No. 18-1207

In the Supreme Court of the United States

IN RE TWELVE GRAND JURY SUBPOENAS

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

BRIEF FOR THE UNITED STATES IN OPPOSITION (REDACTED FOR PUBLIC FILING)

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QUESTIONS PRESENTED

1. Whether the longstanding "collective entity" doctrine applied in *Braswell* v. *United States*, 487 U.S. 99 (1988), should be overruled.

2. Whether the corporate entities in which petitioner holds an interest qualify as collective entities.

3. Whether the corporate entities in which petitioner holds an interest should be exempted from complying with a subpoena for corporate records on the theory that a jury would inevitably conclude that petitioner produced the records.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Ariz.):

In re Twelve Grand Jury Subpoenas, No. 17-mc-56 (Oct. 20, 2017) (contempt order)

[redacted]

United States Court of Appeals (9th Cir.):

In re Twelve Grand Jury Subpoenas, No. 17-17213 (Nov. 8, 2018) (affirming contempt order)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-22a) is published at 908 F.3d 525. The opinion of the district court (Pet. App. 1a-9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2018. On January 29, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 13, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following petitioner's refusal to comply with subpoenas issued by a grand jury in the District of Arizona, the district court held petitioner in contempt. Pet. App. 10a-11a. The court of appeals affirmed. *Id.* at 14a.

1. In 2017, a grand jury issued subpoenas directed to the custodian of records of 12 business entities in which petitioner holds an interest. Pet. App. 1a. The

subpoenas did not name any particular individual as the person required to produce the documents and were instead directed to a custodian of records for each entity. See *id.* at 14a, 27a; Gov't C.A. Br. 5. The subpoenas were served on petitioner's counsel, who had previously agreed to accept service on behalf of the entities. Gov't C.A. Br. 5.

The subpoenas sought production of financial records of the 12 entities. Pet. App. 1a. Ten of the 12 entities had more than one shareholder or member. Gov't C.A. Br. 5-6. The two entities for which petitioner was sole shareholder were law firms, incorporated as professional corporations, that had failed to pay employment taxes withheld from employee paychecks. *Id.* at 4-5. The flow of funds between the law firms and the various other business entities was relevant to the grand jury's ongoing investigation of potential criminal violations, including tax offenses. Pet. App. 14a; Gov't C.A. Br. 4.

2. The district court granted the government's motion to compel compliance with the subpoenas. Pet. App. 1a-9a. The court observed that "[u]nder the collective entity doctrine, * * * corporations and other collective businesses such as LLCs may not invoke the Fifth Amendment privilege against self-incrimination, as the privilege is a personal one enjoyed only by natural individuals." *Id.* at 3a. The court also relied on *Braswell* v. *United States*, 487 U.S. 99 (1988), which "unequivocally held that a custodian of business records may not resist a subpoena for such records on the ground that the act of production may personally incriminate him in violation of the Fifth Amendment." Pet. App. 5a. The court noted that petitioner did "not

dispute this case law or application of the collective entity doctrine to businesses such as LLCs" and had instead argued only that the Supreme Court might revisit the doctrine "if faced with the issue in the future." *Id.* at 4a. The district court declined to "ignore binding precedent," *id.* at 6a, and directed that petitioner "or another custodian of records designated by him" must comply with the subpoenas, *id.* at 9a.

After petitioner informed the district court that he wished to appeal the decision on the motion to compel, the court facilitated his appeal by entering a contempt order. Pet. App. 10a-11a.

3. The court of appeals affirmed. Pet. App. 12a-22a. The court first considered petitioner's argument "that *Braswell* is no longer good law in light of the Supreme Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, [573 U.S. 682] (2014), and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)." Pet. App. 17a-18a. The court was "skeptical that either case has any bearing on the collective entity rule as articulated and applied in *Braswell*." *Id.* at 18a. And the court explained that, in any event, *Braswell* was directly applicable binding precedent. *Ibid.*

