No. 20-1009

In the
Supreme Court of the United States

DAVID SHINN, *et al.*,

Petitioners,

v.

DAVID MARTINEZ RAMIREZ AND BARRY LEE JONES,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF FEDERAL DEFENDER CAPITAL HABEAS UNITS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are the nation's Capital Habeas Units (CHUs)—the divisions of Federal Defender Organizations that represent indigent state death-row inmates in federal habeas proceedings. A complete list of the CHUs joining this brief is set forth in the Appendix.

The CHUs devote their energy and expertise to ensuring that state death sentences are carried out only when those sentences have been obtained in compliance with the Constitution. Often operating under extraordinarily challenging conditions and facing harsh deadlines, the CHUs strive to provide the highest-quality representation to those who most desperately need it. Because their practice is devoted entirely to federal habeas proceedings, the CHUs have significant experience litigating cases under the narrow exception to procedural default set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012), and are well situated to understand both the importance of that decision and the grave consequences of limiting its holding as Arizona suggests.

The CHUs submit this brief to explain that stripping *Martinez* of practical effect, as Arizona proposes, will have no meaningful effect on federal-state comity or the finality of properly obtained convictions, but will slam shut an important safety valve for addressing grave constitutional violations.

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[1] The parties have given blanket consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part. No one other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

As this Court has recognized, federal habeas should be available to guard against "extreme malfunctions in the state criminal justice systems." *Davis v. Ayala*, 576 U.S. 257, 276 (2015) (citing *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). *Martinez*'s narrow exception for cases where no court has ever heard a prisoner's substantial ineffective-assistance claim is critical to ensuring that federal habeas can continue to perform that role.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should resist Arizona's call to hollow out *Martinez*. *Martinez* is not—contrary to Arizona's and *amici*'s suggestion—drowning the federal courts in gratuitous evidentiary hearings or imperiling federal-state comity. As the CHUs' experience demonstrates, *Martinez* claims have produced only a handful of evidentiary hearings and even fewer grants of habeas relief. *Martinez* nevertheless provides an essential check for particularly egregious cases where a state would otherwise be able to carry out a prisoner's sentence without *any* court having considered the prisoner's substantial claim that his conviction or sentence resulted from trial counsel's deficient performance.

As respondents explain, 28 U.S.C. § 2254(e)(2) does not impose a "separate statutory hurdle to relief," Pet. Br. 40, for prisoners pressing claims of ineffective assistance of trial counsel under *Martinez*, *see* Resp. Br. 28–41. Rather, a petitioner who makes the showing required by *Martinez* has necessarily also demonstrated that he was not at fault in "fail[ing] to develop" the factual basis of his claim in state court, as the first clause of § 2254(e)(2) requires.

Arizona's contention that *Martinez* did not resolve this question ignores the logic of that decision and the practical reality of litigating *Martinez* claims. The CHUs' experience confirms what the *Martinez* Court well understood—that presenting a new claim of ineffective assistance of trial counsel in a federal habeas proceeding virtually always requires adducing evidence beyond the state-court record. Adopting Arizona's interpretation of § 2254(e)(2) would therefore be tantamount to overruling *Martinez*.

ARGUMENT

I. Because *Martinez* claims virtually always require extra-record evidence, adopting Arizona's reading of § 2254(e)(2) would be tantamount to overruling *Martinez*.

A. *Martinez* held that when (1) a state prisoner has a substantial claim that his trial counsel was constitutionally ineffective, (2) the State barred the prisoner from raising that claim on direct appeal, and (3) postconviction counsel's deficient performance prevented the defendant from raising that claim in the first postconviction proceeding in which he could do so, the defendant may raise the claim in a federal habeas proceeding. 566 U.S. at 17. This affords him *one* opportunity for a judicial hearing on the claim. *See id*.

Arizona asks the Court to hold that even when a prisoner makes the showing required by *Martinez*, § 2254(e)(2) stands as an independent bar to a federal habeas court's holding an evidentiary hearing on the prisoner's claim or considering evidence outside the state-court record to adjudicate that claim. Arizona's reading would render *Martinez* a dead letter. As the

CHUs' experience confirms, litigating unpreserved trial-ineffectiveness claims in federal court nearly always requires the presentation of extra-record evidence newly developed by federal habeas counsel.

