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NO. 96975-2

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
NO. 50235-6-II

THURSTON COUNTY SUPERIOR COURT
NO. 17-2-00906-34

BRELVIS CONSULTING, LLC,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

BRELVIS CONSULTING, LLC'S STATEMENT OF ADDITIONAL AUTHORITIES

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Pursuant to RAP 10.8, Petitioner Brelvis Consulting, LLC, submits the following statement of additional authorities:

1. Whether the Limited Use Immunity in RCW 19.86.110(7)(b) Satisfies Fifth Amendment and Article 1, Section 9 Constitutional Protections.

On the issue of whether the limited use immunity provided in RCW 19.86.110(7)(b) satisfies the requirements of the Fifth Amendment and Article 1, Section 9, *see* State's Answer to Petition for Review at 10, Brelvis submits the following additional authority:

> The State's contention that the statute provides sufficient immunity is also unpersuasive. There are three kinds of immunity in this setting. The broadest—"transactional immunity"—prohibits prosecution for any matter about which the witness testified or gave a statement; i.e., the entire transaction. "Use immunity" prohibits the direct use of compelled statements in a later criminal trial. "Derivative use immunity" bars the use of any evidence derived from immunized statements. When granted together, "derivative use" and "use" immunity provide protection that is "coextensive" with the Fifth Amendment privilege. In essence, use and derivative use immunity leave the witness, and the government, in the same situation they would have been in had the witness not given a statement or testified."
>
> **RCW 26.45.053(2) speaks only of "use" immunity. It does not purport to provide immunity for evidence derived from immunized statements. The statute thus provides less comprehensive immunity than the Fifth Amendment.**
>
> In summary, because there was a real and substantial danger of incrimination from the parents' evaluations, and because the immunity statute does not adequately protect their Fifth Amendment rights, we reject the Department's argument that the parents' Fifth Amendment rights were not threatened.

In re Dependency of J.R.U.-S., 126 Wn. App. 786, 797–800, 110 P.3d 773, 779–80 (2005) (bold supplied) (footnotes omitted) (holding that RCW 26.45.053(2), an almost identical state "use immunity" statute, was *not* sufficient to protect the Fifth Amendment rights of parents who were court ordered to submit to evaluations in dependency matters).

2. Whether Any Immunity Granted by State Authorities Is Also Binding on Federal Law Enforcement Authorities.

On the issue of whether the limited use immunity provided in RCW 19.86.110(7)(b) would provide any constitutional protection of the right to remain silent in a criminal prosecution by federal law enforcement authorities, Brelvis submits the following additional authorities:

> "The DCI [Division of Criminal Investigation] is a division of the Wyoming State Attorney General's Office, . . . It is clear that, as state officials acting independently, the DCI agents "are without authority to bind federal proceedings." *Johnson v. Lumpkin,* 769 F.2d 630, 634 (9th Cir.1985); *accord United States v. Glauning,* 211 F.3d 1085, 1087 (8th Cir.2000) ("[S]tate and local government officials have no power to bind the federal government."

United States v. Lilly, 810 F.3d 1205, 1212 (10th Cir. 2016) (holding that federal authorities are not bound by any immunity conferred pursuant to actions of the state attorney general's office, "as state officials acting independently. . . . are without authority to bind federal proceedings").

3. The Citation of *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525 (9th Cir. 2018), in the State's Answer to the Petition, Should Include the Subsequent History of the Case, i.e., that a Petition for Certiorari from this Decision is now Pending Before the United States Supreme Court.

In its Answer to the Petition for Review, the State cited *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525 (9th Cir. 2018), regarding the vitality of the collective entity doctrine. *See* State's Answer to Petition for Review at 8. Brelvis hereby submits the full citation[1], including the subsequent history that a petition for certiorari from this decision is now pending in the United States Supreme Court:

- *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525 (9th Cir. 2018) *petition for cert filed* (U.S. Feb. 13, 2019) (No. 18-1207) (on April 9, 2019, the United States Supreme Court called for the government to answer the petition; on May 9, 2019, the brief of Amici Curiae Arizona Attorneys for Criminal Justice and the National Federation of Independent Business Small Business Legal Center in Support of Petitioner was filed).[2]

Dated this 7th day of June, 2019.

Respectfully submitted,

s/ Peter Offenbecher	s/ Cooper Offenbecher
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[1] *See* Rule 10.7, The Bluebook: A Uniform System of Citation 109 (Columbia Law Review Ass'n et al. eds, 20th ed. 2016) (requiring the "entire subsequent history of a case").

[2] The Petition for Certiorari and the Amici Curiae brief are attached as Exh. A and B.

EXHIBIT A

No. 18-____

IN THE

Supreme Court of the United States

IN RE: TWELVE GRAND JURY SUBPOENAS,
Grand Jury Panel 17-02

,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI
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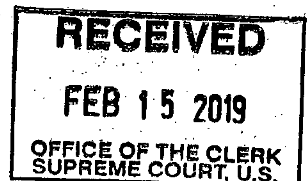

QUESTIONS PRESENTED

In *Braswell v. United States*, 487 U.S. 99, 102, 109 (1988), this Court held 5-4 that a records custodian of a business entity cannot resist a government-issued subpoena duces tecum on Fifth Amendment grounds, "regardless of how small the [entity] may be." Yet, *Braswell* left open a potential exception for situations in which the jury would "inevitably conclude" the custodian-owner produced the records. *Id.* at 118 n. 11.

1. Should *Braswell* be limited or overturned given: (i) the explosion in the formation of small, family-owned limited liability and pass-through entities, (ii) the Court's increased recognition of the legal rights of closely-held business entities, *e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and (iii) the fact that the *Braswell* custodian-owner asserted his *individual* privilege rather than a privilege on behalf of his closely-held corporation?

2. Are small, family-owned limited liability companies (LLCs) and pass-through entities (subchapter "S" corporations) "collective entities" under the Fifth Amendment and, if so, do situations like Petitioner's fall within *Braswell*'s potential exception?

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INTRODUCTION

If certiorari is granted, Petitioner will ask this Court to limit or overturn *Braswell* as it applies to custodians of small family businesses, such as limited liability and pass-through entities. Under *Braswell*, all would-be small-business owners have a troublesome choice about which most are unaware: they can create a limited liability or closely-held company, or they can retain their Fifth Amendment privilege when faced with a government-issued subpoena for business records. But they cannot do both, even though none have knowingly, intentionally waived this right.

Many years ago, Petitioner created several small, family-owned limited liability companies and subchapter "S" corporations.[1] According to *Braswell*, when he filed his articles of organization with the state, he automatically forfeited his ability to assert a privilege against self-incrimination as his businesses' records custodian. Petitioner is now being compelled to produce, compile, organize, and authenticate thousands of his businesses' records. Thus, Petitioner is being forced to provide the evidence forming the basis for what will likely be the government's primary exhibit against him at trial. This scenario is in tension with the act-of-production privilege under *United States v. Hubbell,* 530 U.S. 27 (2000), and *Fisher v. United States,* 425 U.S. 391 (1976), and is repugnant to the principles underlying the Self-Incrimination Clause.

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[1] Unlike most "C" corporations (which separately pay taxes), "S" corporations are pass-through entities in which all tax liability is ultimately the *personal* responsibility of the individual owner-taxpayer. Thus, as in *Hobby Lobby*, the rights of such entities are often inseparable from the rights of the individuals who own and run them. 134 S. Ct. at 2768–69.

Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., concurring).

As Justice Kennedy noted in his sharp *Braswell* dissent, joined by Justices Scalia, Brennan and Marshall, the majority's broadly-worded decision was inconsistent with the Fifth Amendment's text, history, and purpose. *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting).[2] Over a decade later, Justices Thomas and Scalia reiterated those concerns and expressed a desire to reexamine the Court's self-incrimination jurisprudence as it relates to business entities. *Hubbell*, 530 U.S. at 49 (2000) (Thomas, J., concurring).

Since *Braswell*, there has been an explosion in the creation of small, limited liability companies and pass-through entities in the United States. With the rise of these modern small-business forms, *Braswell's* categorical holding cannot stand, as it forces millions of Americans to unwittingly forfeit a fundamental right. In addition, the Court's recent decisions recognizing the rights of closely-held and family-owned businesses in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), cast further doubt on *Braswell's* validity and its underlying assumption that even closely-held business entities and their custodians (most of whom are the owners) are not "persons" under the Fifth Amendment.

