No. 17-212

In the Supreme Court of the United States

CLARENCE NAGELVOORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's resignation from a hospital that was engaged in a criminal conspiracy conclusively established, as a matter of law, that petitioner withdrew from the conspiracy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 856 F.3d 1117. The order of the district court (Pet. App. 38a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2016. The petition for a writ of certiorari was filed on August 9, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 11 counts of knowingly and willfully causing a hospital to offer and pay kickbacks to physicians in return for patient referrals, in violation of 42 U.S.C. 1320a-7b(b)(2)(A); and one count of conspiracy to violate Section 1320a-7b(b)(2)(A), in violation of

18 U.S.C. 371. Pet. App. 2a. He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. 1a-25a.

1. a. This case arose out of an extensive federal investigation into fraudulent activities at Sacred Heart Hospital (Sacred Heart), an acute-care facility in Chicago, Illinois. Pet. App. 2a. From 2001 to 2013, Sacred Heart paid kickbacks to physicians in exchange for patient referrals to the hospital. *Ibid.* Those kickbacks took several forms, including: (1) personal-services agreements with physicians for work never performed; (2) teaching-services agreements unaccompanied by additional teaching duties; (3) agreements to lease a physician's facilities; and (4) arrangements to provide physicians with the services of other medical professionals. *Id.* at 3a-11a. Sacred Heart billed Medicare and Medicaid millions of dollars for treating patients who had been referred by physicians receiving those benefits. See Gov't C.A. Br. 4.

From August 2007 to April 2011, petitioner served as an outside consultant to Sacred Heart and, at various times during that period, its Vice President of Administration and Chief Operating Officer. Pet. App. 2a. In that role, he worked with Sacred Heart's President and Chief Executive Officer, Edward Novak, to arrange several different kickback relationships with referring physicians. *Id.* at 3a-11a. For example, petitioner told one physician to "just sign [a personal-services] contract," when the physician could not perform any of the services described in the contract and understood that he would be paid without doing so. *Id.* at 3a. Petitioner likewise drafted a teaching contract for another physician who understood that his pay under the contract

would be linked to referrals rather than any teaching duties. *Id.* at 6a-7a. And petitioner established a system of compensating physician assistants and nurse practitioners who assisted certain referring physicians, even when those medical professionals performed work outside of the hospital. *Id.* at 8a-10a.

b. On the morning of April 28, 2011, petitioner called Novak and asked to be fired from Sacred Heart, purportedly because he was "miserable" in his job. Pet. App. 34a. In a letter dated the same day, Novak complied with petitioner's request and "terminate[d] [the] relationship." *Ibid.* The letter enclosed a check from Novak to petitioner's consulting firm, characterizing it "as a goodwill gesture on [Novak's] part." *Ibid.* Petitioner subsequently deposited a $30,000 check, which cleared Sacred Heart's bank account. See 3/10/15 Trial Tr. 6505; 3/16/15 Trial Tr. 7315. The day after sending his letter to petitioner, Novak sent a memorandum on hospital letterhead to "All Department Managers," advising that petitioner "is no longer associated with Sacred Heart Hospital." Pet. App. 37a.

2. a. In March 2014, a federal grand jury returned a superseding indictment charging petitioner (along with Novak and several other Sacred Heart administrators) with multiple counts of knowingly and willfully causing Sacred Heart to offer and pay kickbacks in exchange for patient referrals, in violation of the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b(b)(2)(A), and one count of conspiracy to do the same, in violation of 18 U.S.C. 371. Superseding Indictment 1-83.

b. During their investigation, law enforcement agents had secured the cooperation of certain Sacred Heart employees, who from 2012 to 2013 had recorded various conversations with hospital administrators

about the kickback scheme. Gov't C.A. Br. 2-3. The government planned to introduce some of those recordings at a joint trial of petitioner, Novak, and another co-conspirator. *Id.* at 3. Before trial, however, petitioner sought a limiting instruction that any statements of co-conspirators recorded after April 28, 2011, were inadmissible against him. Pet. App. 26a-31a. Petitioner contended that out-of-court statements made in furtherance of a conspiracy are admissible only against a co-conspirator. *Id.* at 30a; see Fed. R. Evid. 801(d)(2)(E). He further contended that his resignation from the hospital in 2011 amounted to a withdrawal from the conspiracy, thus rendering any subsequent hearsay statements inadmissible against him. Pet. App. 30a.