Developing such extra-record evidence is a central part of the CHUs' representation of state prisoners. Even before *Martinez*, the most common federal constitutional claim raised in capital habeas petitions was that the petitioner was denied the effective assistance of trial counsel. *See* Nancy King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 28, 64 (2007), *available at* https://bit.ly/2YiOBQN. Trial counsel's performance may have been deficient because they failed to conduct a reasonable investigation into the facts of the crime, failed to present important evidence or legal arguments, or failed to conduct a reasonable investigation into the client's life history to discover compelling mitigating evidence. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

The cold state-court record rarely discloses the basis for these claims. Instead, meritorious claims are typically identified as a result of the CHUs' independent investigation, which may uncover defenses or exculpatory or mitigating evidence that counsel overlooked. Congress has recognized the importance of such independent investigations. *See* 18 U.S.C. § 3006A(a)(2)(B) (when the "interests of justice so require," representation including "investigative, expert, and other services necessary for adequate representation" are "provided for any financially eligible person who … is seeking relief under section 2241, 2254, or 2255 of title 28"); *see also* Am. Bar Ass'n, *American Bar Association Guidelines*

for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1085–86 (2003).

The extra-record evidence developed as a result of the CHUs' efforts is critical to supporting a claim that trial counsel was ineffective. Without the ability to present such evidence at a federal evidentiary hearing, *Martinez*'s already-narrow gateway would be slammed shut in practically every case.[2]

B. None of this was news to the *Martinez* Court, which well understood that *Martinez* claims would nearly always require the development of new evidence in federal court. The Court acknowledged that "[c]laims of ineffective assistance at trial often require investigative work" and "often depend on evidence outside the trial record." 566 U.S. at 11, 13. Accordingly, "developing the factual basis for the claim" will usually require "evidentiary hearings" and an opportunity to "expand the record." *Id.* at 13; *see also Trevino v. Thaler*, 569 U.S. 413, 422 (2013). Indeed, the claims at issue in *Martinez*—including claims that trial counsel should have called an expert witness and pursued an exculpatory explanation for certain DNA evidence—undoubtedly would have required extra-record evidence. *See* 566 U.S. at 7.

Nor were these novel insights. This Court has long recognized that a trial record is "often incomplete or inadequate" for litigating "either prong of the

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[2] Moreover, in the extremely rare but theoretically possible case in which a trial lawyer commits such an egregious error that the trial record alone establishes deficient performance and prejudice, state postconviction counsel are unlikely to have failed to present such an obvious claim.

Strickland analysis." *Massaro v. United States*, 538 U.S. 500, 504–05 (2003) (holding that federal prisoners can raise trial-ineffectiveness claims in collateral proceedings). "The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." *Id.* at 505. And "[i]f the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it," leaving the appellate court with "no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." *Id.* "[A]dditional factual development" is also often necessary to permit a court to determine "whether the alleged error was prejudicial." *Id.*

It gives the *Martinez* Court far too little credit to suggest that it adopted a rule allowing substantial trial-ineffectiveness claims to be heard for the first time in federal court, only to have those claims be independently barred by § 2254(e)(2). The Court did no such thing. As respondents explain, paragraph (e)(2) applies only where a prisoner is "at fault for the deficiency in the state-court record." *Williams v. Taylor*, 529 U.S. 420, 433 (2000); *see* Resp. Br. 29–31. And *Martinez* holds that a prisoner whose counsel performed deficiently in an initial-review collateral proceeding is not "at fault." *See* 566 U.S. at 13 ("By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims."). *Martinez* thus makes clear that ineffective assistance of state postconviction counsel in such a proceeding is not a failure that can justly be laid at the applicant's feet for purposes of § 2254(e)(2).