Numerous litigants and scholars have called for *Braswell* and the collective entity doctrine to be revisited. *See, e.g., In re Grand Jury Empaneled on*

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[2] Moreover, Mr. Braswell did not even assert a privilege on behalf of his closely-held company. *Braswell,* 487 U.S. at 102-03. He asserted his *individual* Fifth Amendment privilege in response to the corporate subpoenas. *Id.*

May 9, 2014, 786 F.3d 255, 263 (3d Cir. 2015); *Armstrong v. Guccione*, 470 F.3d 89, 98 (2d Cir. 2006); *Amato v. United States*, 450 F.3d 46, 50-53 (1st Cir. 2006); *Fed. Trade Comm'n v. Lexium Int'l LLC*, 2017 WL 2664360, at *8 (M.D. Fla. June 1, 2017), *report and recommendation adopted*, 2017 WL 2655107 (M.D. Fla. June 20, 2017); Ramzi Abadou, *High Court May Take on Corporate 5th Amendment Privilege*, Law360, March 25, 2015 (arguing current iteration of collective entity doctrine is inconsistent with *Hobby Lobby*).[3] They persuasively argue that it makes no sense to apply the "agency rationale" to limited liability companies and pass-through corporations that are essentially run like sole proprietorships or family-owned small businesses, especially following *Hobby Lobby, Citizens United* and *Hubbell*. They also note that, unlike big corporations, small business owners do not normally foresee (and are not warned) that their choice of a particular business form to limit their personal liability will *automatically* result in the unintentional loss of fundamental rights. This is inconsistent with the Court's history of requiring informed, knowing waivers of constitutional rights.

[3] *See also* Lila L. Inman, *Personal Enough for Protection: The Fifth Amendment and Single-Member LLCs*, 58 Wm. & Mary L. Rev. 1067 (2017); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. Pa. L. Rev. 95, 157 (2014); Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 Colum. Bus. L. Rev. 1, 12, 103, 109 (2005); John Grogan, Jr., *Fifth Amendment—The Act of Production Privilege: the Supreme Court's Portrait of a Dualistic Record Custodian*, 79 J. Crim. L. & Criminology 701 (1988); *see also* Preston Burton, Bree Murphy and Leslie Meredith, *The Arrival of Justice Gorsuch May Bring Opportunity to Reform the Collective Entity Doctrine*, National Law Journal, June 5, 2017.

Petitioner now joins this growing group of scholars and litigants in asking the Court to revisit its thirty-year-old 5-4 decision in *Braswell*, and to adjust the collective entity doctrine in light of these developments in the law and the explosion of small limited liability and pass-through companies. By doing so, the Court can restore consistency to its self-incrimination jurisprudence and ensure that at least owners of small family-owned businesses are not automatically deprived of this fundamental right simply because of their choice to adopt a particular business form to compete in the marketplace.

OPINIONS BELOW

The district court's order requiring compliance with the contested subpoenas is at Appendix A, and its contempt order and temporary stay is at Appendix B. The published opinion of the United States Court of Appeals for the Ninth Circuit, *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525 (9th Cir. 2018), is at Appendix C.

JURISDICTION

The district court's order compelling compliance with the twelve grand jury subpoenas was entered September 22, 2017, and its contempt order was entered October 20, 2017. Appendices A, B. The Ninth Circuit issued its opinion on October 24, 2018. Appendix C. On January 29, 2019, Justice Kagan signed an order extending the time for filing this petition for certiorari to and including February 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V.

In developing its Fifth Amendment self-incrimination jurisprudence, this Court has developed two interconnected but sometimes conflicting doctrines: the collective entity doctrine and the act-of-production doctrine. The collective entity doctrine provides that multi-member organizations (such as corporations, partnerships, and labor unions) and their agents cannot resist a government subpoena on Fifth Amendment grounds. The act-of-production doctrine prevents the government from compelling an individual to produce, compile and authenticate business records if that individual's "act of production" would be self-incriminating.

STATEMENT OF THE CASE

Petitioner is the target of an ongoing grand jury investigation of alleged offenses, including tax evasion and bankruptcy fraud. The government claims Petitioner concealed his income from the IRS by transferring funds among several of his business entities.[4] Petitioner owns ten businesses: three closely-held "S" corporations (wholly owned by Petitioner or Petitioner and his wife) and seven LLCs (all wholly owned by Petitioner and his wife, except one in which he holds 70% of the percentage interest but 100% of the

[4] In fact, all asset and money transfers have been transparent, based upon fair market value, and easily observable by even a cursory review of the entities' tax returns, which the government has long had in its possession. Nothing has ever been concealed, and the government is on a "fishing expedition" like that condemned in *Hubbell*, 530 U.S. at 32, 42.

economic interest).[5] During the years at issue, Petitioner was solely responsible for the accounting and document preparation for all entities (and is therefore the only person who can act as records custodian).

Initially, the government issued two subpoenas, both *personally* directed to Petitioner—one for a subchapter "S" corporation ( ) and the other covering the remaining businesses. After Petitioner asserted the act-of-production privilege under *Hubbell*, the government withdrew those subpoenas and issued twelve new subpoenas directed instead to the "Custodian of Records" of each entity.[6] *See, e.g.*, Grand Jury Subpoena (dated May 16, 2017), at Appendix E. These "blanket" subpoenas demanded production of (among other things) "the records and books of account relative to the financial transactions" of each entity, including all bookkeeping records, ledgers, journals, receipts, sales and purchase records, accounts receivable and payable ledgers, sales and expense invoices, inventory records, copies of all checks, and lists of all financial institution accounts (open and closed) and the entity's clients. Appendix E.[7]

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[5] The precise percentages of ownership for each entity are set forth at Appendix D, except (AZ) is now wholly owned by (DE), 98% of which is owned by Petitioner and his wife, and 2% of which is owned by (which is wholly owned by Petitioner and his wife). None of the entities have parent companies or subsidiaries in which investors or outside persons have an interest. Sup. Ct. R. 29.1.

[6] Three were issued to one professional limited liability company (a law firm), which had two minor name changes.

[7] The subpoenas were re-issued November 15, 2018. They were identical but eliminated demands for client lists, bank checks, and certain inventory records and work papers. They also limited

Petitioner objected to the new subpoenas on Fifth Amendment and overbreadth grounds, arguing that the act of producing, compiling, and authenticating the records would amount to testimonial self-incrimination under *Hubbell*, 530 U.S. at 36–38. (D.Ct. Doc. 1, Ex. 2). He also argued that this would be magnified by the fact that he is the owner and sole operator of these small businesses.

After Petitioner asserted the privilege, the government moved to compel compliance, which the district court granted in reliance on *Braswell*. (D.Ct. Doc. 1, 10). Appendix A. When Petitioner continued to assert the privilege, he was held in contempt pursuant to 28 U.S.C. § 1826. (D.Ct. Dkt. 19). Appendix B. The district court stayed enforcement of the order pending Petitioner's appeal to the United States Court of Appeals for the Ninth Circuit. (Id.).

Following briefing and oral argument, the Ninth Circuit issued its published opinion on November 8, 2018, *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525 (9th Cir. 2018). Appendix C. Petitioner now seeks a writ of certiorari.[8]

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the list of financial institution accounts to the period from January 1, 2007 through May 3, 2017. *See* Re-issued [redacted] Subpoena. Appendix F.

[8] Petitioner requested a stay of the mandate pending certiorari but it was denied. *See* Case No. 18A655. As the government asserted below in arguing against a stay, forced compliance with the subpoenas does not render these issues moot. *See Church of Scientology of California v. United States*, 506 U.S. 9 (1992); *In re Grand Jury Proceeding No. 97-11-8*, 162 F.3d 554 (9th Cir. 1988).