The court of appeals also rejected petitioner's argument that the corporate entities in which he holds an interest should be excused from complying with the subpoenas, which was based on petitioner's allegation that a jury would inevitably conclude that petitioner produced the records. Pet. App. 19a-22a. The court observed that such an exception "would be inconsistent with the reasoning and holding of *Braswell*" because "*Braswell* reiterated the longstanding principle that 'no privilege can be claimed by the custodian of corporate records, *regardless of how small the corporation may*

be.'" *Id.* at 19a (quoting *Braswell*, 487 U.S. at 108). The court explained that "*Braswell* itself involved two corporations entirely owned or held (either directly or indirectly) by Petitioner Braswell, with corporate boards consisting only of Braswell, his wife, and his mother," yet this Court "[n]evertheless * * * held that Braswell could not assert a Fifth Amendment privilege to resist producing corporate records on the ground that it would incriminate him personally." *Id.* at 19a-20a.

The court of appeals considered petitioner's reliance on a footnote in *Braswell* that left open the question whether a custodian must "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." 487 U.S. at 118 n.11; see Pet. App. 19a-20a. But the court found that the "reasoning and holding of *Braswell*" would ultimately foreclose such an exception, which would in any event lack "practical import." Pet. App. 19a-20a. The court observed that *Braswell* prohibits evidentiary use of a custodian's individual act of production by identifying him as the custodian, but contemplates that a jury may reasonably infer from a defendant's "prominent position within the corporation that produced the records, * * * that [the defendant] had possession of the documents or knowledge of their contents." *Id.* at 20a (quoting *Braswell*, 487 U.S. at 118) (brackets in original). The court explained that "[i]n any situation where a jury would inevitably conclude that a defendant produced the records in question, the relevant nexus between the defendant and the documents" would separately lead the jury to permissibly conclude that the defendant possessed or knew of the documents. *Id.* at 21a. The court

accordingly reasoned that because the jury could reach the latter conclusion (that the defendant possessed or knew of the records), the former conclusion (that the defendant was also the individual who produced the documents) would be "irrelevant to the jury's assessment of guilt or innocence as to the charges in question." *Ibid.*

The court of appeals noted that all of its "sister circuits to consider this issue have reached the same conclusion." Pet. App. 21a. Because the court determined that records custodians for small, closely held corporations may not "resist a subpoena for a collective entity's records on Fifth Amendment grounds," *id.* at 22a, the court found it unnecessary to address the factual dispute between the parties about whether "a jury inevitably would conclude [petitioner] produced the records," *id.* at 19a n.4—and thus, whether petitioner would qualify for an exception if one were to exist.*

ARGUMENT

The court of appeals correctly applied the collective entity doctrine in this case. That doctrine was first articulated in 1906 in *Hale* v. *Henkel*, 201 U.S. 43 (1906), and has been repeatedly reaffirmed, including in *Braswell* v. *United States*, 487 U.S. 99 (1988). Petitioner nevertheless contends (Pet. 9-18) that this Court should

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* After the court of appeals denied petitioner's request for a stay of the mandate pending the resolution of his petition for a writ of certiorari, the companies in which petitioner holds an interest complied with the subpoenas. The government acknowledged below that such compliance would not moot this dispute. See *Church of Scientology* v. *United States*, 506 U.S. 9, 15-18 (1992). Petitioner has now been indicted on various tax and obstruction offenses. See [redacted]

grant review to reconsider *Braswell* as it applies to small, closely held corporate entities. But petitioner provides no sound basis for reconsidering the Court's collective entity doctrine, which has been the law for more than 100 years. Petitioner alternatively contends (Pet. 18-20) that small, closely held corporate entities do not qualify as collective entities. Review of that alternative contention is not warranted because it was not pressed or passed upon below and lacks merit in any event.

Petitioner finally contends (Pet. 20-23) that an exception to the collective entity doctrine should exist when the jury would inevitably conclude that a particular individual produced a corporate entity's records. Petitioner's request for such an exception lacks merit, has produced no conflict in the lower courts, and would not benefit him on the facts of this case. The petition for a writ of certiorari should be denied.

1. a. This Court has observed that the "collective entity" rule that "artificial entities are not protected by the Fifth Amendment" has a "lengthy and distinguished pedigree." *Braswell*, 487 U.S. at 102, 104. For over a century, the Court has recognized that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *United States* v. *White*, 322 U.S. 694, 698 (1944); see *Hale*, 201 U.S. at 74 ("[T]here is a clear distinction * * * between an individual and a corporation, and * * * the latter has no right to refuse to submit its books and papers for an examination at the suit of the State."). "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." *White*, 322 U.S. at 699.