That explains why not a single Justice so much as hinted that § 2254(e)(2) might pose an independent bar to federal courts' adjudication of *Martinez* claims. Nor can Arizona plausibly suggest that the Court was unaware of § 2254(e)(2). The Court expressly rejected Arizona's argument that "the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, bars Martinez from asserting attorney error as cause for procedural default." 566 U.S. at 17. True, the Court specifically discussed only subsection (i) of § 2254. But that is surely not because the Court overlooked paragraph (e)(2), a provision it had discussed at length just the Term before. *See Cullen v. Pinholster*, 563 U.S. 170, 183–86 (2011). Instead, the Court did not separately discuss § 2254(e)(2) because it recognized that that statute would not apply to claims that met the requirements to pass through the *Martinez* gateway.

And if the seven Justices in the majority had somehow overlooked that § 2254(e)(2) might require the denial of essentially all *Martinez* claims, then surely the two dissenters would have pointed it out. *Cf. Hudson v. McMillian*, 503 U.S. 1, 22 n.2 (1992) (Thomas, J., joined by Scalia, J., dissenting) (criticizing majority for "leav[ing] open" a "critical question" that could render "today's decision … a dead letter"). On the contrary, the dissenters decried the sweeping "practical consequences" of the Court's "radical" holding, which they claimed would significantly expand federal habeas review of defaulted claims. *Martinez*, 566 U.S. at 20, 28 (Scalia, J., dissenting). Like the majority, the dissenters plainly understood that § 2254(e)(2) would not operate as an independent bar to those claims.

C. For these reasons, treating § 2254(e)(2) as a "separate and independent hurdle to habeas relief," Pet. Br. 36, even though a prisoner has made the necessary showing under *Martinez* to excuse her procedural default, would have virtually the same effect as overruling *Martinez* entirely. But "[b]efore overruling precedent, the Court usually requires that a party ask for overruling, or at least obtains briefing on the overruling question, and then the Court carefully evaluates the traditional *stare decisis* factors." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 n.5 (2020) (plurality opinion of Kavanaugh, J.). Arizona does not ask the Court to overrule *Martinez* and does not attempt to overcome the presumption of *stare decisis*, so the Court has no occasion to revisit that decision.

Instead, Arizona asks the Court to pay lip service to *Martinez* while construing AEDPA in a way that would deprive that decision of any meaningful effect. The Court owes its precedent more respect than that. "[H]onoring *stare decisis* requires more than beating [a precedent] to a pulp and then sending it out to the lower courts weakened, denigrated, … and yet somehow technically alive." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 636 (2007) (Scalia, J., concurring in judgment). The rule-of-law principles underlying *stare decisis* require giving the Court's precedent its full reasonable scope. *See, e.g.*, *Ocasio v. United States*, 136 S. Ct. 1423, 1434 (2016). In this case, that means recognizing that § 2254(e)(2) cannot operate to independently bar federal courts from considering evidence on *Martinez* claims.

II. Overruling *Martinez* would shield extreme malfunctions in state criminal-justice systems and would lack any countervailing benefits.

A. Arizona and its *amici* suggest *Martinez* evidentiary hearings pose a dire threat to federal-state comity and the finality of state convictions—one that necessitates using § 2254(e)(2) to drastically curtail such hearings, if not eliminate them altogether. As the CHUs can attest, the reality on the ground is very different. *Martinez* hearings are not the norm, but a rare exception. In almost a decade since the case was decided, the CHUs have obtained evidentiary hearings under *Martinez* in only a few dozen cases (fewer than five per judicial district on average).[3]

Nor has *Martinez* significantly impaired the operation of the States' criminal justice systems. Dire warnings aside, the States effectively admit as much. For example, the States complain that Texas has "*three* cases pending before the Fifth Circuit" that raise questions about whether a state prisoner should have received an evidentiary hearing under AEDPA. States' *Amicus* Br. 20–21 (emphasis added). To put that into perspective, Texas has nevertheless managed to carry out *fourteen* executions since the first of those appeals was filed. *See* Tex. Dep't of Crim.

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[3] *Martinez* hearings are equally rare in non-capital cases outside the CHUs' purview. And as the dissenters in *Martinez* acknowledged, such hearings in non-capital cases do not pose a significant threat to finality because "[t]he defendant will stay in prison, continuing to serve his sentence," for the duration of federal habeas review. 566 U.S. at 23 (Scalia, J., dissenting).

