No. 17-212

IN THE
Supreme Court of the United States

CLARENCE NAGELVOORT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In *Hyde v. United States*, 225 U.S. 347 (1912), this Court held that a conspirator seeking to establish withdrawal from a conspiracy must show "affirmative action. . . . to disavow or defeat the purpose" of the conspiracy. *Id.* at 369. This case presents a strong vehicle to resolve a circuit split over the proper interpretation of *Hyde*'s "affirmative action" requirement. In the Second, Third, and Eleventh Circuits, unequivocally severing ties with an organization engaged in a conspiracy constitutes "affirmative action" sufficient to show withdrawal. Those circuits reason that a conspirator who affirmatively severs ties with a conspiracy deprives the conspiracy of his *own* services, and hence "disavow[s] or defeat[s] the purpose" of the conspiracy under *Hyde*. *Id.* In the decision below, however, the Seventh Circuit rejected those out-of-circuit authorities and held that a defendant's unequivocal severance of ties is *not* enough to establish "affirmative action." Pet. App. 21a.

The government does not grapple with Petitioner's showing that Seventh Circuit applies a different legal standard from the Second, Third, and Eleventh Circuits. Instead, it makes a tortured and unsuccessful effort to reconcile the conflicting cases on their facts. It also throws up a supposed vehicle problem—that Petitioner received a severance payment upon his departure from Sacred Heart—a fact which was never mentioned by the Seventh Circuit and is entirely irrelevant to the legal rule it applied. Because this case is an ideal vehicle to resolve an acknowledged circuit conflict, the petition for certiorari should be granted.

I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED.

It is undisputed that Petitioner affirmatively severed his ties with Sacred Heart, and that he neither "work[ed] for," nor "receive[d] any payments or benefits of any kind from Sacred Heart" after his departure. Pet. App. 61a. The Seventh Circuit nonetheless held that these facts were insufficient to establish withdrawal. As the Seventh Circuit correctly recognized, this holding conflicts with decisions of the Second, Third, and Eleventh Circuits. Pet. App. 21a. Unlike the Seventh Circuit, those circuits hold that resignation from an organization engaged in a conspiracy, where no evidence exists of a post-resignation relationship or benefit, suffices to establish withdrawal. The government's efforts to deny the circuit split lack merit.

Third Circuit. In *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982), the Third Circuit held that evidence that a conspirator "resigned and permanently severed his employment relationship" sufficed to establish withdrawal as a matter of law. Pet. 13-14 (quoting *Steele*, 685 F.2d at 804). The government does not attempt to reconcile the decision below with *Steele*. Instead, it contends that *Steele* was abrogated by *Smith v. United States*, 568 U.S. 106 (2013), which held that the defendant bears the burden of proving withdrawal from the conspiracy.

The government is incorrect. *Smith* addressed the *procedural* question of who bears the burden of proving withdrawal; it had nothing to say about the *substantive* question of what types of acts constitute "affirmative action" under *Hyde*. On that substantive question,

Steele relied on the Third Circuit's prior decision in *United States v. Lowell*, 649 F.2d 950 (3d Cir. 1981), which held that "where fraud constitutes the 'standard operating procedure' of a business enterprise, 'affirmative action' sufficient to show withdrawal as a matter of law from the conspiracy embodied in the business association may be demonstrated by the retirement of a co-conspirator from the business, severance of all ties to the business, and consequent deprivation to the remaining conspirator group of the services that constituted the retiree's contribution to the fraud." *Id.* at 955. More recently, in *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995), *overruled on other grounds by Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001), the Third Circuit reaffirmed that "total severing of ties with the enterprise," such that the defendant neither "continues to do acts in furtherance of the conspiracy" nor "continues to receive benefits from the conspiracy's operations" thereafter, is sufficient to show withdrawal. *Id.* at 583. *Smith* said nothing about whether these holdings correctly interpreted *Hyde*'s "affirmative action" requirement. It simply held that the burden of proof lies on the defendant—a burden which is plainly met in this case by virtue of the stipulated facts as to Petitioner's withdrawal.