REASONS FOR GRANTING THE PETITION

This Petition should be granted for two reasons: (1) the collective entity doctrine, as applied in *Braswell*, is inconsistent with *Hubbell, Hobby Lobby, Citizens United* and other Supreme Court precedent, and is resulting in the automatic forfeiture of fundamental rights by millions of Americans who now own and operate small family businesses; and (2) the Court has never decided whether small LLCs and "pass-through" entities ("S" corporations) are "collective entities" under the Fifth Amendment, or whether an exception exists under *Braswell*'s footnote 11 where business owners are particularly vulnerable to an incriminating inference by their act of production. This case provides the perfect vehicle for the Court to decide these important issues.

As commentators have recognized: "The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights." Akhil Amar & Renee L. Lerner, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 857 (1995). The collective entity doctrine has proved to be particularly convoluted due to the Court's "difficulty in articulating a durable rationale" for the doctrine. Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 Pitt. L. Rev. 27, 65–66 (1986). By granting this Petition, the Court can further untie the Fifth Amendment's Gordian knot and provide needed relief to the millions of unwary small-business owners who have become entangled in its trap.

I. *Braswell* is incompatible with the Court's increased recognition of business rights and its overall self-incrimination jurisprudence, and it was decided before the explosion of small, family-owned limited liability and pass-through entities.

A. With the emergence of LLCs and "S" corporations, *Braswell* is now causing millions of Americans to unknowingly waive a fundamental right.

"The emergence of the LLC is astounding."[9] In 1988, when *Braswell* was decided, only *two states* had laws recognizing LLCs.[10] By 1997, however, every state had a statute allowing for the formation of LLCs,[11] and today there are over 1.2 million LLCs in the United States—over 300,000 of which are single-member LLCs operated as sole proprietorships.[12] In addition, between 1980 and 2011, the number of subchapter "S" corporations grew 660%—increasing from 545,000 to 4.15 million over that thirty-year period.[13]

Yet, according to the lower courts' interpretation of *Braswell*, all of these people (including Petitioner) *automatically* forfeited their privilege against self-

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[9] Sandra K. Miller, *The Duty of Care in the LLC: Maintaining Accountability While Minimizing Judicial Interference*, 87 Neb. L. Rev. 125, 132 (2008).

[10] Cole, *Reexamining the Collective Entity*, 2005 Colum. Bus. L. Rev. at 79.

[11] Inman, *Personal Enough for Protection*, 58 Wm. & Mary L. Rev. at 1085, 1086.

[12] *See* Brent M. Johnston, *The Federal Tax Personality of Disregarded LLCs*, 47 Washburn L.J. 203, 203 n. 2 (2007).

[13] Kyle Pomerleau, *An Overview of Pass-Through Businesses in the United States,* 227 Tax. Found. 1, 6 (2015).

incrimination as custodians of record for their small businesses the moment they filed their articles of organization. They, and the many small-business owners yet to follow them, are unaware of the fact that their formation of a limited liability or pass-through business entity will result in the loss of this fundamental right. Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 Colum. Bus. L. Rev. 1, 12, 103, 104 (2005). For example, there are no mandatory disclosures issued from the offices of Secretary of State, Corporation Commission, Department of Revenue and/or Internal Revenue Service that by choosing certain business forms, a person or family will automatically forfeit Fifth Amendment rights as custodians to their newly formed businesses.[14] Thus, they are naïve to this automatic forfeiture of rights until and unless the government comes knocking at their door.

That is exactly what happened to Petitioner when he was suddenly faced with the grand jury subpoenas for his small, family-owned businesses. According to the Ninth Circuit: "by choosing to operate his businesses as a corporation or LLC and not as a sole proprietorship, [Petitioner] knowingly sought out the benefits of these forms. Having done so, he cannot now be shielded from its costs." *In re Twelve Grand Jury Subpoenas*, 908 F.3d at 530. In other words, under the current iteration of the collective entity doctrine in *Braswell*, one of the "costs" of being a small-business

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[14] Perhaps a warning on these agencies' websites or forms similar to the one required on cigarette packaging would be helpful, such as: "INCORPORATING A BUSINESS MAY BE HAZARDOUS TO YOUR CONSTITUTIONAL RIGHTS."

owner of an LLC or closely-held corporation is the automatic, unwitting forfeiture of fundamental rights.

This sort of "Hobson's choice" for the small-business owner is inconsistent with the Court's longstanding jurisprudence requiring a knowing, intentional relinquishment of fundamental rights. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1156 (10th Cir. 2013) (Gorsuch, J., concurring) (observing that the "Hobson's choice" there was the Green family's illusory choice between "abiding their religion or saving their business"). As Justice Kennedy long ago observed, there is nothing in the Court's Fifth Amendment jurisprudence (aside from *Braswell*) to suggest that forming a business should automatically lead to the forfeiture of constitutional rights. *See Braswell*, 487 U.S. at 130 (Kennedy, J., dissenting). Indeed, the Court will not generally recognize a waiver of Fifth Amendment self-incrimination rights unless it was: (1) "the product of a free and deliberate choice," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Implied waiver is not favored and the Court applies a strong presumption against implied waiver of fundamental rights. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *Braswell*, as currently applied, is therefore incompatible with the Court's jurisprudence requiring knowing, intentional waivers of constitutional rights.

B. *Braswell's* underlying rationale is inconsistent with the Court's increased recognition of constitutional rights for closely-held businesses.

Collective entities, especially closely-held ones, enjoy free speech rights under the First Amendment, *Citizens*

United, 558 U.S. at 364–65, free association rights under the First Amendment, *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000), privacy rights under the Fourth Amendment, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977), double jeopardy protections under the Fifth Amendment, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977), equal protection rights under the Fourteenth Amendment, *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933), due process rights under the Fourteenth Amendment, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 297 (1980), and free exercise rights under federal law, *Hobby Lobby*, 134 S. Ct. at 2768–69. *Braswell*, however, held that these same entities (and their owners/custodians) cannot enjoy the Fifth Amendment's self-incrimination protections, simply by virtue of their status as "corporations," regardless of their size or how closely-held they are. 487 U.S. at 108–110. "This reasoning simply does not fit the Supreme Court's approach to other constitutional rights, particularly in the way that [collective entities'] lack of constitutional protection . . . has the potential to deprive *individuals* of constitutional protection." Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. Pa. L. Rev. 95, 133 (2014).

As the *Hobby Lobby* Court explained, a closely-held collective entity's rights are often inseparable from the rights of those who "own, run, and are employed by [the entity]," and "[w]hen rights . . . are extended to [business entities], the purpose is to protect these *people*." *Hobby Lobby*, 134 S. Ct. at 2768–69 (emphasis added). The *Braswell* majority's categorical refusal to extend Fifth Amendment self-incrimination rights to collective entities and their custodians "directly impact[s] the rights of individual employees

[and officers]," depriving them of a fundamental right simply because of their choice to compete in the marketplace. *See* Garrett, *supra*, at 157.

"The law is not captive to its own fictions." *Braswell*, 487 U.S. at 130 (Kennedy, J., dissenting). When a prior decision's doctrinal "underpinnings have been eroded by subsequent developments [in] constitutional law," the principles of *stare decisis* no longer apply. *Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring); *see also Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring) (where "adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished."). According to Chief Justice Roberts, this occurs when the precedent's "rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring).

By accepting review in this case, the Court can correct the "fiction" Justice Kennedy identified in *Braswell*, and take steps toward bringing its treatment of the Fifth Amendment rights of closely-held companies into alignment with its current recognition of the constitutional rights of these businesses generally.

C. *Braswell* did not address the assertion of an act-of-production privilege on behalf of a closely-held company.

Importantly, the issue of whether Mr. Braswell's closely-held corporation could assert a Fifth Amendment act-of-production privilege was not even before the Court because he never asserted the privilege on behalf of his company. *Braswell,* 487 U.S. at 102-03; *see also* Cole, *Reexamining the Collective Entity Doctrine, supra*, at 42 and n. 152. Rather, Mr. Braswell argued he was entitled to assert his own *individual* privilege because the act of producing the business records would incriminate him personally. *Id.* The *Braswell* majority reached its sweeping holding that records custodians can never claim an act-of-production privilege by asserting that under *Bellis v. United States,* 417 U.S. 85, 101 (1974), it was "well established that such artificial entities are not protected by the Fifth Amendment." *Braswell,* 487 U.S. at 102.

