No. 20-1009

IN THE

Supreme Court of the United States

DAVID SHINN, ET AL.,

Petitioners,

v.

DAVID MARTIN RAMIREZ AND BARRY LEE JONES,

Respondents.

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

BRIEF OF FORMER STATE SUPREME COURT JUSTICES AND FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

We are former state supreme court justices and former federal judges who submit this brief as *amici curiae* in support of Respondents, pursuant to Supreme Court Rule 37.1.[1]

Charles F. Baird served as an Associate Justice on the Texas Court of Criminal Appeals from 1990 through 1998.

Michael Burrage served as a U.S. District Judge on the U.S. District Courts for the Western, Northern, and Eastern Districts of Oklahoma from 1994 through 2001, and served as the Chief Judge on the U.S. District Court for the Eastern District of Oklahoma from 1996 through 2001.

Robert Cindrich served as a U.S. District Judge on the U.S. District Court for the Western District of Pennsylvania from 1994 through 2004.

Sue Bell Cobb served as Chief Justice on the Alabama Supreme Court from 2007 through 2011.

Norman S. Fletcher served as an Associate Justice on the Supreme Court of Georgia from 1989 until 2001 when he was elevated to Chief Justice. He served in this position until his retirement in 2005.

Sol Wachtler served as a Judge on the New York Court of Appeals from 1972 until 1985, when he was

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[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the preparation or submissions of the brief; and no person other than *amici* or counsel contributed money intended to fund the preparation or submission of the brief. Petitioner and Respondents have filed blanket consents to the filing of *amicus curiae* briefs under Supreme Court Rule 37.3.

elevated to Chief Judge. He served in this position until 1992.

Penny J. White served as an Associate Justice on the Tennessee Supreme Court from 1994 through 1996.

Michael A. Wolff served as a Judge on the Missouri Supreme Court from 1998 to August 2011, and served as Chief Justice for the term of July 1, 2005, through June 30, 2007.

As members of the state and federal judiciary, we devoted a substantial amount of time to safeguarding the integrity and reliability of criminal prosecutions, ensuring that criminal proceedings in our respective courts complied with both state and federal constitutional protections against improper and wrongful conviction. Certain federal claims, notably those asserting that the prosecution suppressed material evidence or that trial counsel was constitutionally ineffective, cannot practically be brought either at trial or on direct appeal because of the difficulties of discovering, or adequately litigating, the facts supporting the claims. Indeed, in some cases, criminal defendants are prohibited from bringing these types of claims before state postconviction proceedings.

This Court recognized these difficulties when it held that federal habeas courts could hear substantial claims of ineffective assistance despite a state defendant's failure to raise the claim in state postconviction proceedings. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012). Here, however, Arizona argues that federal courts adjudicating such claims are limited to the (almost always insufficient) record before the state trial

court. We are gravely concerned about the implications of Arizona's position in this case. If accepted, that position will make federal judges complicit in injustice, forced to ignore evidence of a petitioner's innocence or of a serious breakdown in the criminal justice process. We are also deeply concerned that state judges will never have certainty that defendants convicted in their courtrooms had a full and fair opportunity to raise all of their federal constitutional claims.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If there is one hallmark feature of our criminal justice system, it is this: Defendants must have at least one full and fair opportunity to litigate their constitutional claims. The balance in guaranteeing that opportunity may have shifted over the years (from state to federal and back to state court), but the basic obligation has always remained. There must be *some* forum in which a criminal defendant can effectively press his rights.

In *Martinez v. Ryan*, this Court put that principle into practice for the unique set of claims involving ineffective assistance of trial counsel. Unlike claims about other alleged constitutional violations, these claims cannot (or cannot effectively) be raised at trial or on direct appeal. So if a defendant is *ever* to receive a full and fair opportunity to challenge his trial counsel's effectiveness, he must do so in state postconviction court or federal habeas court. But because defendants currently lack a constitutional right to counsel in postconviction proceedings—even with respect to claims that *could not* have been pressed earlier—they may struggle to raise the arguments and gather the evidence needed to show trial counsel's ineffectiveness.

To guarantee these defendants one full and fair opportunity, *Martinez* held that, where initial-review collateral proceedings present the first chance for a prisoner to bring ineffective assistance of trial counsel claims, the ineffective assistance of postconviction counsel may establish cause to excuse the prisoner's procedural default of that ineffective assistance of trial

counsel claim, and a federal court may review the claim. 566 U.S. 1 (2012). *Martinez* thus ensured that if a state prisoner has not had an adequate opportunity to present his claim to the state court, he will receive his one fair chance in federal habeas court.

In this way, *Martinez* encouraged state postconviction courts to hear claims that cannot or should not be brought on direct review, and it permitted federal courts to serve as a backstop when *no* state court could properly hear the claim. At the same time (and in the same way), the Court in *Martinez* preserved the careful balance between state and federal judges. It gave defendants one fair opportunity to present claims in federal court if necessary while maintaining state judges' primacy in resolving federal constitutional issues affecting state criminal trials overall.