The district court denied petitioner's motion. Pet. App. 38a-41a. The court held that it could not determine "as a matter of law, before trial," whether petitioner's resignation constituted withdrawal from the conspiracy. *Id.* at 39a.

c. At trial, petitioner renewed his request for a limiting instruction that the jury should not consider his co-conspirators' post-April 2011 statements against him. Pet. App. 55a-56a. The district court again deferred the issue. *Id.* at 55a-57a. It explained that "the real question here is whether there is more to it than just leaving your job." *Id.* at 57a. Because the court perceived factual "complexities" to the withdrawal question in this case, it suggested that the question "is really something for the jury to decide." *Ibid.* At a minimum, the court noted that the motion was "premature," as it needed to hear the trial evidence before it could rule on the issue. *Ibid.*

The parties thereafter stipulated to certain facts related to petitioner's departure from the hospital. See Pet. App. 61a. The stipulation provided:

> [Petitioner's] consulting employment agreement with Sacred Heart Hospital was terminated on April 28, 2011. [Petitioner] did not perform any work for Sacred Heart Hospital after that date, and [petitioner] did not receive any payments or benefits of any kind from Sacred Heart Hospital's operations or payroll accounts after that date.

Ibid.

At the charging conference, petitioner repeated his request for a limiting instruction. Pet. App. 65a-69a. The district court again denied the motion. *Id.* at 69a-70a. Instead, it instructed the jury that that if it found that petitioner had shown "that it's more likely than not that he withdrew from the alleged conspiracy as of April 28th, 2011, then you may not consider as evidence against him any statements made by any alleged co-conspirators after that date." 3/12/15 Trial Tr. 6910.

d. After a seven-week trial—at which the jury heard from 55 witnesses, saw thousands of pages of documents, and listened to a number of tape-recorded conversations—the jury found petitioner guilty of conspiracy and of 11 of the 12 substantive kickback counts. Pet. App. 11a; Judgment 1-2; 3/12/15 Trial Tr. 7354; Gov't C.A. Br. 40-41.[*]

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[*] The jury found Novak guilty of conspiracy and of 26 of the 27 substantive kickback counts with which he was charged. Pet. App. 11a; Judgment 1-2; 3/17/15 Trial Tr. 7353. The government also dismissed one substantive count against petitioner and Novak at the close of its evidence. 3/12/15 Trial Tr. 6888-6889.

Petitioner filed a post-trial motion for judgment of acquittal or, alternatively, for a new trial. Pet. App. 71a-131a. Among other things, he argued that he was entitled to a jury instruction that, as a matter of law, any statements of co-conspirators made after April 2011 could not be considered as evidence against him. *Id.* at 102a-109a. The district court denied the motion. *Id.* at 137a-138a. It explained that petitioner bore the burden of proving withdrawal and that "[t]he issue is legitimately disputed in this case, * * * thus precluding me from taking the issue away from the jury." *Id.* at 136a (citing *Smith* v. *United States*, 568 U.S. 106 (2013), and *Hyde* v. *United States*, 225 U.S. 347 (1912)). The court sentenced petitioner to 21 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-25a. It rejected a sufficiency-of-the-evidence challenge brought by both Novak and petitioner, *id.* at 12a-19a, as well as a challenge to the constitutionality of the Medicare anti-kickback statute, *id.* at 23a-25a.

As relevant here, the court of appeals also determined that the district court "did not abuse its discretion" in admitting the out-of-court statements of petitioner's co-conspirators recorded after April 2011 and allowing the jury to consider them if it found that petitioner had not withdrawn from the conspiracy at the time they were made. Pet. App. 22a; see *id.* at 19a-23a. The court accepted the premise that, if petitioner had withdrawn from the conspiracy, subsequent statements of co-conspirators would not have been admissible under Federal Rule of Evidence 801(d)(2)(E). Pet. App. 20a. It emphasized, however, that petitioner bore the

"burden to prove that he withdrew from the conspiracy." *Ibid.* The court explained that "[c]easing one's active participation in the conspiracy, by itself, is not sufficient to prove withdrawal." *Ibid.* Rather, it continued, "[w]ithdrawal requires an 'affirmative action . . . to disavow or defeat the purpose of the conspiracy.'" *Ibid.* (quoting *Smith*, 568 U.S. at 113) (internal quotation marks omitted).