First, *Bellis* dealt with a former member of a partnership who possessed the partnership's financial records in what was "fairly said to be a representative capacity," 417 U.S. at 101, not with a closely-held company where the custodian was the same person as the owner. Thus, it was not yet "well established" before *Braswell* was decided that even closely-held companies like Braswell's were not protected by the Fifth Amendment. Second, and more importantly, "none of the collective entity cases cited by the [*Braswell*] majority . . . presented . . . a claim that the custodian would be incriminated *by the act of production, in contrast to the contents of the documents*" subpoenaed from the company. *Braswell,* 487 U.S. at 123 (Kennedy, J., dissenting) (emphasis

added). As set forth below, the *Braswell* majority's broad application of the collective entity doctrine to prevent all records custodians from asserting an act-of-production privilege on behalf of the company resulted in the tension that remains today between the current iterations of the collective entity and act-of-production doctrines. Yet, that issue was not even squarely before the Court due to the nature of the privilege asserted by Mr. Braswell.

D. *Braswell* is inconsistent with the act-of-production privilege under *Hubbell* and *Fisher*, and the values underlying the privilege.

Petitioner's case demonstrates the current tension existing between the collective entity doctrine as applied by the *Braswell* majority, and the act-of-production privilege under *Hubbell,* 530 U.S. 27 (2000), and *Fisher v. United States,* 425 U.S. 391 (1976). When a records custodian is forced to comply with a broadly-worded subpoena, the government compels the custodian to admit the sought-after documents: (i) exist, (ii) are in the suspect's custody or control, (iii) are authentic, and (iv) match the subpoena's description. *Hubbell,* 530 U.S. at 36-37. And the "existence, custody, and authenticity" of certain documents is often all a prosecutor needs to "furnish a link in the chain of evidence needed to prosecute." *Id.* at 37-38. As currently applied, and seen in this case, the collective entity doctrine allows the government to compel owners of small, family-owned businesses to involuntarily further their own prosecutions.

This is not what was envisioned by the Framers of the Fifth Amendment, who enshrined in our Bill of Rights the principle that it is better for an accused to go free than for the prosecution to build its criminal

case "with the assistance of enforced disclosures by the accused." *Ullmann v. United States*, 350 U.S. 422, 426-27 (1956). As the Court has repeatedly instructed, the Self-Incrimination Clause should be given a "liberal construction," *id.* at 427, to ensure the government does not compel an accused to use "the contents of his own mind" to secure his own conviction. *See Hubbell*, 530 U.S. at 36; *Doe v. United States (Doe II)*, 487 U.S. 201, 211 (1988).

Yet, under *Braswell*, and notwithstanding *Hubbell* and *Doe II*, the blanket subpoenas of the sort served on Petitioner as "custodian" of his closely-held business entities amount to an "extortion of information from the accused," which "force [him] to disclose the contents of his own mind" to the prosecution. *Doe II*, 487 U.S. at 211; *see also Braswell,* 487 U.S. at 126, 128 (Kennedy, J., dissenting) (what the government really seeks when it issues these blanket subpoenas is "the right to choose any corporate agent as a target of its subpoena" and compel that individual to "disclose the contents of his own mind").[15]

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[15] As Justice Thomas observed in expressing a willingness "to reconsider the scope and meaning of the Self-Incrimination Clause," the act-of-production doctrine may itself "be inconsistent with the original meaning" of the Clause. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring). He noted that "[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, *but of any incriminating evidence*." *Id.* (emphasis added). Petitioner's case is illustrative. As the sole person who prepared the documents and kept the books for his businesses, the entries contained in the reports and documents he is being compelled to disclose constitute a "roadmap" of his thoughts and the "contents of his own mind," and are thereby "witnesses." All that is left is for the government to place its "spin" on the meaning of the documents and reports, which will force Petitioner to testify

Allowing small-business owners (most of whom *are* the custodians) to assert a Fifth Amendment act-of-production privilege would not hamstring white-collar law enforcement. *See Braswell*, 487 U.S. at 129 (Kennedy, J., dissenting). Even if the government's subpoena powers were curtailed, it would still be able to access its sought-after documents by obtaining a search warrant through the normal and minimally burdensome procedures already in place. Requiring the government to go through those procedures is a small price to pay when weighed against the Fifth Amendment rights of millions of small-business owners for whom the "testimonial consequences" of complying with a subpoena are amplified. *See United States v. Doe* (*Doe I*), 465 U.S. 605, 613 (1984); *Braswell,* 487 U.S. at 118 n. 11.[16]

Moreover, the quantum leaps in technology since *Braswell* was decided mean there is now an enormous difference in the ability of prosecuting agencies to investigate cases. All now have easy online access to information from third-party sources (such as Corporation Commissions, Secretary of States' Offices and County Recorders' Offices) and can easily access bank records and tax returns for free. Investigative reports such as Transunion TLOxp (see www.tlo.com) are also available to prosecuting agencies at minimal cost. Thus, the "prosecutorial convenience" rationale

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regarding their actual meaning and thereby forego the protections of the privilege.

[16] Additionally, many business owners would be unable to assert a Fifth Amendment privilege under the Court's "foregone conclusion" analysis described in *Fisher,* 425 U.S. at 411–12, and *Hubbell*, 530 U.S. at 44 (suspect cannot assert act of production privilege if the subpoena is so specific that the existence of the sought-after documents is a "foregone conclusion").

underlying a broad application of *Braswell* and the Court's prior collective entity cases no longer serves as a legitimate justification for the wholesale forfeiture of closely-held business owners' Fifth Amendment rights.

All of the values underlying the Self-Incrimination Clause are undercut in this case, and in every case where the collective entity doctrine is applied in this manner to small, family-owned businesses. *See Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 54-55 (1964), *abrogated on other grounds by United States v. Balsys*, 524 U.S. 666 (1998). These include avoiding the "cruel trilemma" of perjury, contempt, or self-accusation existing before the Self-Incrimination Clause; ensuring the prosecution "shoulders its entire burden;" and requiring the government to respect a person's privacy and "leave the individual alone until good cause is shown for disturbing him." *Id.* Under *Braswell*, the government has been given free license to force all small-business owners like Petitioner to compile, organize, and authenticate thousands of pages of potentially incriminating documents without cause and without judicial oversight. As a result, these owners are being forced to create the exhibits that will be used against them at trial. The Fifth Amendment demands more.

II. This case provides the perfect vehicle to decide whether small LLCs and pass-through "S" corporations are "collective entities" under *Braswell*.

As noted above, small-business owners and their companies retain most of their constitutional rights when they form their limited liability and pass-through entities. These include First Amendment free speech and association rights, protections from

unreasonable searches and seizures under the Fourth Amendment, double jeopardy protections under the Fifth Amendment, and equal protection and due process rights under the Fourteenth Amendment. They also now retain their right to exercise their religion without undue state interference. *Hobby Lobby*, 134 S. Ct. at 2768–69. Yet, under *Braswell's* reasoning, these same small-business owners automatically forfeit their Fifth Amendment privilege against self-incrimination the instant they file their articles of organization with the state. Given *Braswell's* often draconian (and personal) consequences for business owners, it should not be applied to small LLCs and "S" corporations without addressing whether these entities are, in fact, collective entities subject to *Braswell*. The question of whether these businesses are "collective entities" with no Fifth Amendment privilege for their custodians has yet to be answered by this Court.

In *United States v. White*, 322 U.S. 694 (1944), the Court provided a test for determining whether an organization is a "collective entity" within the meaning of the Self-Incrimination Clause. "The test is whether one can fairly say under all the circumstances that [the] particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* at 701. Under the *White* test, small LLCs and closely-held "S" corporations like Petitioner's should not be considered "collective entities." LLCs have "blur[red] the traditional distinctions between individual and group business activities." Cole, *supra*, at 77. And closely-held businesses—unlike the large-scale corporations that dominated the

business landscape when *Braswell* was decided—do not possess independent institutional identities; they are merely an extension of their owner(s). Inman, *supra*, at 1095, 1097.

Indeed, closely-held LLCs and pass-through "S" corporations, unlike large corporations, are not meaningfully distinguishable from sole proprietorships, which *are* entitled to self-incrimination protections. *Doe I*, 465 U.S. at 617. The Court should accept certiorari to clarify whether today's most popular forms of limited liability companies are "collective entities" under *Braswell*.