Justice, Texas Death Row Information—Executed Inmates (2021), https://bit.ly/3zuSAdQ.

Even more absurd is the States' suggestion that *Martinez* imperils finality and federalism because criminal defendants will "sandbag" prosecutors by deliberately withholding "their best evidence" during state-court proceedings and saving it for federal habeas. States' *Amicus* Br. 4, 27. Set aside that this suggests officers of the court would intentionally provide substandard advocacy for their clients. It also beggars belief that a defendant who believes his conviction was obtained due in part to the ineffective assistance of his trial counsel would not present his best case for acquittal or reduction of sentence at the first opportunity, but would instead choose to sit in prison for "years, if not decades," *id.* at 23, in the hope of winning federal habeas relief that is granted in only the rarest circumstances. No one with experience representing criminal defendants could possibly think that such "sandbagging" would be a wise or effective strategy.

What is more, the States could mitigate the problems they complain of by establishing systems "to ensure that proper consideration [is] given to a substantial claim" in initial-review collateral proceedings. *Martinez*, 566 U.S. at 14. That means providing qualified lawyers to represent defendants in those proceedings and ensuring that those lawyers have the time and resources necessary to conduct an adequate investigation, so that prisoners with substantial trial-ineffectiveness claims have a fair chance to present those claims in state court. Unfortunately, the States have fallen short of even that modest goal.

As just one illustration of the States' shortcomings in this area, no State is currently certified as meeting the basic requirements for appointment of postconviction counsel set forth in Chapter 154 of AEDPA. That chapter curtails federal habeas review of state capital convictions when the Attorney General certifies a State as having an adequate system for appointing postconviction counsel for indigent capital prisoners. To qualify, the State need only ensure that appointed counsel are competent and timely appointed and provide them with sufficient compensation and resources to do their jobs. *See* 28 U.S.C. §§ 2261–2266; 28 C.F.R. §§ 26.20–.23. At present, no state is certified as meeting these basic requirements.[4]

In short, the practical effect of *Martinez* on the States' interests in finality and comity has been minimal, and what effect exists could be further mitigated if the States made a greater effort to ensure that defendants are adequately represented in postconviction proceedings—especially when those proceedings represent the defendant's first and only opportunity to raise a claim in state court concerning trial counsel's effectiveness. Those effects do not justify overruling *Martinez*, expressly or otherwise.

B. Although courts hold *Martinez* hearings infrequently, *Martinez* provides a vital safety valve

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[4] Arizona was briefly certified in 2020, despite an outpouring of public comment explaining the myriad ways in which the State's system for appointing postconviction counsel was deeply defective. The Attorney General withdrew the certification in 2021 and is currently reexamining the issue. *See* Respondents' Mot. for Voluntary Remand at 4–5, *Office of Fed. Pub. Def. for Dist. of Ariz. v. Garland*, No. 20-1144 (D.C. Cir. Apr. 28, 2021).

for cases where "the provision of two consecutive constitutionally ineffective lawyers" would otherwise "trap habeas petitions in a procedural double-bind through which they would be consigned to prison"—or even to death—"without a court ever hearing the merits of their constitutional claim." *Mitchell v. Genovese*, 974 F.3d 638, 651–52 (6th Cir. 2020) (granting relief under *Martinez* to remedy the "judicial travesty" of a black defendant convicted by an all-white jury due to an undisputed *Batson* violation) (citing *Mitchell v. Rees*, 114 F.3d 571, 583 (6th Cir. 1997) (Keith, J., dissenting)). Such "extreme malfunctions in the state criminal justice systems" are precisely what federal habeas guards against. *Davis*, 576 U.S. at 276 (citing *Harrington*, 562 U.S. at 102).