Applying those principles, the court of appeals rejected petitioner's assertion that he "effectively withdrew" from the conspiracy as a matter of law when he was terminated from Sacred Heart and when Novak communicated that fact to others at the hospital. Pet. App. 20a. The court noted that petitioner did not contend "that he took any other affirmative actions toward withdrawal" or "additional action aimed at defeating or disavowing the objectives of the conspiracy." *Id.* at 21a. The court also dismissed petitioner's citation to several out-of-circuit decisions, reasoning that in the Seventh Circuit "simply ending one's involvement in the conspiracy, even voluntarily, is not enough to constitute withdrawal." *Ibid.* (citing *Morton's Mkt., Inc.* v. *Gustafson's Dairy, Inc.*, 198 F.3d 823, 838-839 (11th Cir. 1999), cert. denied, 529 U.S. 1130 (2000); *United States* v. *Nerlinger*, 862 F.2d 967, 974-975 (2d Cir. 1988); *United States* v. *Steele*, 685 F.2d 793, 803-804 (3d Cir.), cert. denied, 459 U.S. 908 (1982)). The court "agree[d] with the district court's finding that [petitioner] had not carried his burden of proving that he had withdrawn from the conspiracy as a matter of law." *Id.* at 22a. It also rejected petitioner's contention that, "despite the [district] court's findings, he was prejudiced by the court's decision to allow the jury to consider the issue of withdrawal," observing that, "[i]f anything, it appears that

he only could have benefitted from the instruction." *Id.* at 22a-23a.

ARGUMENT

Petitioner renews his contention (Pet. 12-21) that a defendant who "severs his relationship with an organization engaged in a conspiracy" necessarily withdraws from the conspiracy as a matter of law. That contention lacks merit. The court of appeals correctly determined that petitioner did not establish withdrawal as a matter of law on the facts of this case, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The essence of a criminal conspiracy is "the combination of minds in an unlawful purpose." *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879). To convict a defendant of conspiracy, the government "must prove beyond a reasonable doubt that two or more people agreed to commit a crime covered by the specific conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy)." *Smith* v. *United States*, 568 U.S. 106, 110 (2013).

A defendant who alleges that he "withdrew" from a criminal conspiracy does not seek to negate an element of the crime; to the contrary, as the Court explained in *Smith*, "withdrawal presupposes that the defendant committed the offense." 568 U.S. at 111. But withdrawal can serve to either eliminate or reduce a defendant's exposure to criminal liability. For example, withdrawal from a conspiracy provides "a complete defense" to conspiracy charges when the withdrawal occurred "beyond the applicable statute-of-limitations period." *Ibid.*; see also, *e.g.*, *United States* v. *Hughes*, 191 F.3d 1317, 1323 (10th Cir. 1999), cert. denied, 529 U.S. 1022

(2000); *United States* v. *Grimmett*, 150 F.3d 958, 961 (8th Cir. 1998). Withdrawal can also reduce a defendant's liability under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), for substantive crimes committed by his co-conspirators in furtherance of the criminal conspiracy. See *Smith*, 568 U.S. at 111 ("Withdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators.").

The concept of withdrawal from a conspiracy can also affect evidentiary determinations at trial. Under Federal Rule of Evidence 801(d)(2)(E), an out-of-court statement made by a defendant's co-conspirator during the course of and in furtherance of a conspiracy is not hearsay. A "conspiracy" may exist for purposes of that rule (which applies in both civil and criminal cases) "even though no conspiracy has been charged." Fed. R. Evid. 801 advisory committee's note (1974). Courts of appeals have held that once a defendant withdraws from a conspiracy, however, subsequent statements by his former co-conspirators fall outside the hearsay exemption. See, *e.g.*, *United States* v. *Nerlinger*, 862 F.2d 967, 974 (2d Cir. 1988); *United States* v. *Abou-Saada*, 785 F.2d 1, 8 (1st Cir.) ("We * * * agree that the [evidence] would ordinarily not be admissible against El-Debeib as a conspirator, for he had previously withdrawn from the conspiracy."), cert. denied, 477 U.S. 908 (1986); *United States* v. *Mardian*, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976) ("Had Mardian withdrawn, the declarations of co-conspirators uttered after the date of his withdrawal would not be admissible against him."); cf. *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953) ("[D]eclarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended.").

