No. 17-4257

In the United States Court of Appeals for the Sixth Circuit

WILLIAM ANDREW WRIGHT,

Petitioner-Appellant,

v.

STEPHEN SPAULDING, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, D. CT. NO. 4:17-CV-2097 (HON. CHRISTOPHER A. BOYKO)

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

JUSTIN E. HERDMAN
United States Attorney
Northern District of Ohio

SEGEV PHILLIPS
Assistant United States Attorney
Northern District of Ohio

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MATTHEW S. MINER
Deputy Assistant Attorney General

JOSHUA K. HANDELL
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, Rm. 1515
Washington, DC 20530
(202) 305-4244
joshua.handell@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. The Article III Cases or Controversies Requirement Extends Judicial Power to Disputed Individual Claims to Legal Relief That Are Amenable to Litigation and Adjudication in Court. 2

II. The Supreme Court's Understanding of the Cases or Controversies Requirement Is Consistent with Sources in the Corpus. 4

III. The Distinction Between Holding and Dicta Relates to the Manner in Which Courts Decide Cases and Controversies 8

IV. *Hill* Describes Its Scope Narrowly but Endorses the Parties' Uncontested View of a Broader Issue. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Arkansas Game and Fish Comm'n v. *United States*,
568 U.S. 23 (2012) 8

Carpenter v. *United States*,
138 S. Ct. 2206 (2018) 5

Central Virginia Community College v. *Katz*,
546 U.S. 356 (2006) 8

Cohens v. *State of Virginia*,
19 U.S. 264 (1821) 8, 9

Dupont Dow Elastomers, L.LC. v. *NLRB*,
296 F.3d 495 (6th Cir. 2002) 10

Gamble v. *United States*,
139 S. Ct. 1960 (2019) 5

Hill v. *Gregory*,
1792 WL 235 (Va. High Ch. Oct. 27, 1792) 7

Hill v. *Masters*,
836 F.3d 591 (6th Cir. 2016) 2, 9, 10

Muskrat v. *United States*,
219 U.S. 346 (1911) 3, 4

People v. *Harris*,
885 N.W.2d 832 (Mich. 2016) 5

Seminole Tribe of Florida v. *Florida*,
517 U.S. 44 (1996) 9, 10

Spokeo, Inc. v. *Robins*,
136 S. Ct. 1540 (2016) 3

United States v. *Peterman*,
249 F.3d 458 (6th Cir. 2001) 9

United States v. *Windsor*,
570 U.S. 744 (2013) 10

Wilson v. *Safelite Group, Inc.*,
No. 18-3408, 2019 WL 3000995 (6th Cir. July 10, 2019) 5

Wisniewski v. *United States*,
353 U.S 901 (1957) 11

Constitutional Provisions

U.S. CONST. art. III, § 2 3

Other Authorities

2 *Farrand's Records* 7

Alexander Hamilton, *Letters of Pacificus* (1793) 7

Hugh Blair, *Select Sermons* (1795) 6

John Adams, *Letter to the President of Congress* (Aug. 14, 1780) 6

Corpus of Founding Era American English (COFEA), BYU LAW: LAW & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/ 4, 5

Sir John Hawles, *The Englishman's Right: A Dialogue between a Barrister and a Juryman* (1680) 6

Stephen Mouritsen, *Corpus Linguistics in Legal Interpretation: An Evolving Interpretive Framework*, INT'L J. LANG. & L. (2017) 5

The Trial of Daniel Isaac Eaton (1794) 6

No. 17-4257

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN SPAULDING, Warden,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, D. CT. NO. 4:17-CV-2097 (HON. CHRISTOPHER A. BOYKO)

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

STATEMENT OF THE ISSUES

The government submits this supplemental brief in response to the Court's order dated May 28, 2019, Doc. 44, which directed the parties to address the following issues:

1. What is the original meaning of the Article III Cases or Controversies requirement?

2. How does the corpus help inform that determination?

    a. See https://lcl.byu.edu/projects/cofea/.

3. How does that original meaning relate to the distinction between holding and dicta?

4. How does that ultimate determination relate to which test in *Hill* should govern?

SUMMARY OF ARGUMENT

As the Supreme Court has recognized, the Cases or Controversies requirement extends the judicial power of the United States to disputes within the jurisdictional categories identified in Article III so long as those disputes present controverted claims to legal relief that are amenable to, and litigated within, a judicial setting. The corpus confirms this reading of the Cases or Controversies requirement by demonstrating the Founding Era understanding that cases and controversies were cognizable only so far as they presented, for solemn deliberation in a court of law, disputed claims to vindicate rights or redress wrongs. That original understanding principally informs the jurisdictional contours of the judicial power, rather than the extent to which language in one decision binds a court in a later case. To draw the latter distinction—between holding and dicta—the Supreme Court has articulated certain general criteria, which can be applied to the question of which saving-clause test in *Hill* v. *Masters*, 836 F.3d 591 (6th Cir. 2016), should govern. Wright would not be entitled to relief under either test discussed in *Hill*, and this Court should affirm the district court's judgment dismissing Wright's Section 2241 petition.

