No. 18-___

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

PETITION FOR WRIT OF CERTIORARI [REDACTED]

CLARK L. DERRICK
RHONDA ELAINE NEFF
KIMERER & DERRICK, P.C.
1313 E. Osborn Road
Suite 100
Phoenix, Arizona 85014
(602) 279-5900
CLD@kimerer.com
Rneff@kimerer.com

LORI L. VOEPEL
Counsel of Record
JONES, SKELTON & HOCHULI, P.L.C.
40 N. Central Avenue
Suite 2700
Phoenix, Arizona 85004
(602) 263-1700
lvoepel@jshfirm.com

Counsel for Petitioner

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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.

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[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

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[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 ([redacted]) 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.*, [redacted] 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 [redacted] (AZ) is now wholly owned by [redacted] (DE), 98% of which is owned by Petitioner and his wife, and 2% of which is owned by [redacted] (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,

CLARK L. DERRICK
RHONDA ELAINE NEFF
KIMERER & DERRICK, P.C.
1313 E. Osborn Road
Suite 100
Phoenix, Arizona 85014
(602) 279-5900
CLD@kimerer.com
Rneff@kimerer.com

LORI L. VOEPEL
Counsel of Record
JONES, SKELTON & HOCHULI, P.L.C.
40 N. Central Avenue
Suite 2700
Phoenix, Arizona 85004
(602) 263-1700
lvoepel@jshfirm.com

Counsel for Petitioner

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