III. Even if small LLCs and pass-through entities are "collective entities," the Court should grant certiorari to decide whether situations like Petitioner's fall within *Braswell's* potential exception.

Petitioner argued below that because his LLCs and closely-held "S" corporations are small, family-owned businesses that he (or he and his wife) wholly own and effectively operate as sole proprietorships, they fall within the exception left open by *Braswell*. In what has been termed "the *Braswell* footnote," the Court stated:

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records *when the custodian is able to establish,* by showing for example that he is the sole employee and officer of the corporation, *that the jury would inevitably conclude that he produced the records.*

Braswell, 487 U.S. at 118 n. 11 (emphasis added). This "open question" indicates even the majority's discomfort with an overly-broad reading of *Braswell* that

would forever foreclose any and all ability of a custodian-owner to assert the "act of production" privilege. Thus, the Court appears to have left a "safety valve" where the compelled production of subpoenaed records would lead the jury to "inevitably conclude" that a particular individual is the one who produced the records ultimately used against that individual at trial.

This potential exception to a blanket application of *Braswell* seems to rest on a rationale similar to the potential exception left open in *Bellis v. United States*, 417 U.S. 85, 101 (1974). There, after holding that a former partner's possession of the partnership's financial records "in what can be fairly said to be a representative capacity," the Court noted that "[t]his might be a different case if it involved a small family partnership[.]" *Id.* (citing with approval *United States v. Slutsky*, 352 F. Supp. 1105, 1107–08 (S.D.N.Y. 1972) (small, two-man partnership could rely on the Fifth Amendment as a safe haven because the partners were intimately involved in the partnership's day-to-day operations)). As a lower court later put it: "the *Bellis* Court contemplated that individual owners of the proverbial 'Mom and Pop' stores would continue to enjoy the protection[s] of the Fifth Amendment . . ." *In re Grand Jury Subpoena Duces Tecum*, 605 F. Supp. 174, 178 (E.D.N.Y. 1985).

The rationale behind the *Bellis* "small family partnership" exception applies with equal force to small family-owned LLCs and "S" corporations like Petitioner's, as they too are personal businesses that are mere extensions of their owners. For example, unlike "C" corporations (which separately pay taxes), the "S" corporations owned by Petitioner and his wife are pass-through entities in which all tax liability is

ultimately the *personal* responsibility of the individual owner-taxpayer. Thus, as in *Hobby Lobby*, the rights (and responsibilities) of these small businesses are inseparable from the individuals who own and run them (Petitioner and his wife). 134 S. Ct. at 2768–69.

The Ninth Circuit rejected this position, believing that "recogniz[ing] an exception for custodians of small, closely held collective entities, *including one-person corporations or LLCs*, would be inconsistent with the reasoning and holding of *Braswell*." *In re Twelve Grand Jury Subpoenas*, 908 F.3d at 529 (emphasis added). Other lower courts have also construed *Braswell's* footnote (and the exception in *Bellis*) to be meaningless and inconsistent with the facts and holding of *Braswell* itself, and have not entertained *any* exceptions to the collective entity doctrine as a result. *See, e.g., In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 263 (3d Cir. 2015); *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d 155, 158 (2d Cir. 2010). Yet, this seeming inconsistency between the questions left open in *Braswell* and *Bellis* and the text of *Braswell* can potentially be explained by the fact that, as noted above, Mr. Braswell did not assert a self-incrimination claim on behalf of his wholly-owned corporation. *Braswell*, 487 U.S. at 102-03. Rather, he argued he was entitled to assert his *individual* privilege because the act of producing the business records would incriminate him personally. *Id.; see also* Cole, *supra,* at 42 and n. 152. Thus, the question left open in *Braswell* was not squarely before the Court.

By ignoring these potential exceptions to the collective entity doctrine, the lower courts have construed *Braswell* in an overly-broad manner, categorically withholding Fifth Amendment protections from all

"Mom and Pop" businesses, including those like Petitioner's, which were formed as limited liability companies and pass-through "S" corporations that are inseparable from the individuals who own and run them. As construed in this manner, *Braswell* is inconsistent with this Court's case law both preceding it, *see Bellis*, 417 U.S. at 101, and following it, *see Hobby Lobby*, 134 S. Ct. at 2768–69; *Hubbell*, 530 U.S. at 36. This constitutional "anomaly" is therefore in need of reevaluation. Cole, *supra*, at 12.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant certiorari, vacate the decision of the United States Court of Appeals for the Ninth Circuit, and reverse the United States District Court's rulings compelling compliance with the government's twelve grand jury subpoenas.

Respectfully submitted,

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EXHIBIT B

No. 18-1207

IN THE

Supreme Court of the United States

IN RE: TWELVE GRAND JURY SUBPOENAS,
Grand Jury Panel 17-02

[REDACTED],
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

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INTEREST OF *AMICI CURIAE*[1]

Arizona Attorneys for Criminal Justice, the Arizona affiliate of the National Association of Criminal Defense Lawyers, is a not-for-profit membership organization of criminal defense lawyers and associated professionals. Its mission is to give a voice to the criminally accused and those who defend them. To that end, AACJ is dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the role of the criminal defense lawyer.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses, many of which are members of the National Federation of Independent Business (NFIB). The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a

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[1] Counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief. All parties have consented in writing to the filing of this brief. No entity or person aside from amici curiae made any monetary contribution supporting the preparation or submission of this brief. No counsel for any party to this proceeding authored this brief in whole or in part.

nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

This case raises questions of critical importance regarding the Fifth Amendment rights of small business owners. The Ninth Circuit's opinion, which dutifully applies this Court's 1980's-vintage precedent on the ability of individuals running closely held corporations to resist compulsory grand jury subpoenas, is fundamentally inconsistent with the privilege against self-incrimination. The issue at stake here is directly relevant to *amici*'s missions: This departure from first principles has harmed criminal defendants in Arizona and around the country, unjustifiably expanded the federal government's power over small business owners, and made it more difficult for criminal defense lawyers to protect their clients from government overreach. As such, AACJ and NFIB Legal Center both have an interest in urging this Court to grant certiorari.

SUMMARY OF ARGUMENT

The Petition presents the Court with a rare and much-needed opportunity to revisit its holding in *Braswell v. United States*, 487 U.S. 99 (1988). In *Braswell*, two doctrinal threads of Fifth Amendment self-incrimination jurisprudence converged: the collective entity doctrine and the act-of-production doctrine. The result was unsatisfactory at the time and has not aged well with the enormous expansion in the use of corporate forms.

Under the collective entity doctrine, a corporate custodian of records may not invoke the Fifth Amendment's privilege against self-incrimination to resist a subpoena because the act of responding to the subpoena is a representative act—an act of the corporation—rather than an individual act, and corporations are not entitled to Fifth Amendment protection. *Id.* at 110.

The act-of-production doctrine recognizes that the mere act of production may be testimonial and incriminating. When a party produces incriminating documents, a factfinder may infer that the producing party is declaring that the records requested in fact exist, are authentic, and are responsive to the government's request. Consequently, "[a] government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." *United States v. Doe*, 465 U.S. 605, 612 (1984). Such acts *are* protected by the Fifth Amendment.

In certain situations, these two doctrines are at odds with one another, where the collective entity doctrine would seem to deny protection, but the act-of-production doctrine simultaneously requires it. In the

context of a single-member limited liability company (LLC), for instance, the collective entity doctrine would deprive an individual acting in his capacity as an LLC member of the ability to resist the subpoena; he or she faces contempt sanctions if they refuse to hand over responsive documents. But when a single-member LLC responds to a subpoena, any "jury would inevitably conclude that he produced the records." *Braswell*, 487 U.S. at 118 n.11. In that case, a jury would necessarily attribute the (incriminating) testimonial aspects of producing the documents to the individual, regardless of his status as a corporate custodian; the act of responding to the subpoena would thus be personally incriminating, and would fall simultaneously under the act-of-production doctrine.