It is similarly "well settled" under the collective entity doctrine "that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Bellis* v. *United States*, 417 U.S. 85, 100 (1974). "Since no artificial organization may utilize the personal privilege against compulsory self-incrimination," the Court has recognized "that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege." *Id.* at 90; see also, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911); *Dreier* v. *United States*, 221 U.S. 394, 400 (1911).

Braswell applied these principles to reject the claim of a small business owner that his act of producing his corporate entities' records would incriminate him because the corporations were "so small that [they] constitute[d] nothing more than [his] alter ego." 487 U.S. at 101-102. The Court summarized the long line of decisions recognizing that "a corporate custodian * * * may not resist a subpoena for corporate records on Fifth Amendment grounds." *Id.* at 108-109. "From *Wilson* [in 1911] forward," *Braswell* emphasized, "the Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity." *Id.* at 109-110. And because "a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government, the custodian's act of production is not deemed a personal act, but rather an act of the corporation." *Id.* at 110. *Braswell* thus explained that "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of

privilege by the corporation—which of course possesses no such privilege." *Ibid.*

b. Petitioner's argument (Pet. 8-18) that the Court should reconsider the collective entity doctrine, and overrule *Braswell*, does not merit review. Petitioner identifies no "special justification" to warrant reconsideration of the collective entity doctrine. *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted).

Petitioner primarily contends that the doctrine's rationale "is inconsistent with the Court's increased recognition of constitutional rights for closely-held businesses," Pet. 11 (emphasis omitted), citing *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310 (2010), and *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). But those decisions are inapposite. In *Citizens United*, the Court invalidated a statute that burdened the speech rights of a corporation only after citing a long line of decisions "recogniz[ing] that First Amendment protection extends to corporations." 558 U.S. at 342. The Court emphasized that it had previously "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343 (citation omitted). In the self-incrimination context, in contrast, this Court has recognized for more than a century that the Fifth Amendment privilege protects only natural persons. The analysis of a different constitutional provision with a different history in *Citizens United* provides no support to reconsider the collective entity doctrine, to which the Court has ascribed a "lengthy and distinguished pedigree." *Braswell*, 487 U.S. at 104.

Nor does the analysis in *Hobby Lobby* call the collective entity doctrine into question. The Court there concluded that corporations fell within the protections of the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb *et seq.*), based on the statute's text and history. 573 U.S. at 706-708. No similar analysis applies to the Fifth Amendment's Self-Incrimination Clause, which has consistently been interpreted not to protect artificial entities. And petitioner's argument that the Court should create an exception only for small, closely held corporations is in tension with the analysis in *Hobby Lobb*y declining to distinguish between different types of corporations when determining RFRA's reach. *Id.* at 708.

Petitioner also relies (Pet. 11, 13) on Justice Kennedy's dissent in *Braswell*. But that dissent began by emphasizing the "common ground" that "[a]ll accept the longstanding rule that labor unions, corporations, partnerships, and other collective entities have no Fifth Amendment self-incrimination privilege" and "that a natural person cannot assert such a privilege on their behalf." 487 U.S. at 120; see *id.* at 123 (treating the collective entity doctrine as settled and observing that "since *Hale* v. *Henkel*, * * * it has been understood that a corporation has no Fifth Amendment privilege and cannot resist compelled production of its documents on grounds that it will be incriminated by their release"). Although the dissent would have permitted a corporate custodian to assert his *individual* right against compelled self-incrimination based on his act of production, *id.* at 124, the dissent provides no support for petitioner's claim that this Court should reverse more than 100 years of precedent and permit a small,

closely held corporation to claim protection against self-incrimination under the Fifth Amendment.