Cases where *Martinez* hearings are permitted are those in which a state prisoner's conviction or sentence is highly likely to be suspect. Postconviction investigations have, with depressing frequency, revealed wrongful convictions that resulted from ineffective assistance of trial counsel. The National Registry of Exonerations—a database maintained by the law schools of the University of California at Irvine, the University of Michigan, and Michigan State University—lists a staggering 779 exonerations since 1989 in which "inadequate legal defense" was the sole or a contributing factor in the improper conviction. *See* Nat'l Registry of Exonerations, *Summary View*, https://bit.ly/2XOYokj (last visited Sept. 20, 2021) (when filtered for "inadequate legal defense"). That statistic includes 44 exonerated prisoners who were facing the death penalty as a result of their counsel's ineffectiveness. *Id.*, *Detailed View*, https://bit.ly/2W79OiZ (last visited Sept. 20,

2021) (when filtered for "Death sentence" and "ILD"—*i.e.*, inadequate legal defense).

A recent case handled by CHU counsel from the Arizona Federal Public Defender's Office illustrates what is at stake in these cases. In *Gallegos v. Shinn*, evidence adduced by CHU counsel at a *Martinez* hearing led to the vacatur of an improperly imposed death sentence. The evidence demonstrated that trial counsel had failed to investigate and present "particularly compelling mitigation evidence" that Gallegos suffered from a traumatic brain injury that likely "'impaired his judgment at the time of the crimes.'" 2020 WL 7230698, at *7–19, *25–26 (D. Ariz. Dec. 8, 2020), *no appeal filed*. Gallegos was unable to raise this claim in state court due to his postconviction counsel's deficient performance. Postconviction counsel initially offered an ineffective-assistance "argument" consisting entirely of this:

> VII. Insufficient Mental and Personal History Mitigation Were Conducted Previously, therefore, Petitioner Received Ineffective Assistance of Counsel at the Penalty Phase. (No Argument Supplied Because of Time Constraints.)

Gallegos v. Shinn, 2020 WL 836600, at *6 (D. Ariz. Feb. 20, 2020) (quotation marks omitted). Counsel filed a supplemental petition six months later in which "[h]e again failed to present any legal authority or factual support" for the claim. *Id.* Nor did counsel present any evidence in support of the claim at the state-court hearing. *Id.* at *6, *9. As a result, had CHU counsel not been able to supplement the state-court record, no court would ever have considered Gallegos's meritorious claim.

Consider, too, a recent decision from the District of Montana, which granted a conditional writ based on an evidentiary record developed under *Martinez*. *See Collier v. Montana*, 2020 WL 1394612, at *8, *17 (D. Mont. Mar. 2, 2020). Although Collier's "mental disability was obvious and would have been readily apparent to an attorney representing him," the sentencing court "was not provided any mitigation evidence regarding Collier's mental capacity." *Id.* at *14, *17. Targeted *Martinez* discovery revealed that Collier's trial counsel conducted no meaningful investigation: he never sought to "obtain any medical records, social security disability records, educational records, or records of intellectual testing, and he did not interview any teachers or professionals who worked with Collier while in school." *Id.* at *8. And Collier's state postconviction counsel abruptly "left the country without notifying the court, the state, or Collier that he would no longer be pursuing Collier's claim." *Id.* at *10. Absent the evidence adduced in federal court—including an updated psychological evaluation and testimony from state trial and postconviction counsel—Collier's 50-year sentence would have been unchallengeable.

No single law or precedent can solve the vexing problem of improper convictions and sentences. But *Martinez* helps ensure that state prisoners who were failed by *both* their trial counsel *and* their postconviction counsel have meaningful recourse to the federal writ. It does so, moreover, at little cost to federalism or to the finality of properly achieved convictions. *Martinez* should be allowed to continue to perform its critical function, not overruled or narrowed out of existence.

CONCLUSION

The Court should affirm the judgments below.

Respectfully submitted,

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September 20, 2021

APPENDIX

APPENDIX

*Interested Parties (*Amici)

The following is a complete list of the jurisdictions whose Capital Habeas Units join this brief as *amici curiae*:

Middle District of Alabama

Eastern District of Arkansas

Central District of California

Eastern District of California

Middle District of Florida

Northern District of Florida

Northern District of Georgia

District of Idaho

Western District of Missouri

District of Nevada

Northern District of Ohio

Southern District of Ohio

Western District of Oklahoma

Eastern District of Pennsylvania

Middle District of Pennsylvania

Western District of Pennsylvania

Eastern District of Tennessee

Middle District of Tennessee

Northern District of Texas

Western District of Texas

Fourth Circuit