The government points out that in *Steele* and *Antar*, after imposing the burden on the defendant to establish the requisite "affirmative action," the Third Circuit then shifted the burden to the government to prove that the defendant maintained a relationship with the conspiracy. BIO 18-19. In the government's view, that is inconsistent with *Smith*'s allocation of the burden of

proof to the defendant. *Id.* The government may well be right that, post-*Smith*, the Third Circuit would place the burden of proof on the defendant rather than apply a burden-shifting approach, but that has nothing to do with the substantive question of whether the deprivation of a conspiracy of one's own services constitutes "affirmative action." Nothing in *Smith* speaks to the substantive question of what the phrase "affirmative action" means.

The government also observes that in the decision below, the court decided the withdrawal issue for purposes of applying the hearsay rule, whereas in *Steele* (as well as the Eleventh Circuit's decision in *Morton's Market*), the withdrawal issue arose for purposes of applying the statute of limitations (as in *Smith*). BIO 14-15. The government makes no argument, however, that the *definition* of withdrawal will vary based on the *reason* the court is deciding whether withdrawal occurred, nor has any court ever so held. To the contrary, the fact that the withdrawal issue arises in multiple contexts confirms that the question presented is sufficiently important for this Court's review. Pet. 21-22.

Second Circuit. The decision below is irreconcilable with *United States v. Nerlinger*, 862 F.2d 967 (2d Cir. 1988). In that case, the defendant severed his ties with a company that was engaged in a conspiracy. The Second Circuit held that this was sufficient to establish withdrawal for purposes of Fed. R. Evid. 801(d)(2)(E), in direct conflict with the decision below. Pet. 16-17.

The government attempts to distinguish *Nerlinger* from this case on the ground that there, the defendant

"clos[ed]" his "account" with his employer, which "disabled him from further participation" in the conspiracy. BIO 15-16 (quoting *Nerlinger*, 862 F.2d at 974). That is no distinction at all. The *Nerlinger* defendant's "closing of the account," BIO 15, reflected a proactive step that severed his relationship with his employer, and disabled him from continued participation in the conspiracy. Likewise here, Petitioner's request to be terminated from Sacred Heart reflected a proactive step that severed his relationship with Sacred Heart, and disabled him from continued participation in the conspiracy. There is zero analytical distinction between the two cases. Importantly, Nerlinger did *not* engage in "additional acts" beyond severing his ties with the organization—he did not "report the conspiracy to law enforcement," "cancel any of" the illegal acts he had undertaken, "dissuade any of his co-conspirators," or otherwise "undermine the conspiracy." BIO 11. Yet, the Second Circuit nonetheless concluded he had withdrawn. That holding is irreconcilable with the decision below.

The Second Circuit's decision in *United States v. Berger*, 224 F.3d 107 (2d Cir. 2000), further crystallizes the conflict of authority. As the petition explained (Pet. 17-18), *Berger* reaffirmed the Second Circuit's prior holding that a defendant satisfies the burden of proving withdrawal by showing "resignation plus the absence of any subsequent activity." 224 F.3d at 118 (citing *United States v. Goldberg*, 401 F.2d 644, 649 (2d Cir. 1968)). Expressly adopting the Third Circuit's legal standard, *Berger* explained that although "resignation from a criminal enterprise, standing alone, does not constitute

withdrawal as a matter of law," the defendant can show withdrawal so long as he does "not take any subsequent acts to promote the conspiracy" or "receive any additional benefits from the conspiracy." *Id.* Moreover, in addition to adopting the Third Circuit's substantive legal standard for withdrawal, *Berger* also expressly stated that "the burden of establishing withdrawal lies on the defendant," consistent with the Court's subsequent holding in *Smith*. *Id.* (quoting *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964)). This confirms that the *substantive* rule that severance of ties is "affirmative action" is perfectly consistent with *Smith*'s *procedural* rule that the defendant bears the burden of proving withdrawal.