b. Even for purposes of substantive criminal law, withdrawal from a conspiracy requires more than simply the cessation of "conscious participation." *Hyde* v. *United States*, 225 U.S. 347, 368 (1912) (emphasis omitted). This Court has recognized that if the conspiracy continues, "the relation of the conspirators to it must continue" as well. *Id.* at 369. Thus, if a conspirator wishes to withdraw, he must take an "affirmative action * * * to disavow or defeat the purpose" of the conspiracy. *Ibid.* The form of a conspirator's withdrawal may vary based on the evidence introduced in the case. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978) (*Gypsum Co.*). But whatever form it takes, the conspirator must introduce evidence that he engaged in "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *Ibid.*

The Court has recently confirmed that the burden of proving withdrawal "rest[s] firmly on the defendant." *Smith*, 568 U.S. at 110. Its decision in *Smith* also reiterates that "[p]assive nonparticipation in the continuing scheme is not enough to sever the meeting of minds that constitutes the conspiracy." *Id.* at 112-113. Rather, "a defendant's membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely *inactive* after joining it." *Id.* at 114. Unless the defendant shows that he has taken an affirmative act to disavow or defeat the conspiracy's purposes, he remains liable for "the havoc wreaked by the unlawful scheme, whether or not he remained actively involved." *Ibid.*

c. Applying *Hyde* and *Smith* to the circumstances of this case, the court of appeals correctly concluded that petitioner did not meet his burden to prove that he withdrew from the conspiracy as a matter of law. Pet. App.

20a-22a. Petitioner contends (Pet. 25) that his mere act of resigning from the hospital, combined with his non-receipt of payments or benefits from the hospital thereafter, effected a withdrawal as a matter of law. He thus contends (Pet. 24) that the court mistakenly required "additional action" beyond the "affirmative action" required by *Hyde*. But voluntary resignation from an organization engaged in a criminal conspiracy does not, by itself, satisfy *Hyde*'s affirmative-action requirement. Although resignation may show that the particular defendant is no longer interested in being an active participant in the conspiracy, it does not necessarily "defeat the purpose" of the conspiracy or "disavow" its criminal objectives. 225 U.S. at 369. At least under the facts of this case, the court correctly concluded that "[t]he termination of [petitioner's] employment alone does not constitute withdrawal" as a matter of law. Pet. App. 21a.

First, petitioner took no affirmative action to *defeat* the conspiracy. He did not report the conspiracy to law enforcement, cancel any of the illegal contracts that he had arranged, dissuade any of his co-conspirators from continuing to participate in the conspiracy, or take any other action to undermine the conspiracy. He simply resigned from Sacred Heart. Petitioner asserts (Pet. 3) that, in so doing, he "deprive[d] the conspiracy of his *own* services." But that would be true any time that a conspirator stops performing overt acts—and *Hyde* made clear that refraining from active participation does not amount to withdrawal from the conspiracy. See 225 U.S. at 368-369; see also *Smith*, 568 U.S. at 112-113 ("Passive nonparticipation in the continuing scheme is not enough to sever the meeting of minds that constitutes the conspiracy."). That rule recognizes, *inter alia*,

that a conspiracy may continue to benefit from a conspirator's previous acts even after his direct involvement has ended.

Contrary to petitioner's assertion (Pet. 27-28), his resignation is unlike the defendants' evidence of withdrawal in *Gypsum Co.* In that case, the defendants had been accused of an antitrust conspiracy involving price-fixing. 438 U.S. at 427. The defendants challenged a jury instruction that limited them "to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." *Id.* at 464. Instead, they wished to pursue a theory that their "resumption of competitive behavior, such as intensified price cutting or price wars" was an "affirmative action showing a withdrawal from the price-fixing enterprise." *Ibid.* (brackets and internal quotation marks omitted). The Court permitted them to do so, holding that a new instruction "giving the jury broader compass on the question of withdrawal must be given." *Id.* at 465.