ARGUMENT

I. The Article III Cases or Controversies Requirement Extends Judicial Power to Disputed Individual Claims to Legal Relief That Are Amenable to Litigation and Adjudication in Court.

Article III, Section 2 of the Constitution provides that "[t]he judicial Power [of the United States] shall extend to" nine categories of disputes:

> [1] all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—[2] to all Cases affecting Ambassadors, other public Ministers and Consuls;—[3] to all Cases of admiralty and maritime Jurisdiction;—[4] to Controversies to which the United States shall be a Party;—[5] to Controversies between two or more States;—[6] between a State and Citizens of another State;—[7] between Citizens of different States;—[8] between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2. Although Article III "does not fully explain what is meant by '[t]he judicial Power of the United States,'" it specifies that "this power extends only to 'Cases' and 'Controversies.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547 (2016) (citations omitted). Accordingly, the Supreme Court has observed that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Ibid.* (quotation marks and citation omitted).

In *Muskrat* v. *United States*, 219 U.S. 346 (1911), a seminal decision demarcating the bounds of constitutional standing, the Court delimited the scope of "cases" and "controversies" for purposes of Article III:

> By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.

Id. at 357 (internal quotation marks omitted). The *Muskrat* definition thus requires a case or controversy to present (1) a "claim" by a "litigant[]" or "litigants" (2) premised upon some legal entitlement to "protect[] or enforce[] * * * rights" or "prevent[], redress, or punish[] * * * wrongs" (3) that is controverted by an "adverse part[y]." *Muskrat* further clarifies that the term "cases and controversies" describes only those disputes (1) "brought before the courts for determination by such regular proceedings as are established by law or custom" (2) in "such a form that the judicial power is capable of acting upon" them (3) once the parties' "contentions" have been "submitted to the court for adjudication."

II. The Supreme Court's Understanding of the Cases or Controversies Requirement Is Consistent with Sources in the Corpus.

Relevant texts in the corpus are consistent with the discussion of cases and controversies set out by the Supreme Court in *Muskrat*.

A. The Corpus of Founding Era American English ("COFEA" or "the corpus"), a project of the J. Reuben Clark Law School at Brigham Young University, is an online database containing 126,393 texts consisting of 136,848,583 words, "cover[ing] the time period starting with the reign of King George III, and ending with the death of George Washington (1760-1799)." *Corpus of Founding Era American English (COFEA)*, BYU LAW: LAW & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/. The texts in the corpus are drawn primarily from six sources: the National Archives' Founders Online; HeinOnline; Evans Early American Imprints; Elliot's *Debates in the*

State Conventions on the Adoption of the Federal Constitution; Farrand's *Records of the Federal Constitutional Convention of 1787*; and the U.S. statutes from the first five Congresses. *Ibid.*

Corpus-linguistic analysis has grown increasingly popular as a tool for determining the original public meaning of constitutional and statutory terms. See, *e.g.*, Stephen Mouritsen, *Corpus Linguistics in Legal Interpretation: An Evolving Interpretive Framework*, INT'L J. LANG. & L., 67-89 (2017) ("A corpus-based approach to legal interpretation promises to increase the objectivity and predictability of decisions about the meanings of legal texts."). Although not all jurists have embraced its utility, see *Wilson* v. *Safelite Group, Inc.*, No. 18-3408, 2019 WL 3000995, at *13-*15 (6th Cir. July 10, 2019) (Stranch, J., concurring), corpus research has informed judicial analysis in recent state court decisions, *e.g.*, *People* v. *Harris*, 885 N.W.2d 832, 839 (Mich. 2016), and Supreme Court opinions, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2238 & n.4 (2018) (Thomas, J., dissenting). See also *Wilson*, 2019 WL 3000995, at *8-*9, *11-*12 (Thapar, J., concurring).