The government completely ignores the legal standard in *Berger* and the petition's discussion of that case. Instead, the government observes that on the facts of *Berger*, the Second Circuit held that the withdrawal question should go to the jury. BIO 16. But that is because in *Berger*, there was evidence that the defendant continued to perform overt acts in support of the conspiracy after his purported resignation. Although the Second Circuit recognized that "withdrawal does not require a defendant to turn in his co-conspirators or warn off possible victims," it pointed out that the defendant's resignation letter was itself a fraudulent document, and that the defendant lied to law enforcement long after his resignation. 224 F.3d at 119. By contrast, in this case, the government expressly stipulated that Petitioner engaged in no comparable conduct. Like the defendant in *Nerlinger*, Petitioner

simply terminated his employment, and never furthered the conspiracy or benefited from it ever again.

More fundamentally, the relevant point for assessing whether there is a circuit conflict is whether the legal rules applied by the two circuits differ. Here, the government pointedly does not contend that the Second Circuit's legal rule can be reconciled with the Seventh Circuit's legal rule.

Eleventh Circuit. The Seventh Circuit's decision conflicts with *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000). In that case, the defendant did not do "anything to defeat the continuation of the other dairies price-fixing. It simply sold its dairy and walked away." *Id.* at 838. Nonetheless, the court held, at summary judgment, that the defendant had established withdrawal as a matter of law. It applied the following legal rule:

> In the context of a business conspiracy, one in which the conspiracy is carried out through the regular activities of an otherwise legitimate business enterprise, the law has given effect to a conspirator's abandonment of the conspiracy only where the conspirator can demonstrate that he retired from the business, severed all ties to the business, and deprived the remaining conspirator group of the services which he provided to the conspiracy.

Pet. 19 (quoting *Morton's Market*, 198 F.3d at 839). The government does not cite or mention this legal rule and

makes no argument that it can be reconciled with the decision below.

Instead, the government attempts to distinguish *Morton's Market* on the ground that the sale in that case "deprived the remaining conspirator group of the services which [the defendant] provided to the conspiracy." BIO at 16-17 (quoting *Morton's Market*, 198 F.3d at 839). This case is *identical*. Petitioner's act of quitting his job deprived the remaining conspiracy group of the services that he had previously provided to the conspiracy. Precisely as in this case, the defendant did not do "anything to defeat the continuation" of the conspiracy beyond "walk[ing] away" and thus depriving the conspiracy of his own services. *Morton's Market*, 198 F.3d at 838. The Eleventh Circuit held that this was withdrawal as a matter of law based entirely on its application of a legal rule that diverged from the Seventh Circuit's rule.

The government also points to *United States v. Bergman*, 852 F.3d 1046 (11th Cir. 2017), *cert. denied*, No. 17-5695, 2017 WL 3613383 (U.S. Oct. 2, 2017), as evidence that there is no split. BIO 17. The petition contained a detailed discussion of *Bergman*, which explained why it reinforced the divergence in legal standards between the Seventh and Eleventh Circuits. Pet. 19-21. In short, *Bergman* holds that "an employee's resignation" can "be an effective withdrawal," so long as the resignation is voluntary rather than forced—a rule that the Seventh Circuit squarely rejects. Pet. 20 (quoting *Bergman*, 852 F.3d at 1065). The government

tellingly declines to respond to Petitioner's analysis of *Bergman*.

* * *

The Seventh Circuit correctly recognized that its legal standard for withdrawal differs from the legal standard applied by the Second, Third, and Eleventh Circuits. The government does not appear to dispute that point—it does not attempt to harmonize the various circuits' legal standards. Indeed, it does not even mention the legal standard of those circuits. There can be no serious dispute that this case presents a circuit split on a substantial and recurring issue that this Court should resolve.

II. THERE ARE NO VEHICLE PROBLEMS.

This case is the ideal vehicle to resolve the circuit split. As the petition explained, the issue was cleanly preserved, and the Seventh Circuit's resolution of the issue was outcome-determinative. Pet. 23-24.

The government points out that the District Court ruled that Petitioner did not establish withdrawal as a matter of law, and instead submitted the issue to the jury. BIO 15. But in *Steele*, *Nerlinger*, and *Morton's Market*, the courts of appeals held that the withdrawal issue should *not* go to the jury. *Steele*, 685 F.2d at 804 (defendant entitled to acquittal as a matter of law); *Nerlinger*, 862 F.2d at 974 (evidence should have been excluded under hearsay rule); *Morton's Market*, 198 F.3d at 839 (evidence established withdrawal at summary judgment stage). Thus, there is a *perfectly*

square split, and this case presents the cleanest possible procedural posture to address the question presented.