Arizona now argues, however, that when ruling upon the ineffective-assistance claims that *Martinez* allowed to proceed, a federal habeas court may consider only the evidence already in the trial record. If Arizona prevails, a defendant's one "full" and "fair" opportunity will be neither. The evidence that existed at the time of the ineffectively defended trial will almost never be enough to satisfy *Strickland*, leaving defendants unable to develop and present even meritorious claims for relief. That cramped review runs counter to habeas law's animating principles.

As former state and federal judges, we are deeply concerned with the implications of Arizona's view. Requiring federal judges to blind themselves to evidence developed to support a *Martinez* claim will lead to injustices of precisely the kind that giving defendants one full and fair opportunity is designed to prevent.

That result will obviously harm defendants, who will be left imprisoned without ever having had a fair trial. But it will also harm judges themselves. Federal judges, for their part, will have to ignore compelling evidence of a serious breakdown in the criminal process—or even of a defendant's innocence. And state judges will have to live with the uncertainty that, unbeknownst to them, the trials and guilty pleas over which they presided may have been marred by unconstitutionally poor lawyering.

Against the basic principles of justice and one fair opportunity outlined just above, Arizona contends in large part that allowing federal courts to rely upon newly developed evidence will inundate the federal courts with habeas cases raising ineffective-assistance claims. (Pet. Br. 38). But *Martinez* has been on the books for nearly ten years. If there were a flood threatening the federal courts, we would have seen the water. Yet Arizona has presented no evidence for its claim, and we have not observed any either. Rather, federal district courts can and do reject *Martinez* claims that are "insubstantial," 566 U.S. at 16, without requiring an evidentiary hearing, while leaving *Martinez*'s "narrow exception" open to petitioners who deserve a "meaningful opportunity" to present their claims, *Trevino v. Thaler*, 569 U.S. 413, 428 (2013). Meanwhile, *Martinez* has spurred states to improve postconviction proceedings, guaranteeing that state courts continue to play the primary role in protecting constitutional rights.

ARGUMENT

I. CRIMINAL DEFENDANTS MUST HAVE ONE FULL AND FAIR OPPORTUNITY TO LITIGATE THEIR CLAIMS.

Our system rests on the basic principle that everyone is entitled to her day in court. In the habeas context, where liberty is at stake, criminal defendants must have one full and fair opportunity to present their claims, either in state or federal court. Federal habeas review and AEDPA preserve this opportunity. And this Court's decision in *Martinez* protected it for ineffective assistance of trial counsel claims in particular, which typically can be raised only in state or federal postconviction review.

A. Due Process Requires One Full And Fair Opportunity To Be Heard.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Even in civil cases, the government cannot "deny[] ... a full and fair hearing" before depriving someone of their rights." *United States v. Ill. Cent. R.R.*, 291 U.S. 457, 460 (1934); *see, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (no issue preclusion unless "the party against whom the earlier decision is asserted … ha[d] a 'full and fair opportunity' to litigate that issue in the earlier case") (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). After all, "neither judges, the parties, nor the adversary system performs perfectly in all cases," so a "full and fair opportunity to litigate is a most significant safeguard."

Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

The right to a full and fair opportunity applies all the more forcefully in criminal cases, where life and liberty are on the line. It is "uncontroversial" that one held in prison must have a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of" the Constitution. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)). For this reason, the Due Process Clause requires states "to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963). That is why, for instance, a parolee "must have an opportunity to be heard" before his parole is revoked. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972). It is also why, so long as a prisoner makes a showing of mental incompetence, he must have a "constitutionally adequate opportunity to be heard" on claims of incompetency. *Panetti v. Quarterman*, 551 U.S. 930, 952 (2007).

The ineffective assistance of trial counsel claims at issue here are no different. They, too, must "receive review by at least one state or federal court." *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017); *see also, e.g.*, *Martinez*, 566 U.S. at 10–11 (noting that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, *no court* will review the prisoner's claims") (emphasis added); *Trevino*, 569 U.S. at 429 (applying *Martinez* where a state's proce-

dural design makes it "highly unlikely … that a defendant will have *a meaningful opportunity* to raise a claim of ineffective assistance of trial counsel on direct appeal") (emphasis added).

B. AEDPA Honors State Primacy While Giving Defendants A Full Opportunity.

1. For more than five decades, federal habeas courts have played a significant role in guaranteeing that state defendants have one full and fair opportunity to press their claims. In *Fay v. Noia*, 372 U.S. 391 (1963), this Court held that a federal court's plenary jurisdiction over habeas petitions was not affected by the petitioner's procedural defaults of claims during state court proceedings, so long as the petitioner had not deliberately avoided state procedure. And in *Townsend v. Sain*, 372 U.S. 293 (1963), the Court held that federal habeas petitioners deserved an evidentiary hearing on their claims under a wide variety of circumstances, including if "for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 312–18.