Petitioner additionally asserts (Pet. 15-18) that tension exists between the collective entity doctrine and this Court's decisions in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *United States* v. *Hubbell*, 530 U.S. 27 (2000). But those decisions involved individuals—not corporate entities—who claimed that they would be incriminated by the act of producing documents in response to a subpoena. Because the individuals enjoyed Fifth Amendment protection and were producing documents in an individual rather than a representative capacity, those cases do not call the collective entity doctrine into question. Indeed, *Braswell* post-dated *Fisher* and expressly rejected an argument that *Fisher*'s act-of-production analysis undermined the collective entity doctrine. *Braswell*, 487 U.S. at 109-110; see, *e.g.*, *id.* at 113 ("[T]he lesson of *Fisher* is clear: A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds."). Similarly, courts have recognized that *Hubbell*'s act-of-production analysis has no bearing on the collective entity doctrine. See *e.g.*, *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 262-263 (3d Cir. 2015); *Armstrong* v. *Guccione*, 470 F.3d 89, 98 (2d Cir. 2006), cert. denied, 552 U.S. 989 (2007); *Amato* v. *United States*, 450 F.3d 46, 49-53 (1st Cir. 2006).

Finally, petitioner argues (Pet. 9-11) that the Court should reconsider the collective entity doctrine because the number of LLCs has increased since *Braswell* was decided. But this Court has expressly considered the application of the collective entity doctrine to small, closely held corporate entities and concluded that artificial entities cannot claim a Fifth Amendment privilege

"regardless of how small the corporation may be." *Braswell*, 487 U.S. at 108 (quoting *Bellis*, 417 U.S. at 100). Indeed, *Braswell* itself involved closely held corporations with a single shareholder. *Id.* at 101. And the Court determined, based on long-established precedent, that the principle that a corporate custodian acts in a representative rather than an individual capacity applies equally in that context. *Id.* at 109-110.

2. Petitioner separately seeks (Pet. 18-20) this Court's review of whether small, closely held corporations qualify as collective entities. But that issue is not properly before the Court because petitioner has raised it for the first time in his petition for a writ of certiorari. In the district court proceedings, petitioner did "not dispute * * * application of the collective entity doctrine to businesses such as LLCs." Pet. App. 4a. In the court of appeals, petitioner contended that a custodian should not be "compelled to produce a collective entity's records" if the jury "inevitably would conclude" that the particular custodian was responsible for the production, *id.* at 18a—but he never argued that his corporate entities were not collective entities in the first place. This Court's "traditional rule * * * precludes a grant of certiorari" to review an issue that "'was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994). Petitioner provides no justification for departing from that usual practice here.

Even if the argument were properly preserved, courts have uniformly rejected it. They have observed that a small, closely held corporation "is still a corporation, a state law-regulated entity that has a separate le-

gal existence from [its sole shareholder, director, officer, and employee] shielding him from its liabilities"—not a natural person. *United States* v. *Stone*, 976 F.2d 909, 912 (4th Cir. 1992) (per curiam), cert. denied, 507 U.S. 1029 (1993). This Court has previously emphasized that "no artificial organization may utilize the personal privilege against compulsory self-incrimination" because of the Court's "consistent view" that the privilege "should be 'limited to its historic function of protecting only the natural individual.'" *Bellis*, 417 U.S. at 89-90 (citation omitted). And petitioner identifies no decision holding that small, closely held corporations do not count as collective entities. See, *e.g.*, *United States* v. *Feng Juan Lu*, 248 Fed. Appx. 806, 807-808 (9th Cir. 2007) (rejecting the sole owner and operator's argument that "her LLCs are not collective entities" because the defendant was "acting in a representative capacity" as custodian and "intentionally took advantage of the corporate characteristics of the LLC structure" to ensure that "the businesses [would] be separate from her in the event of a lawsuit").

3. Petitioner finally argues (Pet. 20-23) that the Court should recognize an exception to the collective entity doctrine when a jury would inevitably conclude that a particular custodian produced the corporation's records. That contention is inconsistent with *Braswell*'s reasoning, has not been the subject of any conflicting decisions in the lower courts, and would in any event not provide petitioner relief on the facts of this case.

a. Petitioner relies (Pet. 20) on the footnote in *Braswell* that "le[ft] open the question" whether the collective entity doctrine applies when a "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." 487 U.S. at 118 n.11. But as the court of appeals observed, "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*." Pet. App. 19a. *Braswell* itself involved corporations that were entirely owned or held by Braswell, with corporate boards consisting only of Braswell, his wife, and his mother. See *ibid.* And the Court in *Braswell* specifically stated that the collective entity doctrine applied "regardless of how small the corporation may be." 487 U.S. at 108 (quoting *Bellis*, 417 U.S. at 100).