Petitioner seeks a far different rule. As an initial matter, the defendants in *Gypsum Co.* wished only to offer their evidence to a jury, which petitioner was entitled to do here. See Pet. App. 22a-23a. In addition, a business that "resigns" from a price-fixing conspiracy by engaging in "vigorous price competition," *Gypsum Co.*, 438 U.S. at 430, affirmatively undermines the illegal scheme. Here, by contrast, petitioner's resignation did not similarly counteract the kickback scheme in which he participated. When petitioner resigned, he left his co-conspirators to continue the conspiracy unabated, including to continue those aspects of the scheme that he had personally set in motion. For example, after petitioner's departure in April 2011, Sacred Heart continued to pay physicians kickbacks for referrals under

the various contracts that petitioner had arranged. See, *e.g.*, Pet. App. 4a (physician continued collecting payment under contract arranged by petitioner through January 2012); *id.* at 7a (physician continued collecting payment under contract arranged by petitioner through April 2013); *id.* at 10a (medical professionals continued performing services outside the hospital, as arranged by petitioner, through early 2013).

Second, petitioner took no affirmative action to *disavow* the conspiracy. Like an act to defeat a conspiracy, an act to disavow it would represent an effort to prospectively eliminate at least some of the harm of a conspirator's participation. The agreement underlying a conspiracy is itself "a distinct evil" that "makes more likely the commission of other crimes" and "decreases the probability that the individuals involved will depart from their path of criminality." *United States* v. *Jimenez Recio*, 537 U.S. 270, 274-275 (2003) (brackets, citations, and quotation marks omitted). Here, however, petitioner introduced no evidence that he had tried to forestall the continuing effect of his support by renouncing the overall objectives of the conspiracy or conveying to his co-conspirators that he disagreed with, or disapproved of, their continued criminal activities. Pet. App. 22a. Instead, he merely "expressed his desire to end his employment at the Hospital." *Ibid.* Indeed, in a letter memorializing petitioner's resignation, Novak emphasized that petitioner had "done a very good job," that he would "always consider [petitioner] a friend," and that his "door is always open." *Id.* at 34a. Novak's notice to the hospital's department heads about petitioner's departure likewise failed to indicate that petitioner had expressed any discomfort with the conspiracy. See *id.* at 37a.

Petitioner not only declined to disavow the conspiracy, but also implicitly reaffirmed it. The trial evidence showed that, upon his resignation, petitioner had received and cashed a $30,000 check from Novak. 3/10/15 Trial Tr. 6505; 3/16/15 Trial Tr. 7315. Although Novak characterized the check as a "goodwill gesture," Pet. App. 34a, the jury could have reasonably inferred that the check was intended and received as "hush money." The circumstances surrounding the check suggest that, while petitioner may have ceased active participation in the conspiracy, he had no intention of renouncing or thwarting it. To the contrary, his acceptance of the $30,000 check communicated a long-term willingness to conceal the conspiracy's continuing operations—an action that cannot be deemed "inconsistent with the object of the conspiracy." *Gypsum Co.*, 438 U.S. at 464.

In the particular circumstances of this case, therefore, petitioner's resignation from Sacred Heart did not represent "affirmative action * * * to disavow or defeat the purpose" of the conspiracy. *Hyde*, 225 U.S. at 369. At a minimum, any action was insufficiently clear to withhold the matter—on which petitioner bore the burden of proof—from the jury's consideration. See Pet. App. 136a (reasoning that "the issue [of withdrawal] is legitimately disputed in this case"); see also *Gypsum Co.*, 438 U.S. at 464 (rejecting the proposition that "confining blinders be placed on the jury's freedom to consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy").