Under this regime, evidentiary development in federal courts led to corrections of numerous unconstitutional state court convictions and sentences. For instance, in *Miller v. Pate*, 386 U.S. 1, 2–6 (1967), the defendant was sentenced to death after the prosecution presented "a pair of men's underwear shorts covered with large, dark, reddish-brown stains," which prosecution witnesses called "bloody shorts" and which an expert testified were stained with the victim's type of blood. *Id.* at 3–4. The state trial court denied the defendant's motion to inspect the evidence, *id.* at 2, but on federal habeas review, he was permitted

to have them analyzed. It turned out the "stains on the shorts were not blood, but *paint*," and that the state prosecutor had "known" as much all along. *Id.* at 5–6 (emphasis added). This Court concluded that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Id.* at 7.

Other examples of federal habeas courts correcting unconstitutional convictions and sentences based on evidence that trial counsel failed to or was unable to uncover abound. *See, e.g.*, *Henderson v. Sargent*, 926 F.2d 706, 710–14 (8th Cir. 1991) (trial counsel and state postconviction counsel failed to investigate readily available evidence implicating the victim's husband notwithstanding obvious leads); *Harris v. Reed*, 894 F.2d 871, 877–79 (7th Cir. 1990) (trial counsel presented *no* evidence and failed to interview two men who saw the primary alternate suspect fleeing from the scene, even though counsel told jurors they would hear evidence about the alternate suspect).

2. Even under *Fay* and *Townsend*, however, "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, [wa]s secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). That is, federal habeas review was still premised on the assumption that state courts would be the primary ones to give full and fair consideration to constitutional claims.

In line with that principle, this Court further emphasized state courts' primacy in *Wainwright v. Sykes,* 433 U.S. 72 (1977), which rejected the broader "deliberate bypass" standard from *Fay*. *See id.* at 87–88 (emphasizing that the contemporaneous-objection rule

"deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right"). The Court raised the bar again in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *Keeney* explicitly overruled *Townsend* in favor of imposing a standard that required petitioners "to show cause for [their] procedural default, as well as actual prejudice," in order to bring their defaulted claims in a federal habeas proceeding. *Id*. at 6.

AEDPA's reforms made the premise of state court primacy even more of a reality, formally ensuring that state judges have the "primary responsibility" for preserving constitutional rights. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). For example, AEDPA encourages state court review (and gives primacy to state court judges) by requiring federal judges to defer to state court merits rulings. Before AEDPA, federal habeas courts could review state court rulings on purely legal issues and mixed questions of fact and law de novo. *See Williams v. Taylor*, 529 U.S. 362, 400 (2000). Under AEDPA, however, a federal habeas court may grant relief on a claim adjudicated on the merits in state court only if the legal ruling "was contrary to, or involved an unreasonable application of," a prior decision by this Court. 28 U.S.C. § 2254(d)(1). AEDPA's factfinding provisions similarly reinforce the state judge's pride of place. *See, e.g.*, *id.* § 2254(e)(1) (rebuttably presuming the correctness of a state court's factual findings); *id.* § 2254(d)(2) (limiting review to the state court record in certain circumstances). If a petitioner fully aired the facts supporting her claim in state court, the federal judge's role is again limited to

assessing the reasonableness of the state court's views.

However, those same provisions show that AEDPA maintains an important role for federal judges—especially when a petitioner has not had one clear opportunity to present her federal claims. So, for example, § 2254(d) requires deference to legal conclusions only when a "claim … was adjudicated on the merits in State court." *See Johnson v. Williams*, 568 U.S. 289, 293 (2013) (recognizing de novo review for unaddressed claims). And § 2254(e)(1) requires deference to factfinding only when "a determination of a factual issue [was] made by a State court." 28 U.S.C. § 2254(d), (e)(1); *see Wiggins v. Smith*, 539 U.S. 510, 528 (2003). If the petitioner lacked a clear chance to make her claims in the state proceedings, the rules regarding deference do not apply.

Federal judges' role under AEDPA thus reflects Congress's concern with permitting habeas petitioners one full and fair opportunity to present their claims. Indeed, "one bite at the apple" was a common theme throughout legislative debates over AEDPA. *See, e.g.*, 141 Cong. Rec. S16892, S16913 (1995) (statement of Sen. Feinstein) ("[T]his bill provides habeas petitioners with 'one bite at the apple.' It assures that no one convicted of a capital crime will be barred from seeking habeas relief in Federal court."); 141 Cong. Rec. S7803, S7809 (1995) (statement of Sen. Kennedy) ("The proposal to limit inmates to one bite at the apple is sound in principle."); *id.* at S7832 (statement of Sen. Biden) ("[E]ssentially you get one bite out of the apple."); *see also* William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996) ("If this provision [§ 2254(e)(2)] were

read to deny litigants *a meaningful opportunity* to prove the facts necessary to vindicate Federal rights, it would raise serious constitutional questions. I do not read it that way.") (emphasis added).

