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

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

AMY KNIGHT
KUYKENDALL & ASSOCIATES
531 South Convent Avenue
Tucson, Arizona 85701
(520) 792-8033
amyknight@kuykendall-law.com

JOSEPH N. ROTH
Counsel of Record
PHILLIP W. LONDEN
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, Arizona 85012
(602) 640-9000
jroth@omlaw.com
plonden@omlaw.com

{Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DAVID J. EUCHNER
PIMA COUNTY PUBLIC DEFENDER'S OFFICE
33 North Stone Avenue
21st Floor
Tucson, Arizona 85701
(520) 724-6800
david.euchner@pima.gov

KAREN R. HARNED
LUKE A. WAKE
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street NW
Suite 200
Washington, DC 20004
(202) 314-2061
karen.harned@nfib.org
luke.wake@nfib.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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

---

[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*

[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*

---

[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.

---

[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,

AMY KNIGHT
KUYKENDALL & ASSOCIATES
531 South Convent Avenue
Tucson, Arizona 85701
(520) 792-8033
amyknight@
kuykendall-law.com

DAVID J. EUCHNER
PIMA COUNTY PUBLIC
DEFENDER'S OFFICE
33 North Stone Avenue
21st Floor
Tucson, Arizona 85701
(520) 724-6800
david.euchner@pima.gov

JOSEPH N. ROTH
Counsel of Record
PHILLIP W. LONDEN
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, Arizona 85012
(602) 640-9000
jroth@omlaw.com
plonden@omlaw.com

KAREN R. HARNED
LUKE A. WAKE
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street NW
Suite 200
Washington, DC 20004
(202) 314-2061
karen.harned@nfib.org
luke.wake@nfib.org

Counsel for Amici Curiae

May 9, 2019