In addition, "in light of th[e] reasoning in the body of the *Braswell* opinion," the court of appeals was "unable to identify any situation in which the *Braswell* footnote would have any practical import." Pet. App. 20a. *Braswell* acknowledged the possibility that a corporate custodian's act of production could be personally testimonial in nature, and the Court therefore instructed that the government could "make no evidentiary use of the 'individual act' against the individual" custodian. 487 U.S. at 118. But the Court expressly contemplated that "if the defendant held a prominent position within the corporation that produced the records, the jury may * * * reasonably infer that [the defendant] had possession of the documents or knowledge of their contents." *Ibid.* The Court explained that such an inference was permissible "[b]ecause the jury is not told that the defendant produced the records"; instead, "any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in the case." *Ibid.*

The court of appeals here accordingly found the question left open in the *Braswell* footnote to be functionally academic. Pet. App. 21a. "In any situation where a jury would inevitably conclude that a defendant produced the records in question," the court observed, "the relevant nexus between the defendant and the documents would * * * result, first and foremost, from the defendant's role in the corporation." *Ibid.* "Given the obvious—and wholly permissible—inference that the defendant in such a case must have had possession of the documents or knowledge of their contents," the court reasoned, "the fact that a jury may also conclude that [the defendant] produced the documents would be irrelevant to the jury's assessment of guilt or innocence as to the charges in question." *Ibid.*

b. As petitioner acknowledges (Pet. 22), no conflict exists on the question whether an exception to *Braswell* applies if a jury would inevitably conclude that a particular custodian produced corporate records. Every circuit court to have considered that issue as applied to small, closely held corporate entities has rejected the contention. See Pet. App. 21a ("All of our sister circuits to consider this issue have reached the same conclusion."); see also, *e.g.*, *Amato*, 450 F.3d at 51 (1st Cir.); *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d 155, 158-159 (2d Cir. 2010) (per curiam); *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d at 261 (3d Cir.); *Stone*, 976 F.2d at 912 (4th Cir.); *Feng Juan Lu*, 248 Fed. Appx. at 808 (9th Cir.); *United States* v. *Roe*, 421 Fed. Appx. 881, 884-885 (10th Cir. 2011).

c. This case would in any event be an unsuitable vehicle for considering that issue, because petitioner has failed to establish as a factual matter that a jury would inevitably conclude that he produced records on behalf

of the corporate entities in which he holds an interest. Of the 12 corporate entities that received subpoenas, petitioner wholly owns only the two law firms. See Pet. App. 24a-26a; Gov't C.A. Br. 5-6. But those two entities were the ones being investigated for failing to pay employment taxes withheld from employee paychecks, necessarily meaning that the firms had employees who theoretically could have served as records custodians. See *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d at 261 ("It is hard to imagine a jury 'inevitably' concluding that [the sole practitioner in a medical practice] produced the records when the records were created while the Corporation employed other staff besides" the practitioner.).

Even if petitioner were the "sole shareholder, officer, and employee" of the entity, or the jury were effectively to view him as such based on his prominent role, it still would not inevitably conclude that he himself produced corporate records. *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d at 157. "For example, the jury might believe the Government obtained the documents entirely on its own, such as by conducting a search." *Id.* at 159. And "[e]ven if the jurors learned that the Government obtained the documents via a subpoena, they might infer that the corporation engaged a third party to search its records and make the production on its behalf." *Ibid.*; see Pet. App. 9a (directing that petitioner "or another custodian of records designated by him" comply with the subpoenas).

4. Finally, this Court's review is unwarranted for the independent reason that this case is in an interlocutory posture, which "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-283 & n.72 (10th ed. 2013). The Court should not depart from that general practice here.

The absence of a final judgment is especially significant in petitioner's case because there is no way to know whether or how the production of records by the corporate entities in response to the subpoenas might be used against petitioner in criminal proceedings. Accordingly, it is unclear whether and to what extent the court of appeals' decision will have any practical bearing on petitioner's criminal liability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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