Under this scheme, although federal courts play a secondary role to state courts, that role is still an important one: they "stand[] as a safeguard against imprisonment and execution of those held in violation of the law," *Harrington v. Richter*, 562 U.S. 86, 91 (2011), particularly when state defendants have not had a full and fair opportunity to litigate their federal constitutional claims in state court.

C. *Martinez* Protects This Opportunity For Ineffective-Assistance Claims.

Martinez guarantees such an opportunity for a particularly important set of constitutional claims—claims that the defendant's trial counsel gave unconstitutionally poor assistance. "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 566 U.S. at 12. That is because our system relies on "adversarial testing" to "ultimately advance the public interest in truth and fairness," *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981), and to "best promote the ultimate objective that the guilty be convicted and the innocent go free," *Herring v. New York*, 422 U.S. 853, 862 (1975). Without effective adversarial testing, there can thus be no guarantee that the trial was fair, let alone that it reached the right result on guilt or innocence. In this way, it is "through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

However, without meaningful enforcement, this right to counsel is an "unfulfilled, illusory promise." Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2485 (2013). Consequently, defendants must be allowed to bring and develop ineffective assistance of trial counsel claims, as such claims are the "primary mechanism" through which the right to effective assistance of counsel is enforced. Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2688 (2013).

But there is a hitch. Other constitutional claims—that the prosecution introduced an unduly suggestive line-up, that it failed to prove an essential element—can be raised at trial and then litigated on direct appeal, where the defendant enjoys a constitutional right to a lawyer's help. Ineffective assistance of trial counsel claims are different. They generally cannot be raised at trial, because the lawyer cannot be expected to challenge his own conduct and because, with rare exceptions, the judge cannot identify violations *sua sponte*. Nor can they typically be heard on direct appeal, because they "often depend on evidence outside the trial record." *Martinez*, 566 U.S. at 13.

Postconviction review thus provides the "principal forum" in which to bring ineffective-assistance claims. *Harrington*, 562 U.S. at 103. And if *state* postconviction review provides a defendant with a full and fair opportunity to do so, then a federal court must defer to the state court's determination, just as it would with respect to any other issue. *See* 28 U.S.C. § 2254(d). Accordingly, AEDPA and this Court's precedents "encourag[e] the full factual development in state court of a claim that state courts committed constitutional error," "channel[ing] claims into an appropriate forum,

where meritorious claims may be vindicated." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9–10 (1992).

Martinez recognized, however, that state postconviction review—where there is currently no constitutional right to counsel—may not always provide a full and fair opportunity. Therefore, to guarantee that *some* court "will review the prisoner's claims," this Court held that "counsel's errors in an initial-review collateral proceeding … establish cause to excuse" a prisoner's failure to raise his trial ineffectiveness claim in postconviction review. 566 U.S. at 10–11. In other words, because state postconviction proceedings "may not have been sufficient to ensure that proper consideration was given to a substantial claim," federal courts may overlook the default and adjudicate the claim on their own. *Id.* at 14. This approach aligns with AEDPA's core principles: state judges retain their primary role, but a petitioner prevented from raising her ineffective assistance claim in state postconviction proceedings retains her one full and fair opportunity to raise that claim in federal habeas proceedings. *See supra* Part I.B.

If Arizona prevails here, however, *Martinez*'s promise will ring hollow in all but the most unusual circumstances. Arizona believes that, in adjudicating the trial ineffectiveness claims that *Martinez* allows federal habeas petitioners to press, judges may only consider the evidence in the record *from their flawed state court proceedings*; they may not rely on the evidence used to justify excusing the petitioner's procedural default, let alone additional evidence gathered in a new evidentiary hearing. (Pet. Br. 26). But as explained above (and as this Court has repeated time and time

again), "the inherent nature of most ineffective assistance of trial counsel claims means that the trial court record will often fail to contain the information necessary to substantiate the claim." *Trevino*, 569 U.S. at 424 (internal quotation marks omitted) (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)); *see also, e.g.*, *Massaro v. United States*, 538 U.S. 500, 505 (2003) (same). And because of that inescapable fact, the version of federal habeas review imagined by Arizona will fall far short of a full and fair opportunity to press one's ineffective-assistance claims. That outcome contravenes the principles underlying habeas law and transforms *Martinez*'s crucial safeguard into a Pyrrhic victory.

II. ARIZONA'S APPROACH HARMS FEDERAL AND STATE JUDGES.

By preventing federal courts from relying upon evidence developed in a *Martinez* hearing, Arizona's approach would thus prevent petitioners' claims from being meaningfully heard in *any* court, state or federal. Such a result obviously creates the very "unfairness" to defendants that this Court's precedents have guarded against. *Trevino*, 569 U.S. at 425. But it also imposes serious harms on federal and state judges, forcing the former to blind themselves to potential injustice and shaking the latter's confidence in the convictions entered under their supervision.