As this Court has observed, these issues "do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." *Doe*, 465 U.S. at 613. *Braswell*, however, has promoted a categorical rather than a fact-and-case specific approach. Under *Braswell*, the corporate form of the entity dictates whether a custodian may assert the privilege, regardless of whether, as a factual matter, his act of production would unavoidably personally incriminate him. *Braswell* elevates form over substance, at the cost of core personal constitutional protections.

Braswell's 5-4 holding rested on shaky ground from the beginning, and the passage of time has only eroded its reasoning. Yet as the opinion below reflects (Pet. App. C at 18a), *Braswell* remains binding on lower courts and has also been highly influential on the parallel development of state and international law. Over the last three decades, the use of limited liability entities, including single-member LLCs, has grown far

beyond expectations. At the same time, this Court has gradually strengthened the rights of closely held corporations and those who operate them. But under *Braswell*, lower courts cannot weigh the impact on individual rights when applying the collective entity doctrine. They are bound by *Braswell*. Only this Court has the power to reconsider the wisdom of *Braswell* in this modern reality.

Opportunities to revisit *Braswell* have been few and far between. Although the *Braswell* problem broadly drives the behavior of prosecutors, investigators, grand juries, business owners, and courts, it rarely gives rise to this type of litigation for a host of reasons, including the (rational) unwillingness of small business owners to risk contempt sanctions for resisting *Braswell*-authorized subpoenas and the blanket secrecy of grand jury proceedings, which largely keeps this question out of view.

This case presents a rare pristine vehicle to reconsider *Braswell*. Petitioner has willingly incurred contempt sanctions (and paid legal bills) to challenge the subpoenas. The twelve subpoenaed entities each involve only one or two members, typically Petitioner and his wife. This Court can thus issue a clean legal ruling regarding the Fifth Amendment rights of owners of very small business entities.

ARGUMENT

I. THE IMPORTANT QUESTIONS PRESENTED IN THE PETITION HAVE BEEN WAITING FOR THIS COURT'S REVIEW.

A. *Braswell* undercuts a core constitutional protection.

Like the First Amendment, the Fifth Amendment privilege against self-incrimination is a crucial constitutional check against government infringement on individual liberties. The two protections are in some ways two sides of the same coin. Both the First Amendment and the Fifth Amendment restrict the government from compelling speech in certain circumstances: "The Fifth Amendment protects the right not to be compelled in any criminal case to be a witness against [one]self, while the First Amendment protects, among other things, the right to refrain from speaking at all." *See Newman v. Beard*, 617 F.3d 775, 780 (3d Cir. 2010) (citations omitted; alteration in original); *see also* Dwight G. Duncan, *Conscience, Coercion and the Constitution: Some Thoughts*, 2 S. New Eng. Roundtable Symp. L.J. 39, 57 (2007) ("The guarantee of religious freedom that begins the First Amendment and the broad scope of freedom of speech and association that fills it out, and indeed the provision of the Fifth Amendment against compelled self-incrimination, all manifest a solemn respect for freedom of conscience vis-à-vis the law and the government.").

Braswell's underlying rationales were questionable in 1988 and have been eroded by time and experience. The so-called "agency rationale" cannot survive the proliferation of small businesses using corporate and quasi-corporate forms. To continue to insist that

juries will attribute a custodian's testimonial acts in compiling and producing records only to the corporation rather than the individual requires an act of willful ignorance. When only one natural person is associated with a corporate entity, any rational juror will necessarily understand that this person compiled the records. There is literally no alternative.

Braswell's "law enforcement rationale" has aged worse. Allowing custodians to assert the Fifth Amendment privilege where the act of production is personally incriminating may of course sometimes limit "the Government's efforts to prosecute 'white-collar crime.'" *Braswell*, 487 U.S. at 115. But strict adherence to constitutional protections of individual liberties "is not a bug to be fixed by this Court, but a calculated feature of the constitutional framework." *N.L.R.B. v. Canning*, 573 U.S. 513, 601 (2014). Of course, police would obtain more confessions without *Miranda* warnings, and more evidence without a warrant requirement, but this Court continues to safeguard those rights because the Constitution demands it. Moreover, the government has an alternative avenue to obtain this same information without trampling on constitutional rights: it could present the facts supporting probable cause to a judge and obtain a search warrant, thus obviating the need for anyone to engage in any act of production at all. That way, the government can collect evidence against the entity without compelling any action, incriminating or otherwise, by any individual. By allowing the government to circumvent the privilege against self-incrimination *and* the warrant process, *Braswell* undermines key constitutional safeguards against government infringement of individual liberty.

B. *Braswell*'s influence is both broad and deep.

As this case illustrates, *Braswell* deprives corporate custodians of records of their Fifth Amendment rights when served with grand jury subpoenas—a concern that arises in both federal and state proceedings nationwide. But *Braswell* is not limited to grand jury subpoenas; federal and state courts have interpreted it broadly to apply to all government demands for "corporate records," regardless of the specific procedural tool used to compel their production. *See, e.g.*, *United States v. Blackman*, 72 F.3d 1418, 1426–27 (9th Cir. 1995) (citing *Braswell*, 487 U.S. at 111–12) (IRS summons); *State v. Brelvis Consulting LLC*, 436 P.3d 818, 827, ¶¶ 27–32 (Wash. Ct. App. 2018) (citing *Braswell*, 487 U.S. at 102) (civil investigative demand issued by state attorney general).

Furthermore, *Braswell* has had significant influence over state and international law. The case has been cited by courts in 26 different states, as well as courts in Puerto Rico, the Virgin Islands, Canada, Australia, and Hong Kong.[2] And many courts simply adopt

[2] *See State v. Far W. Water & Sewer Inc.*, 228 P.3d 909, 931, ¶ 77 (Ariz. Ct. App. 2010); *Craib v. Bulmash*, 777 P.2d 1120, 1127 n.13 (Cal. 1989); *People ex rel. Pub. Utils. Comm'n v. Entrup*, 143 P.3d 1120, 1123 (Colo. App. 2006); *Lieberman v. Reliable Refuse Co.*, 563 A.2d 1013, 1016 (Conn. 1989); *In re Dole Food Co., Inc. Stockholder Litig.*, 110 A.3d 1257, 1261 n.1 (Del. Ch. 2015); *Federated Inst. for Patent & Trademark Registry v. State Office of Att'y Gen.*, 979 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 2008); *Thompson v. State*, 670 S.E.2d 152, 154 (Ga. Ct. App. 2008); *Trepina v. Chuhak & Tecson, P.C.*, 2016 IL App (1st) 150423-U, at *5, ¶ 22 (Ill. App. Ct. Mar. 23, 2016) (unpublished); *Lee v. Ryan*, No. 2002-SC-1057-MR, 2003 WL 21357609, at *4 (Ky. Sept. 18, 2003) (unpublished); *In re W. Feliciana Par. Grand Jury*, 530 So. 2d 552, 552 (La. 1988) (mem. op.); *Jung Chul Park v. Cangen*

Braswell as the law of their jurisdiction without significant discussion. *See, e.g.*, *Verniero v. Beverly Hills Ltd.*, 719 A.2d 713, 715 (N.J. Super Ct. App. Div. 1998) (adopting *Braswell* for New Jersey's "common law privilege against self-incrimination"); *R.I. Grand Jury v. Doe*, 641 A.2d 1295, 1296–97 (R.I. 1994) (adopting *Braswell* for Rhode Island's corresponding state constitutional privilege against self-incrimination).