B. The words "case" or "cases" appear 125,095 times across 22,206 documents in COFEA; the words "controversy" or "controversies" appear 4,941 times across 1,612 documents. The large majority of these uses are not instructive as to the Founding Era understanding of "case" or "controversy" in a legal context. Cf. *Gamble* v. *United States*, 139 S. Ct. 1960, 1965 n.2 (2019) (noting "the unremarkable fact that at the founding, 'offence' could take on a different sense in nonlegal settings, much as 'offense' does today * * * [b]ut the question is what 'offence' meant in legal contexts.").

For example, the phrase "in case" appears 17,958 times across 5,640 documents, virtually always with the same meaning ("in the event that") that it carries today. See, *e.g.*, John Adams, *Letter to the President of Congress* (Aug. 14, 1780) ("[I]n Case any Accident has befallen him, I most earnestly recommend to Congress, the appointment of some other Gentleman") [fndrs.adams.06-10-02-0033].* Similarly, "controversy" most frequently takes on something approximating its modern meaning of a heated or prolonged disagreement outside a legal setting. See, *e.g.*, Hugh Blair, *Select Sermons* (1795) ("Refinements of vain philosophy, or intricate subtl[e]ties of theological controversy, are undoubtedly not [e]ntitled to such regard.") [evans.N21533].

In legal contexts, the corpus indicates that Founding Era Americans used the term "case" to describe both a live dispute to be adjudicated and a settled precedent to be cited for legal principles. See, *e.g.*, Sir John Hawles, *The Englishman's Right: A Dialogue between a Barrister and a Juryman* 42 (1680) [evans.N09756] ("Lastly, is anything more common, than for two lawyers, or judges, to deduce contrary, and opposite conclusions out of the same case in law?"); *The Trial of Daniel Isaac Eaton* 21 (1794) [evans.N20526] (discussing libel law) ("Now, Gentlemen, when the book is sold at his house, if he be not there he is as much guilty as if he were. This is a matter very well known to be law from the earliest time; it is one of the cases in law, where a master may be criminated by the act of his servant, even though he himself he not present.").

* The COFEA text ID follows, in brackets, each citation to a corpus document.

The corpus also indicates that, consistent with the Supreme Court's discussion in *Muskrat*, the Founders understood that the judicial power of the courts is limited to resolving live disputes between parties in judicial settings. See, *e.g.*, Alexander Hamilton, *Letters of Pacificus* 9 (1793) [evans.N23099] ("It is equally obvious, that the act in question is foreign to the judiciary department of the government. The province of that department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties, but it exercises this function only in the litigated cases, that is where contending parties bring before it a specific controversy."); *Hill* v. *Gregory*, 1792 WL 235, at *2 (Va. High Ch. Oct. 27, 1792) [caselaw.va.382036] ("[T]he court, discovering it to be of small importance in its operation in the present case, chose to pass it over on the ground of the masters report not having been excepted to, or the point argued in court; with this caution to avoid an inference of approbation, rather than by a decision either way to establish a precedent which in other cases might be important."); 2 *Farrand's Records* 430 [farrands.v2.section118.txt] ("Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department. The motion of Docr. Johnson was agreed to * * * it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.").

III. The Distinction Between Holding and Dicta Relates to the Manner in Which Courts Decide Cases and Controversies

Although the corpus evidence appears to be consistent with *Muskrat*'s discussion of the Cases or Controversies requirement, that requirement does not in itself prescribe a distinction between holding and dicta. The Cases or Controversies requirement of Article III, section 2 governs the authority of the federal courts to provide a definitive resolution to particular disputes between specific parties. The distinction between holding and dicta relates to the manner in which courts decide cases and controversies that fall within the Article III power—in particular, the extent to which a court is restrained by statements in previous judicial opinions.

The Supreme Court has articulated general principles to distinguish between statements in judicial opinions that are binding in future cases and those that are not. In one of the earliest Supreme Court decisions expounding on the distinction between holding and dicta, Chief Justice Marshall wrote that

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles * * * are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. *State of Virginia*, 19 U.S. 264, 399-400 (1821); see also *Arkansas Game and Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012) (citing *Cohens*); *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 363 (2006) (same). More recently, the Supreme Court has

stated, "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996).