A. Federal Judges Should Not Have To Ignore Compelling Evidence Developed During A *Martinez* Hearing.

1. Under AEDPA, federal judges' review is deferential. But in no circumstances should they be "required to exhibit a naiveté from which ordinary citizens are

free." *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). But Arizona's position would make things even worse than that. Under its approach, federal judges must *ignore* evidence developed to show a substantial *Martinez* claim.

Forcing federal judges to blind themselves to such evidence harms the integrity of the judiciary. "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). By requiring federal judges to look the other way, Arizona's view would make judges complicit in the greatest miscarriage of justice of all—the imprisonment and execution of innocent people.

Arizona's view would make federal judges accomplices to other kinds of injustice as well. "The constitutional rights of criminal defendants … are granted to the innocent and the guilty alike," and this Court has long "decline[d] to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Lafler v. Cooper*, 566 U.S. 156, 169 (2012) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986)). But requiring federal judges to shield their eyes against evidence of ineffective assistance would make them consciously overlook the violation of all sorts of constitutional rights.

For example, the Constitution guarantees convicted capital defendants the right to present mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114

(1982). Habeas petitioners might develop crucial mitigating evidence to show trial counsel's (and postconviction counsel's) ineffectiveness, but it would all be for naught if federal judges are limited to the state court record. If Arizona prevails, those judges will have to stand by—perhaps even allowing the defendant to be executed—while knowing that the sentencer never even considered facts that could have led the judge or jury toward mercy. So too for sentencing errors in noncapital cases. This Court has made clear that "any amount of actual jail time" "has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001). But if Arizona is right, then federal judges may have to let state prisoners endure years of unlawful incarceration simply because the evidence demonstrating counsel's ineffectiveness came out too late.

Because the right to counsel protects all other rights, *see supra* at 13–16, injustices like these are easily multiplied across the Constitution. Under Arizona's view, federal judges will have to watch on as state prisoners whose rights were violated in various ways—a coerced confession that should have been suppressed, a key witness whose testimony could not be confronted, and so on—cannot prevail on their meritorious ineffective-assistance claims because the judge cannot consider what everyone knows to be true. AEDPA does not counsel that result. "When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights." *McQuiggin v. Perkins*, 569 U.S. 383, 397–98 (2013) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

2. These concerns are not hypothetical. Take first the irreversible injustice of the wrongful conviction and "execution of a person who is entirely innocent." *Schlup*, 513 U.S. at 324–25. Arizona's position threatens to bring about that result *in this very case*.

Respondent Jones's state-appointed counsel failed to uncover significant exculpatory evidence at trial, and his state-appointed postconviction counsel failed to raise an ineffective assistance of trial counsel claim in those proceedings. (Indeed, Mr. Jones's postconviction counsel chose "to forego any investigation into the State's strongest evidence of guilt." JA280.) But at a hearing held to determine whether to excuse the default of Mr. Jones's ineffective assistance claim under *Martinez*, the evidence showed that the victim's injury had occurred at least *two days* before her death—that is, *not* during the short window of time during which she was in Mr. Jones's care. JA221–26. It further showed that blood evidence in Mr. Jones's vehicle did not result from violence against the victim, JA232–34, and that multiple other suspects—including the victim's mother—may have beaten the victim. *See* JA245–47. Moreover, the State's forensic pathologist admitted at the hearing that the methodology used to create a timeline from bruising evidence was "scientifically unreliable"—in fact, the district court concluded it was "scientifically unsupport[ed] and untrue"—and yet that evidence "went unchallenged at trial." JA126, JA129, JA262.

Based on this evidence, the district court held that Mr. Jones could proceed on his claim; indeed, it held that Mr. Jones had demonstrated that counsel unjustifiably failed to perform an adequate pretrial investigation and to impeach the state's evidence. JA284–85.

As the district court concluded, "counsel's deficient investigation pervaded the entire evidentiary picture" and "'render[ed] the result'" of the trial "'unreliable.'" JA264 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Yet under Arizona's view, the federal district court could allow Mr. Jones's claim to proceed under *Martinez*, but then should have *ignored* all of the evidence developed to support that claim when it came time for the merits. Frankly, that is absurd.

Other real-world examples prove that, under Arizona's approach, federal judges would have to blind themselves to compelling evidence of other breakdowns in the process as well. In *Harris v. Wallace*, Harris—caught up in separate federal and state prosecutions—pleaded guilty to federal charges and was sentenced to 25 years in prison. 984 F.3d 641, 644 (8th Cir. 2021). He then pleaded guilty to state charges on the "understanding," based on the prosecutor's "proposal" and his lawyer's advice, that his state sentence would run concurrently with his federal sentence. *Id.* at 645. However, although the state court ordered the sentences to run concurrently, that order "had no effect"; federal sentencing rules made the sentences run consecutively. *Id.*; *see id.* at 644–45 & n.2. Yet Harris's postconviction counsel failed to raise an ineffectiveness claim challenging the validity of Harris's plea in light of the *fifteen* additional years he would serve given his consecutive sentences. *See id.* at 646.