Corp., 7 A.3d 520, 522 (Md. 2010); *Commonwealth v. Burgess*, 688 N.E.2d 439, 446–48 & n.4 (Mass. 1997); *Verniero v. Beverly Hills, Ltd.*, 719 A.2d 713, 715 (N.J. Super. Ct. App. Div. 1998); *Doe v. State ex rel. Governor's Organized Crime Prevention Comm'n*, 835 P.2d 76, 79, ¶ 14 & n.1 (N.M. 1992); *Altman v. Bradley*, 184 A.D.2d 131, 135 (N.Y. App. Div. 1992); *Tillery Envtl. LLC v. A & D Holdings, Inc.*, No. 17cv56525, 2018 WL 802515, at *14 (N.C. Super. Ct. Feb. 9, 2018) (unpublished); *State v. Aronson*, 633 N.E.2d 599, 601–03 (Ohio Ct. App. 1993); *Pellegrino v. State ex rel. Cameron Univ. ex rel. Bd. of Regents of State*, 63 P.3d 535, 537, ¶ 5 (Okla. 2003); *Estate of Baehr*, 596 A.2d 803, 806 (Pa. Super. Ct. 1991); *R.I. Grand Jury v. Doe*, 641 A.2d 1295, 1295–97 (R.I. 1994); *State ex rel. Gibbons v. Smart*, No. W2007-9768-COA-R3-CV, 2008 WL 4491729, at *7 n.10 (Tenn. Ct. App. Oct. 8, 2008) (unpublished); *In re Russo*, 550 S.W.3d 782, 788 & n.2 (Tex. App. 2018); *Brixen & Christopher Architects, P.C. v. State*, 29 P.3d 650, 665 n.3 (Utah Ct. App. 2001) (Davis, J., dissenting); *Brelvis Consulting LLC*, 436 P.3d at 824, 827, ¶¶ 11–12, 27–32 & n.2; *State v. Beard*, 461 S.E.2d 486, 501 (W. Va. 1995); *State v. Ridderbush*, 498 N.W.2d 912, at *3 (Wis. Ct. App. Dec. 15, 1992) (unpublished); *see also Exparte Secretario De Hacienda Del Estado Libre Asociado De P.R.*, No. KJV2004-0091 (604), 2005 WL 609886, at *5 (P.R. Cir. Jan. 12, 2005); *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 207 (2009) (Swan, J., dissenting); *Andar Transport Pty Ltd v Brambles Ltd*, (2004) 217 CLR 424 nn. 68, 70–71 (Austl.); *Nat'l Fin. Servs. Corp. v. Wolverton Sec. Ltd.*, [1998] 46 B.C.L.R. (3d) 275, ¶ 15 (Can.); *Salt & Light Dev. Inc. & Others v. SJTU Sunway Software Indus. Ltd.*, [2006] 2 H.K.L.R.D. 279, 293, ¶ 50 (H.K. C.F.I.).

Even when other jurisdictions consciously depart from federal law, a "decision establishing a given legal doctrine can . . . have an anchoring effect on later decision makers, who will take the status quo as their point of departure (even when they ultimately decide to change it) and who may also have internalized or at least acclimated to that status quo." Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 Miss. L.J. 1017, 1027 (2012). Thus, the parallel development of state and international law is "shaped in some respects by the presence of the doctrinal frame" established in *Braswell*. *Id.*[3]

C. Since *Braswell*, there has been both an LLC revolution and an evolution in the rights of closely held corporations.

LLCs have proliferated since this Court decided *Braswell*. In 1988, "only two states had LLC statutes and the limited liability entity revolution had only just begun." Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment*

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[3] In *Commonwealth v. Doe*, for example, the Supreme Judicial Court of Massachusetts declined to follow *Braswell* in construing the corresponding state constitutional provision against self-incrimination. 544 N.E.2d 860, 862 (Mass. 1989). There, the Commonwealth had argued for the wholesale adoption of the *Braswell* framework. *Id.* The Massachusetts high court ultimately declined to adopt *Braswell*, rejecting the "fiction" that a corporate "custodian acts only as a representative, and that his act, therefore, is deemed to be one of the corporation and not of the individual." *Id.* Even so, *Braswell* anchored the discussion by providing the starting point of the analysis, much like a presumptive rule that applies unless its reasoning is rejected by the court.

Privilege?, 2005 Colum. Bus. L. Rev. 1, 79 (2005). By 1996, the form was common enough that the National Conference of Commissioners on Uniform State Laws (NCCUSL) found it worthwhile to promulgate a Uniform Limited Liability Company Act, followed by a revised version in 2006. Today, "[a]ll states and the District of Columbia have adopted LLC statutes, and many LLC statutes have been substantially amended several times." NCCUSL, *Prefatory Note to 2006 Uniform Limited Liability Company Act* at 1 (2013). In addition, "LLC filings are significant in every U.S. jurisdiction, and in many states new LLC filings approach or even outnumber new corporate filings on an annual basis." *Id.* "Single-member LLCs, once suspect because of novel and uncertain tax status, are now popular both for sole proprietorships and as corporate subsidiaries." *Id.*

The Arizona experience with LLCs is instructive. Arizona adopted its first LLC statute in 1992. *See* Ariz. Laws 1992, ch. 113, § 2. That statute "was premised on the assumption that such companies would be used in relatively few situations—primarily for tax purposes." John L. Hay et al., *An Overview*, Arizona Attorney, 55-Mar. Ariz. Att'y 16 (Mar. 2019). "That assumption proved incorrect, as LLCs became wildly popular . . . ." *Id.* Recognizing this reality, Arizona recently substantially overhauled its LLC statute. *See* Ariz. Laws 2018, ch. 168, § 4.

The LLC is now by a wide margin the dominant corporate entity in Arizona. In 2016, according to publicly available Arizona Corporation Commission statistics, LLCs represented 79 percent of existing domestic corporate entities in good standing in the state (666,884/843,800); and if professional limited liability companies are included, that number grows to

81 percent (690,891/843,800).[4] In 2017, the shares swelled to 80 percent (721,906/895,349) and 83 percent (748,596/895,349), respectively.[5] And in 2018, the numbers jumped to 85 percent (758,342/890,764) and 88 percent (787,072/890,764).[6] This corporate landscape would be virtually unrecognizable to the *Braswell* Court.

At the same time, there has been a steady evolution, reflected in this Court's opinions, in the modern understanding of the relationship between individual rights and use of the corporate form. For instance, this Court recognized in 2010 that limitations on political speech "based on the speaker's corporate identity" transgressed "ancient First Amendment principles," and that "stare decisis does not compel the continued acceptance" of that result. *Citizens United v. FEC*, 558 U.S. 310, 318–19 (2010) (citation omitted). And in 2014, it recognized that "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of the[] people" associated with the corporation. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). Under the modern view, then, an individual does not necessarily waive fundamental constitutional rights by using a corporate form.

[4] Statistical Information for January 1, 2016 to December 31, 2016, Arizona Corporation Commission, available at: https://ecorp.azcc.gov/Statistics/Index (last visited May 5, 2019).

[5] Statistical Information for January 1, 2017 to December 31, 2017, Arizona Corporation Commission, available at: https://ecorp.azcc.gov/Statistics/Index (last visited May 5, 2019).

[6] Statistical Information for January 1, 2018 to December 31, 2018, Arizona Corporation Commission, available at: https://ecorp.azcc.gov/Statistics/Index (last visited May 5, 2019).

Braswell is at odds with this modern understanding. Its categorical approach assumes that an individual automatically forfeits core constitutional protections simply by electing to use certain corporate forms. As a result, under *Braswell*, courts force compliance with a subpoena without weighing the cost to the "rights of the[] people" associated with the corporate entity. *Id.* The corporate form is essentially outcome determinative. If that were still a valid principle, *Citizens United* and *Hobby Lobby* would not have come out as they did.

D. Only this Court can address the *Braswell* problem.

This Court has said more than once that it is not the lower courts' role to find Supreme Court precedent tacitly overruled when the underlying "doctrine ha[s] been challenged." *See, e.g.*, *United States v. Salvucci*, 448 U.S. 83, 86 (1980). Instead, whether this Court's precedent has been overruled "is an issue which the Supreme Court must resolve." *Id.* (citation omitted).

Here, the district court (Pet. App. A at 4a–6a) and the Ninth Circuit (Pet. App. C at 18a) made clear that the lower courts "remain bound by *Braswell* until the Supreme Court says otherwise," and that it is not the role of the lower courts "to question its continuing validity or persuasiveness." The Petition does not allege that the lower courts misapplied *Braswell*. Instead, it squarely asks this Court "to limit or overturn *Braswell* as it applies to custodians of small family businesses, such as limited liability and pass-through entities." (Pet. at 1.) The time has come for this Court to bring its Fifth Amendment jurisprudence in line with its modern interpretation of closely related issues involving closely held corporations.