2. Petitioner contends (Pet. 13-21) that the decision below conflicts with decisions of the Second, Third, and Eleventh Circuits. Only one of the decisions on which petitioner relies similarly involved the application of Federal Rule of Evidence 801(d)(2)(E). See *Nerlinger*,

862 F.2d at 974. And even assuming that a court's analysis under the Federal Rules of Evidence would apply equally to substantive conspiracy disputes, no square conflict exists. In the Second and Eleventh Circuit decisions that petitioner cites, the defendants took an affirmative step beyond merely terminating their employment at an organization engaged in a conspiracy. And the Third Circuit decision is inconsistent with *Smith* and has not been reaffirmed since *Smith* was decided. In any event, no circuit would dispute that, given the government's evidence about the $30,000 check from Novak to petitioner, petitioner's withdrawal at a minimum presents a jury question.

a. Contrary to petitioner's contentions (Pet. 16-21), the Second and Eleventh Circuits have not held that a conspirator's resignation from an organization engaged in a conspiracy suffices, by itself, to establish withdrawal from the conspiracy. In *Nerlinger*, the Second Circuit acknowledged that "mere cessation of conspiratorial activity is not enough." 862 F.2d at 974. It concluded that the defendant had nevertheless withdrawn from a conspiracy involving fraudulent trades because he had both resigned from the relevant bank and closed the phony account that he maintained to effectuate the illicit trades. *Id.* at 974-975. The court did not state that the former action alone was sufficient. Rather, it emphasized that the defendant's "*closing of the account* does satisfy this standard [for an affirmative action] because it disabled him from further participation and made that disability known to [his co-conspirator]." *Id.* at 974 (emphasis added). The court determined that "the *closing of the account* in the face of [the co-conspirator's] invitation to continue it is an explicit

withdrawal from the conspiracy." *Id.* at 975 (emphasis added).

Indeed, in a later case involving a conspirator's resignation from a company engaged in a conspiracy, the Second Circuit—like the court of appeals here—submitted the withdrawal question to a jury. See *United States* v. *Berger*, 224 F.3d 107 (2000). The court in that case concluded that the defendant's resignation was inadequate to establish withdrawal as a matter of law. *Id.* at 118-119. It observed that the jury might have reasonably rejected the defendant's withdrawal because his resignation letter repeated the lies of the conspiracy; because he "failed to take any steps" to report the conspiracy; and because he later lied to police when asked about the conspiracy. *Id.* at 119. In the course of its analysis, the Second Circuit distinguished its earlier decision in *Nerlinger* as having involved "resignation *plus* actions that disabled defendant from further participation in the conspiracy." *Id.* at 118 (emphasis added) (brackets and internal quotation marks omitted). No such additional actions are at issue here.

The Eleventh Circuit has likewise applied a narrower, more fact-specific analysis than petitioner suggests. Like the Second Circuit and the Seventh Circuit, the Eleventh Circuit has recognized that "mere cessation of activity is not sufficient to establish withdrawal." *Morton's Market, Inc.* v. *Gustafson's Dairy, Inc.*, 198 F.3d 823, 838 (1999), cert. denied, 529 U.S. 1130 (2000). But in *Morton's Market*, the court concluded that the owner of one of several dairies that were engaged in a price-fixing conspiracy had withdrawn from the conspiracy when it sold the dairy in a publicized sale. *Id.* at 838-839. That sale constituted an affirmative step because it "deprived the remaining conspirator group of

the services which [the defendant] provided to the conspiracy." *Id.* at 839. In the context of a price-fixing conspiracy—as in *Gypsum Co.*—the sale of the defendant's dairy meant that "the purposes of the conspiracy were defeated at least as to" that dairy. *Ibid.*

The Eleventh Circuit later clarified that not "all resignations constitute effective withdrawal no matter the circumstances." *United States* v. *Bergman*, 852 F.3d 1046, 1064 (2017), cert. denied, No. 17-5695 (Oct. 2, 2017). In *Bergman*, the court distinguished the sale of a business in *Morton's Market* from an "employee resignation from a company" engaged in a conspiracy. *Ibid.* Confronted with that latter fact pattern, the court concluded that the question whether a defendant had taken "an affirmative step to disavow or defeat the conspiracy" when he ceased working for a business was properly left to the jury to decide. *Id.* at 1064. It noted that the jury could consider whether the defendant had resigned because he was "upset about" the fraud conspiracy, or whether he had been terminated for performance reasons. *Ibid.* The defendant had testified that he had indicated (by innuendo) that he was resigning because of the fraud, see *id.* at 1058, and the court reasoned that a jury crediting that testimony could find withdrawal, see *id.* at 1064. *Bergman* does not adopt the rule that petitioner advocates here—that a simple resignation with no indication of disavowal constitutes withdrawal as a matter of law.