After the district court denied Harris's request for federal habeas relief, the Eighth Circuit remanded for an evidentiary hearing on this classic case of ineffective assistance. *See id.* at 646–47. If Arizona is right, then the evidence developed at that hearing—which could further corroborate Harris's account of his plea

proceedings or support his claim that he would not have pleaded guilty but for the mistaken advice—must be ignored when considering whether Harris's rights were violated. No judge should be put in that position.

This case and *Harris* are not the only examples. In *Stokes v. Stirling*, federal habeas proceedings made clear that postconviction counsel's decision to abandon a trial ineffectiveness claim about mitigating evidence made no sense. *See* — F.4th —, 2021 WL 3669570 (4th Cir. Aug. 19, 2021). Stokes's childhood was "marked by extreme abuse and neglect"—including living without running water or indoor plumbing, witnessing the early death of his father and mother, suffering from sexual abuse, and more—yet trial counsel presented only testimony from a retired warden intended to show that Stokes would adapt well to life in prison. *Id.* at *1; *see id.* at *1–5. In federal postconviction proceedings, state postconviction counsel's testimony demonstrated that they lacked any strategic reason for failing to properly investigate Stokes's mitigation defense, and expert testimony demonstrated that such evidence could have had real pull with the jury. *See id.* at *2, *8–9, *13. Relying in part on this evidence, the Fourth Circuit held that *Martinez* allowed Stokes to proceed on his procedurally defaulted claim and that, on the merits, counsel had rendered ineffective assistance. *See id.* at *6, *10–14.

Other cases have similar fact patterns, where evidence uncovered at the *Martinez* stage demonstrate counsel's possible or even certain errors. *See, e.g.*, *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270 (6th Cir. 2019) (remanding for an evidentiary hearing on defendant's ineffective assistance of trial claim where trial counsel was himself facing serious criminal

charges brought by the same prosecutor's office, and noting that defendant's counsel-related inability to develop evidence "hamstr[ung] th[e] court's ability to determine whether his trial counsel was constitutionally ineffective") (internal quotations omitted), *cert. denied sub nom. Morgan v. White*, 140 S. Ct. 2826, (2020); *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017) (remanding for an evidentiary hearing where trial and postconviction counsel failed to request a limiting instruction on a co-defendant's confession, resulting in the 13-year-old defendant receiving a 60-year prison sentence); *Gallegos v. Shinn*, No. CV-01-01909-PHX-NVM, 2020 WL 7230698, at *7–19 (D. Ariz. Dec. 8, 2020) (granting the writ for resentencing in a capital case where federal habeas testimony demonstrated that repeated ATV accidents and drug and alcohol abuse led to the defendant's organic brain damage). If Arizona wins, federal judges in cases like these will have to ignore clear evidence that ineffective defense counsel failed to develop or present arguments that could have won someone a new trial, led to his acquittal, or even spared him from death.

Of course, federal judges must operate within AEDPA's structure. But that structure does not require federal judges to abdicate their duty to ensure that convictions and sentences are appropriate and just. The above examples show that *Martinez* hearings—and the evidence developed through those hearings—are valuable tools that federal judges may use to defer to state judges where appropriate while safeguarding federal constitutional rights. By allowing federal judges to decide for themselves where a petitioner's ineffective counsel failed to develop certain evidence or to bring certain claims, *Martinez* gives these

petitioners the full and fair opportunity to litigate these claims that they lacked in state court.

B. *Martinez* Protects State Judges' Role As The Primary Bulwark Against Error.

Under the balance struck by AEDPA, state judges do not ask for or receive blind deference from federal judges when it comes to state postconviction proceedings. Indeed, rather than encroaching on state judges' independence and authority, *Martinez* allows state judges greater certainty that their decisions were just, by helping ensure that those convicted in their courtrooms, and those denied state postconviction relief, had adequate access to counsel. These concerns are even weightier in states like Arizona, where there is no way to raise ineffectiveness of state postconviction counsel in state court, and where the postconviction review system is particularly dysfunctional.

1. State judges must rely on a criminal defendant's counsel to provide constitutionally adequate assistance; otherwise, the criminal proceedings that they oversee cannot be trusted to produce "just results." *Strickland*, 466 U.S. at 696. This is obviously true at trial, where errors of the kinds discussed above threaten to deprive defendants of their rights and to generate wrongful convictions. But it is also true at the "critical point" in "today's criminal justice system," "the negotiation of a plea bargain." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). Counsel's errors in *that* process can have just as devastating an effect on a defendant's rights. If state judges cannot rely on the validity of guilty pleas, then they cannot trust that they are doing justice in the vast majority of cases.