The government identifies one purported vehicle problem, but it does not withstand scrutiny. The government avers that on the date Petitioner was terminated, he received a $30,000 severance payment (approximately one month's salary), which cleared Sacred Heart's bank account a few days later. BIO 19; 2/4/2015 Trial Tr. 1712; 3/10/15 Trial Tr. 6505. Therefore, the government maintains, Petitioner remained a co-conspirator indefinitely, including almost two years later when the hearsay statements at issue were made.

The Court will rarely see a weaker vehicle problem than this. To begin, the Seventh Circuit did not even mention the severance payment—not even in the "Background" section. Nor was this fact relevant to the Seventh Circuit's decision: The Seventh Circuit rejected Petitioner's withdrawal argument because of the absence of any "additional act" beyond Petitioner's resignation, not because he received a severance check the day he terminated his employment.

Moreover, this severance payment is wholly irrelevant to the question presented. The question presented is whether completely severing ties with an organization engaged in a conspiracy constitutes "affirmative action" under *Hyde*. The stipulated facts establish that Petitioner completely severed his ties with Sacred Heart: the government stipulated that Petitioner neither "work[ed] for," nor "receive[d] any payments or benefits of any kind from Sacred Heart" after his departure. Pet. App. 61a. The fact that Sacred Heart issued Petitioner a severance check on the day of

his termination has nothing to do with whether his ties were severed. The government's apparent view is that by receiving a severance check the day he terminated his employment, Petitioner locked himself in as an agent of his co-conspirators forever. The government cites no authority supporting this bizarre characterization of a severance payment.

The government now suggests that the jury might have interpreted this payment to Petitioner as "'hush money,'" communicating a "long-term willingness to conceal the conspiracy's continuing operations." BIO 14. It is questionable whether this argument is even properly preserved. Although the government did mention the fact of this severance payment to the jury in passing, it never even remotely suggested to the jury that this $30,000 payment might be "hush money." 3/16/15 Trial Tr. 7315. And for good reason: there is no evidence in the record supporting this speculation.

Moreover, the government's theory rests on the view that Petitioner's "long-term willingness to conceal the conspiracy's continuing operations" suffices to show continuing participation in the conspiracy. BIO 14. But this merely reiterates the government's view that an "additional act" to expose the conspiracy's operations to law enforcement, or otherwise hinder it, is necessary to establish withdrawal. This merely restates the government's position on the point of law over which the circuits are in conflict.

Ignored by the Seventh Circuit and irrelevant to the question presented, the government's supposed "vehicle problem" is no basis for denying certiorari. The Seventh Circuit decided this case based on a legal rule that, by its

own admission, conflicts with the rule of three other circuits; the Court should grant certiorari to decide whether that legal rule is correct.

III. THE SEVENTH CIRCUIT'S DECISION IS WRONG.

In *Hyde*, this Court held that a defendant must undertake an "affirmative action" to "disavow or defeat the purpose" of the conspiracy to establish withdrawal. 225 U.S. at 368-69. Petitioner did just that. By proactively severing ties with his organization, he engaged in an "affirmative act." And by depriving the conspiracy of his own services, he "disavowed or defeat[ed] the purpose" of the conspiracy. *Id.* at 369.

The government responds that "that would be true any time that a conspirator stops performing overt acts." BIO 11. But Petitioner did not simply stop performing overt acts, while staying at his job. He took an "affirmative action"—quitting his job and terminating any and all contacts with any alleged co-conspirators—and the effect of that affirmative action was to strip the conspiracy of his services, thus satisfying *Hyde*'s "affirmative action" requirement. Of course, Petitioner's withdrawal from the conspiracy does not exonerate him for his prior acts in service of the conspiracy. But it does mean that he ceased to be the agent of his co-conspirators when he completely and unequivocally severed his relationship with them. The Seventh Circuit's contrary ruling should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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