II. THIS CASE PRESENTS A RARE PRISTINE VEHICLE TO REVIEW THE *BRASWELL* PROBLEM.

A. The *Braswell* problem consistently evades this Court's review.

Although dozens of lower court opinions apply *Braswell*—the case has been cited in every circuit[7] and in many states[8]—the issue rarely makes it to this Court. Indeed, the last time a petition for writ of certiorari squarely presented the *Braswell* issue was over 25 years ago, well before the twin sea changes described above. *See* Petition for Writ of Certiorari, *Stone v. United States*, No. 92-1143, 1993 WL 13075346, at **7–11 (Jan. 4, 1993), *certiorari denied*, 507 U.S. 1029 (1993). Although since then the issue has arisen in multiple cases resulting in published opinions by the courts of appeals, *see, e.g.*, *United*

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[7] *See In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 528–31 (9th Cir. 2018) (per curiam); *United States v. Stegman*, 873 F.3d 1215, 1224–27 (10th Cir. 2017); *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 258–63 & n.2 (3d Cir. 2015); *In re Special Feb. 2011-1 Grand Jury Subpoena Dated Sept. 12, 2011*, 691 F.3d 903, 906 (7th Cir. 2012); *Account Servs. Corp. v. United States*, 593 F.3d 155, 157–59 (2d Cir. 2010) (per curiam); *In re Grand Jury Subpoena John Doe, No. 05GJ1318*, 584 F.3d 175, 184 (4th Cir. 2009); *Amato v. United States*, 450 F.3d 46, 48–53 & nn. 2–4 (1st Cir. 2006); *United States v. Hubbell*, 167 F.3d 552, 575–76 (D.C. Cir. 1999) (per curiam); *In re Grand Jury Witnesses*, 92 F.3d 710, 712–13 (8th Cir. 1996); *In re Grand Jury Subpoena Dated Apr. 9, 1996 v. Smith*, 87 F.3d 1198, 1200–03 (11th Cir. 1996); *In re Grand Jury Proceedings*, 55 F.3d 1012, 1013 (5th Cir. 1995) (per curiam); *In re Custodian of Records of Variety Distrib., Inc.*, 927 F.2d 244, 246–51 (6th Cir. 1991). The sole exception is the Federal Circuit, which makes sense given the specialized nature of its docket.

[8] *See* footnote 2, above.

States v. Stegman, 873 F.3d 1215 (10th Cir. 2017); *Account Servs. Corp. v. United States*, 593 F.3d 155 (2d Cir. 2010) (per curiam); *Amato v. United States*, 450 F.3d 46 (1st Cir. 2006), counsel is not aware of any other petition for certiorari since *Stone* that has squarely and cleanly presented the *Braswell* issue for review.[9]

The dearth of certiorari petitions on this relatively common issue is hardly surprising. First, a petitioner must obtain a stay or be willing to incur a contempt finding to facilitate appellate review of this issue; if he complies with the subpoena to avoid incurring significant fines or even imprisonment, *see* 18 U.S.C. § 401; 28 U.S.C. § 1826(a), there is nothing to appeal. Here, for instance, the district court found petitioner in civil contempt and sanctioned him $2,500 per day until he complied with the subpoenas; and if he did not comply within ten days, the Court would also "consider ordering the United States Marshal to take immediate custody" of him. (Pet. App. B at 10a–11a.) While the Court did agree to stay its contempt order pending appeal, it was under no obligation to do so. Thus, subpoena recipients usually face the choice of *certain* punishment for contempt often followed by eventual compliance anyway, or only *possible* punishment based on immediate compliance and production. No surprise that most choose immediate compliance.

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[9] In 2001, a petition for writ of certiorari presented a related question: "Whether a former employee could successfully assert a Fifth Amendment act-of-production privilege to avoid producing documents of a closed corporation." *See* Petition for a Writ of Certiorari, *Slonimsky v. United States*, No. 01-0837, 2001 WL 34117353, at *i (Oct. 4, 2001). The petition sought review of an unpublished summary affirmance by the Eleventh Circuit, and this Court denied certiorari. *See* 534 U.S. 1131 (2002).

Second, the closely held corporations or LLCs that implicate the *Braswell* problem are almost by definition small businesses. Their owners often lack the resources to mount a vigorous challenge to a show of governmental power, and subpoenas are often issued before there is any proceeding for which even an indigent person would be entitled to appointed representation. Legal bills aside, absent a discretionary stay, contempt sanctions can run thousands of dollars per day. Given the low odds of obtaining a certiorari grant, the rational economic choice for a business owner who has lost in the court of appeals is often to fold rather than seek certiorari.

Third, the government routinely uses the threat of serious sanctions to leverage settlements before cases reach this point. While the target of a questionable subpoena may initially resist, once contempt sanctions are on the table or have been imposed and are continuing to accrue, the government has a very strong negotiating position, even when the target has a potentially meritorious legal argument.

Finally, because grand jury investigations are conducted in secret, questions about what occurs in them are generally not a part of the public consciousness in the way that the rights of criminal defendants in public trials or interactions with police are. This Court has "consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). Moreover, a corporate custodian of records responding to a grand jury subpoena will in many cases not know whether he might personally be under investigation. *See, e.g.*, *McKeever v. Barr*, 920 F.3d 842, 850 (D.C. Cir. 2019) (construing the narrow exceptions to grand

jury secrecy found in Fed. R. Crim. P. 6(e) to be exhaustive).

This case made its way through the courts despite these disincentives. This likely happened in part because the government, perhaps inadvertently, revealed the potential significance of the Fifth Amendment issues early on in the proceedings. The government first attempted to obtain documents via subpoenas issued directly to Petitioner. Then, after Petitioner asserted his Fifth Amendment rights, the government issued new subpoenas to Petitioner as custodian of records for the twelve corporate entities. (*See* Pet. at 6.) This unusual sequence of events demonstrates the practical impact of *Braswell* in a way that typically remains hidden during secret grand jury proceedings.

B. The issue is pristinely presented in this case.

In addition to beating the odds to get to this Court, this case offers the Court a clean vehicle to revisit *Braswell*. The district court agreed to stay enforcement of the contempt order while Petitioner appealed it. (Pet. App. B at 11a.) Although the Ninth Circuit declined to stay its mandate while Petitioner pursued relief from this Court, the Government agreed, and the Ninth Circuit ruled, that the challenge to the subpoenas remains live despite forced compliance. (Pet. at 7 n.8.) In addition, the Ninth Circuit's opinion directly addresses the legal issues and confirms that only this Court can address Petitioner's primary argument. (Pet. App. C at 18a.)

The uncomplicated record here is also well suited to resolution of the issue. Each of the twelve subpoenaed entities is either a one- or two-member LLC or

S-Corporation. The involvement of single-member LLCs makes the *Braswell* question unavoidable, as it is both factually and theoretically impossible for anyone else to complete the "act of production." And the presence of two-member entities provides the Court the opportunity to fully develop the contours of the rule, given that a jury would likely assume that the Petitioner produced the records. A decision in this case can thus completely and coherently resolve the question of when an individual or individuals operating a small corporate entity may assert an act-of-production privilege.

Finally, the government's actions in issuing and withdrawing subpoenas directed at Petitioner before deciding to pursue Petitioner through his small corporate entities makes this case an apt illustration of how illogical it is to insist on a bright line between corporate entities and the people who run them. On this record, there can be little doubt that the government had its sights set on Petitioner all along and issued the corporate subpoenas precisely *because* Petitioner asserted his personal Fifth Amendment rights and *because* complying with the subpoenas could incriminate Petitioner. The government of course could have obtained a search warrant to obtain the records. Otherwise, if all it really wanted was the corporate records, the government could have granted Petitioner use immunity under 18 U.S.C. §§ 6002–6003, in which case it could have obtained the documents long ago without having to compel compliance under *Braswell*. *See Doe*, 465 U.S. at 614–17. The fact that the government did not do so speaks volumes.

While it might have made sense to restrict application of the Fifth Amendment to natural persons when corporate forms were uniformly controlled by groups,

making them truly "collective" entities, today, it is no longer safe to assume that there is anything collective about an LLC or an S-Corporation. At the very least, lower courts must be given the opportunity to review the facts and circumstances of each individual case to resolve the tension between the collective entity doctrine and the act-of-production doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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