Martinez—and the ability to consider evidence developed in federal court at issue here—provides state judges with assurance that both kinds of convictions are correct. As cases like this one and *Stirling* show, state court judges can rest assured that defendants who were convicted in their courtrooms without the effective assistance of counsel will have at least one full, fair opportunity to vindicate their constitutional rights. So too for the far greater number of cases resolved by guilty plea. As cases like *Harris* show, state court judges can similarly be certain that those who gave up their right to a trial based upon unconstitutionally bad advice will have one clean shot to raise the issue in postconviction proceedings. By allowing federal judges to consider evidence developed in support of a *Martinez* claim, the Ninth Circuit's position below increases state judges' certainty that their criminal proceedings were fair.

2. *Martinez* also provides necessary assurance to state judges presiding over state postconviction proceedings. In some states, such as Iowa, a defendant may raise his ineffectiveness of state postconviction counsel in a successive proceeding before the state court. *Allison v. State*, 914 N.W.2d 866, 880 (Iowa 2018); *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996) ("Ineffective assistance of postconviction counsel can provide 'sufficient reason' under Iowa Code section 822.8 for a successive postconviction application raising new issues."). However, Arizona and other states provide *no* process for a defendant to raise an ineffectiveness of state postconviction counsel claim in a state postconviction proceeding.

Consequently, in states like Arizona, a state judge would be necessarily blind to, or would be forced to ignore, evidence of state postconviction counsel's ineffective assistance. And that limitation on state judges is especially harmful in states like Arizona, which has a widely recognized history of ineffective postconviction counsel. *See* American Bar Association, *Comments of the American Bar Association* (Feb. 26, 2018), https://tinyurl.com/3dtn27nc (criticizing Arizona's system for appointment of capital postconviction counsel and noting "grave[] risks" of capital defendants "lacking effective assistance of counsel, contrary to principles of fairness and due process and contrary to the fundamental tenets of *habeas corpus* proceedings"). In those instances, federal court is the only place where such claims can be heard. *Martinez* thus provides crucial assurance to state judges that the ineffectiveness of state postconviction counsel, and their unavoidable lack of agency concerning this ineffectiveness, has not hampered the defendant's full and fair opportunity, and has not caused the state judge to become an accessory to injustice.

3. In addition to improving judges' confidence in individual state criminal proceedings, *Martinez* has spurred the improvement of state criminal justice systems as a whole. This, too, allows state judges to have greater confidence that convictions and sentences result from meaningful adversarial testing.

In this vein, consider first increases in the number of states that provide appointed counsel in postconviction proceedings. *Martinez* rightly emphasized that "[t]o present a claim of ineffective assistance at trial," "a prisoner likely needs an effective attorney." 566 U.S. at 12. Since then, state courts and legislatures

have increasingly recognized the need for adequate postconviction counsel by establishing procedures ensuring that defendants—particularly in capital cases—are able to receive assistance. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443 (2017). For example, in 2017, Alabama began appointing postconviction counsel to defendants in capital cases, and significantly raised the cap on total compensation an appointed lawyer could receive. Ala. Code § 13A-5-53.1. Prior to 2017—and before *Martinez*—Alabama did not provide postconviction counsel for *any* petitioners facing capital punishment. *See* Kovarsky, *supra*, at 448. As another example, a New Jersey intermediate court (citing *Martinez*) held "that defendants have a State constitutional right to counsel when raising ineffective assistance of trial counsel for the first time, whether raised on direct appeal or by way of PCR." *State v. Quixal*, 70 A.3d 749, 756 (N.J. Super. Ct. App. Div. 2013).

In addition to guaranteeing access to postconviction counsel, several states have recently established baseline standards—or heightened existing standards—for that counsel in capital cases. For example, Idaho Administrative Code Rule 61.01.02, which took effect in 2019, mandates that postconviction counsel in capital cases have at least ten years of criminal defense experience, and have undergone capital defense training within two years preceding appointment. And Louisiana now requires lead postconviction counsel in capital cases to have at least five years of relevant experience. *See* La. Admin. Code tit. 22, Pt XV, § 915.

Some states have also established additional procedures to safeguard against ineffective postconviction

counsel. As mentioned above, Iowa now affords a defendant a second collateral proceeding if postconviction counsel was ineffective in the initial one. *See Allison*, 914 N.W.2d at 880, 890 (noting *Martinez*'s emphasis on the "importance of effective assistance of counsel in an initial-review collateral proceeding," and adding that, under Iowa law, "successive petitions for [posconviction review] may be filed if counsel is ineffective in the first petition"). *Allison* further recognized that effective assistance of postconviction counsel was crucial enough to warrant tolling of the statute of limitations for postconviction review. *Id.* at 891.