IV. *Hill* Describes Its Scope Narrowly but Endorses the Parties' Uncontested View of a Broader Issue.

The holding-dicta distinction articulated by the Supreme Court can be applied to *Hill* v. *Masters*, 836 F.3d 591 (6th Cir. 2016). The only question squarely presented in *Hill*—*i.e.*, "the very point * * * presented for decision," *Cohens*, 19 U.S. at 399-400—was whether prisoners sentenced under the formerly mandatory Sentencing Guidelines who were foreclosed from filing successive motions under 28 U.S.C. 2255 could obtain relief under Section 2241 when a statutory-interpretation decision by the Supreme Court abrogated prior circuit law and revealed that a previous conviction was not in fact a predicate offense for a career-offender enhancement. *Hill*, 836 F.3d at 599-600. The Court's description of the scope of its decision emphasizes that point. *Ibid.* ("[W]e *reiterate* that our decision addresses only * * * prisoners who were sentenced under the mandatory guidelines regime." (emphasis added)). Particularly given the concern that *Hill* itself erred in dismissing certain statements in *United States* v. *Peterman*, 249 F.3d 458 (6th Cir. 2001), as dicta, see Gov't Br. 34-39, this Court could well conclude that *Hill* establishes binding precedent only in the mandatory-guidelines context and that *Peterman* continues to foreclose relief outside of that context. Cf. *Dupont Dow Elastomers,*

L.LC. v. *NLRB*, 296 F.3d 495, 506 (6th Cir. 2002) ("When a later decision of this court conflicts with the holding of a prior decision, it is the earlier case that controls.").

Before the *Hill* panel turned to the guidelines issue before it, however, the panel considered the availability of Section 2241 relief for sentencing errors more broadly, and in particular whether relief would be available if an intervening decision established that a prisoner was serving a sentence above the applicable statutory maximum. 836 F.3d at 594-597. Applying the multi-part test adopted by other circuits, the panel "agree[d] with the Government's position" at the time that "a habeas petition may be brought pursuant to § 2241 when a sentence exceeds the maximum prescribed by statute," because "[t]o deny relief" in that scenario "would present separation-of-powers concerns." *Ibid.* To the extent that the *Hill* panel's discussion of above-the-maximum sentences was "necessary to" its resolution of the guidelines issues, it could be viewed as part of the holding, *Seminole Tribe*, 517 U.S. at 67. See also *United States* v. *Windsor*, 570 U.S. 744, 759 (2013) (a conclusion in a prior decision is "not dictum" if "[it] was a necessary predicate to the Court's holding").

For the reasons stated in the government's primary brief (at 54), Wright is not entitled to Section 2241 relief under either reading of *Hill*. But given the confusion generated by *Hill*'s treatment of prior circuit precedent and the fact that *Hill* was decided without full adversarial presentation on the saving-clause issue because of the government's litigation position at that time, this Court may wish to consider convening

en banc "to reconcile [these] internal difficulties," *Wisniewski* v. *United States*, 353 U.S 901, 902 (1957), in a case where the governing test makes a difference in the outcome.

CONCLUSION

For the foregoing reasons and those addressed in the government's primary brief, this Court should affirm the judgment below.

Respectfully submitted,

JUSTIN E. HERDMAN
United States Attorney
Northern District of Ohio

SEGEV PHILLIPS
Assistant United States Attorney
Northern District of Ohio

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MATTHEW S. MINER
Deputy Assistant Attorney General

JOSHUA K. HANDELL
U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., NW, Rm. 1515
Washington, DC 20530
(202) 305-4244
joshua.handell@usdoj.gov

July 18, 2019

CERTIFICATE OF SERVICE

I certify that on July 18, 2019, I caused the foregoing brief to be served upon the Filing Users identified below through the Court's Case Management/Electronic Case Files ("cm/ecf") system:

Edmund Scott Sauer
Bradley Arant Boult & Cummings
1600 Division Street
Suite 700
Nashville, TN 37203

Angela Marie Schaefer
Bradley Arant Boult & Cummings
200 Clinton Avenue, W.
Suite 900
Huntsville, AL 35801

Scott Burnett Smith
Bradley Arant Boult & Cummings
200 Clinton Avenue, W.
Suite 900
Huntsville, AL 35801

Attorneys for Petitioner-Appellant William Wright

JOSHUA K. HANDELL
U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., NW, Rm. 1515
Washington, DC 20530
(202) 305-4244
joshua.handell@usdoj.gov

CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limitation imposed by this Court's order dated May 28, 2019, Doc. 44, because it does not exceed 25 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (a)(6) because it has been prepared in a proportionally spaced, 14-point font in text and footnotes using Microsoft Word 2013.

3. This brief complies with the privacy redaction requirement of Fed. R. App. P. 25(a) because it contains no personal data identifiers.

4. The digital version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk.

5. This brief has been scanned for viruses with the most recent version of McAfee Endpoint Security, version 10.50, which is continuously updated, and according to that program, is free of viruses.

JOSHUA K. HANDELL
U.S. Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., NW, Rm. 1515
Washington, DC 20530
(202) 305-4244
joshua.handell@usdoj.gov