b. Petitioner's assertion that the decision below conflicts with the approach of the Third Circuit mistakenly rests on decades-old decisions of that court reflecting a burden-shifting framework inconsistent with this Court's decision in *Smith*. In the case on which petitioner primarily relies (Pet. 13-14), *United States* v.

Steele, 685 F.2d 793 (3d Cir.), cert. denied, 459 U.S. 908 (1982), the court recited the general principle that "[m]ere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." *Id.* at 803. But the court went on to articulate a burden-shifting approach to the question of withdrawal: "When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, * * * the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." *Id.* at 804. The court believed that the defendant in *Steele* had made a prima facie showing of withdrawal by presenting evidence that he had "resigned and permanently severed his employment relationship" from the company engaged in the conspiracy. *Ibid.* It noted, however, that "[h]ad the government impeached or rebutted" the defendant's evidence, "the question properly would have gone to the jury." *Ibid.*; see *United States* v. *Antar*, 53 F.3d 568, 583 (3d Cir. 1995) (assessing withdrawal "through the lens of a two-stage burden of proof"), overruled on other grounds by *Smith* v. *Berg*, 247 F.3d 532 (3d Cir. 2001).

Smith casts doubt on the basic burden-shifting scheme at the center of the Third Circuit's approach in *Steele* and *Antar*. In *Smith*, this Court made clear that the defendant bears the burden of proving withdrawal from a conspiracy. 568 U.S. at 110. The Court described its decision as resolving a circuit split "on which party bears the burden of proving or disproving a defense of withdrawal." *Id.* at 109 (citing *United States* v. *Moore*, 651 F.3d 30, 89-90 (D.C. Cir. 2011) (per curiam),

cert. denied, 567 U.S. 918 (2012)). That conflict included the Third Circuit, which had employed a burden-shifting theory in decisions such as *Steele* and *Antar*. See *Moore*, 651 F.3d at 90. The Third Circuit has not reaffirmed either decision since *Smith* was decided. Thus, because the withdrawal question in those cases was intertwined with the Third Circuit's now-abrogated burden-shifting theory, *Steele* and *Antar* do not support petitioner's contention that the Third Circuit would necessarily have approached this case differently from the decision below.

c. Even assuming that some circuits have employed lower standards for withdrawal than the court of appeals below, petitioner identifies no court that would find withdrawal as a matter of law on the facts presented here. Petitioner is correct that the government stipulated that petitioner did not work for or receive payments from Sacred Heart after April 28, 2011. Pet. App. 61a. But the government also presented evidence that petitioner had received upon his departure a $30,000 check not directly tied to any specific service he had previously performed. 3/10/15 Trial Tr. 6505; 3/16/15 Trial Tr. 7315; see Pet. App. 34a. The jury might have inferred that the check was "hush money" designed to buy petitioner's continued silence. The fact that petitioner deposited the check and subsequently maintained his silence suggests that his resignation was not, in fact, an unequivocal act to disavow or defeat the conspiracy. Rather, a jury could find that petitioner was compensated upon his departure for his future silence—and thus for his ongoing complicity.

In the Second or Eleventh Circuits, that fact would suffice to send the question of withdrawal to a jury, as the district court did in this case. See *Bergman*, 852

F.3d at 1064 (permitting jury to consider "all the evidence about [the defendant's] cessation of work," including competing narratives about why he left); *Berger*, 224 F.3d at 119 (permitting jury to consider evidence that defendant "did not fully abandon the conspiracy," including his perpetuation of the fraud in his resignation letter). And even assuming the continued validity of the Third Circuit's approach, petitioner's acceptance of the money "at least arguably" rebuts any prima facie case of withdrawal. *Antar*, 53 F.3d at 583. Petitioner identifies no court of appeals that would resolve the question in his favor as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2017