States have also created new avenues for postconviction relief. For example, several states, including Texas and California, have developed "changed science" writs that allow petitioners to challenge their convictions based on scientific evidence that was not available at the time of trial. *See, e.g.*, Tex. Code Crim. Proc. Ann. art. 11.073; Cal. Penal Code § 1473. In recent years, four more states—Connecticut, Wyoming, Michigan, and Nevada—have followed suit. Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483, 526 (2020). This significant expansion of state postconviction relief highlights the fact that, rather than shifting the focus to federal court review, *Martinez* has not detracted from state judges' role in the habeas realm. Indeed, *Martinez* has safeguarded state judges' crucial role by encouraging states to provide petitioners with a fair chance to present their claims in state postconviction review. It is only if that process breaks down that *Martinez* and its federal backstop come into play.

C. *Martinez* Has Not Flooded The Federal Courts.

It is clear, then, that Arizona's view of *Martinez* would deprive petitioners of the promise of a full and fair opportunity to present an ineffective assistance of counsel claim, forcing judges to participate in exactly the injustices that this Court sought to prevent in *Martinez*. Respondents have explained why Arizona is wrong to claim that AEDPA does not require that result. *See* Resp. Br. 28–43. But Arizona is also wrong in claiming that giving petitioners their one fair shot will swamp the federal courts with evidentiary hearings on ultimately meritless *Martinez* claims.

Martinez has been in force for nearly ten years. If allowing petitioners to air their substantial ineffective assistance of trial counsel claims were overburdening federal judges, we would know by now. But no such flood has arrived. The *Martinez* gateway is narrow, and accordingly, federal district courts regularly dismiss non-substantial *Martinez* claims.[2]

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[2] *See, e.g.*, *Williams v. Sec'y, Fla. Dep't of Corr.*, No. 18-CV-985-TJC-JRK, 2021 WL 3666326, at *8 (M.D. Fla. Aug. 18, 2021); *Dodd v. Lindamood*, No. 11-CV-1090, 2021 WL 3666907, at *29 (M.D. Tenn. Aug. 18, 2021); *Tabler v. Lumpkin*, No. W-10-CA-034-RP, 2021 WL 2383726, at *17 (W.D. Tex. June 10, 2021); *Foncette v. Muse*, No. CV-18-00691-PHX-DJH, 2021 WL 1163081, at *7 (D. Ariz. Mar. 26, 2021); *Jenkins v. Lumpkin*, No. SA-20-CA-0553-XR, 2021 WL 1069046, at *4 (W.D. Tex. Mar. 18, 2021); *Stiegler v. Neven*, No. 14-CV-01274-APG-DJA, 2021 WL 638031, at *8 (D. Nev. Feb. 18, 2021); *Wanamaker v. Smith*, No. 20-1332, 2021 WL 601543, at *11–14 (E.D. Pa. Feb. 16, 2021); *Bowman v. James*, No. 20-CV-00666-TMC-MHC, 2020 WL 7752650, at *13 (D.S.C. Dec. 8, 2020), *report and recommendation adopted*, 2020 WL 7711343 (D.S.C. Dec. 29, 2020); *McMillan v. Inch*, No.

Indeed, as Petitioners' own *amici* have shown, federal district courts are resolving *Martinez* issues and show no sign of being overwhelmed by such claims. Br. of Tex. et al. as *Amici Curiae* in Supp. of Pet'rs 20–27. To be sure, the *amici* States argue that *States* are "forced to litigate" claims that could not have been developed because of ineffective assistance of counsel. *Id.* at 20. But that litigation burden should not be overexaggerated. First, states faced with a *Martinez* claim in federal court may always assert that the claim is "insubstantial," and, if that is so, then the court can reject the claim without a hearing. *Martinez*, 566 U.S. at 15–16; *supra* at 28–29 n.2. Second, even if the petitioner's substantial allegations lead to an evidentiary hearing, states cannot reasonably complain about that outcome. By definition, states have not had to previously defend against *Martinez* claims on the merits; they could not have been pressed on direct review, and they were not pressed in state postconviction proceedings because of counsel's unacceptable errors. It is not too much of a burden on the state to respond to a defendant's first and only bite at the apple.

This point leads to the last one. To the extent that evidentiary development requires time and resources, the Court should strike the balance in favor of permitting petitioners to fully and fairly present their claims. *Martinez* promised defendants one clear opportunity to protect their essential right to trial counsel. Forcing judges to ignore key evidence of innocence or other

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17CV876-LC-HTC, 2020 WL 8084277, at *11 (N.D. Fla. Oct. 8, 2020), *report and recommendation adopted*, 2021 WL 54214 (N.D. Fla. Jan. 6, 2021); *Fields v. Blades*, No. 95-CV-00422-BLW, 2017 WL 1100897, at *3–4 (D. Idaho Mar. 21, 2017).

breakdowns in the criminal process while adjudicating those claims leaves state court judges to wonder whether an injustice occurred in their courtrooms and makes federal judges complicit in injustice. Nothing in AEDPA or this Court's precedents compels that result.

CONCLUSION

The Court should affirm the judgments below.

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