PUBLIC SERVICE ANNOUNCEMENT: IF YOU OWN A CLOSELY HELD BUSINESS ENTITY, YOU HAVE WAIVED FIFTH AMENDMENT RIGHTS

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Most people are familiar with "pleading the Fifth." Most people understand it to mean they have "the right to remain silent," *Miranda v. Arizona*, 384 U.S. 436, 468 (1966), and that the government cannot force them to disclose incriminating information that could lead to their own indictment or conviction. *Williams v. Florida*, 399 U.S. 78, 111 (1970) (Black, J., concurring). What most people don't know, however, is that this right does not apply to most business-related activities. For example, the Supreme Court has held that corporations, partnerships, labor unions, and all "collective group[s]" with an "impersonal" character do not possess any privilege against self-incrimination.[1]

In its harshest opinion on this topic, the Supreme Court held 5-4 in *Braswell v. United States*, 487 U.S. 99, 108–14 (1988), that a corporation's sole shareholder could be forced to produce, compile, organize, and (by way of compelled testimony) authenticate his company's incriminating business records. "[T]he custodian of… entity records holds those documents in a representative rather than a personal capacity," the Court reasoned. *Id.* at 109-10. Thus, "the custodian's act of production is not deemed a personal act, but rather an act of the corporation," which has no Fifth Amendment privilege. *Id.* at 110. In other words, because businesses have no privilege against self-incrimination, and records custodians are mere extensions of their businesses, custodians forfeit that privilege while acting on behalf of the business.

What this means in real-world terms is that businesses and their records custodians can *never* resist government-issued subpoenas on Fifth Amendment self-incrimination grounds, regardless of how small the business may be and even if the individual custodian is the actual target of the investigation. *Braswell*, 487 U.S. at 108-10. Assume, for example, that you and your spouse decide to open a small business. You go to the Corporation Commission's website, fill out the necessary paperwork, and form Mom and Pop, LLC. Congratulations, you have just forfeited a fundamental constitutional right. The moment you filed your articles of organization with the Secretary of State's Office, you and your spouse, as the business's records custodians, surrendered your right to withhold any business-related documents from the government. *See id.* The IRS or criminal prosecuting agencies—without even a reasonable suspicion of wrongdoing—can serve you with a subpoena duces tecum and require you to produce, compile, and authenticate all of your business's records. If you refuse to comply, you will be held in contempt of court, meaning you could face serious fines and even jail time. In effect, under *Braswell*, the government can force small-business owners to create the exhibits that will be used against them at trial.

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In February 2019, Jones, Skelton & Hochuli, P.L.C., in collaboration with Jones Day, filed a Petition for a Writ of Certiorari with the United States Supreme Court, asking the Court to hear a case that would have overturned or limited *Braswell* as it applies to small, family-owned, closely held businesses. In October, the Court unfortunately denied this Petition—leaving in place, for now, the rule that businesses and their custodians do not enjoy a constitutional privilege against self-incrimination.

Under current Supreme Court precedent, such businesses have the right to engage in free speech, the right to freely exercise their religion, the right to freely associate with whom they choose, the right to be free from unreasonable government searches and seizures, the right not to be tried for the same crime more than once, the right to a jury trial, the right to equal protection under the law, and the right to due process of law.

In our Petition, we argued that it makes no sense to afford the owners of small businesses so many constitutional rights but to arbitrarily withhold Fifth Amendment rights without even requiring any type of waiver. As the Supreme Court recently explained in *Burwell v. Hobby Lobby Stores*, Inc., 134 S. Ct. 2751, 2768–69 (2014), small, family-owned businesses are often mere extensions of "the human beings who own, run, and are employed by them." And when rights are extended to such small businesses, "the purpose is to protect the rights of these *people*." *Id.* (emphasis added).[2] Unfortunately, the Court was not ready to address this discrepancy and will continue to withhold Fifth Amendment self-incrimination rights from the owners of small and family-owned businesses for the foreseeable future.

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1 *Wilson v. United States, 221 U.S. 361, 376, 385 (1911) (corporations); Bellis v. United States,* 417 U.S. 85, 101 (1974) (partnerships); *United States v. White*, 322 U.S. 694, 701 (1944) (labor unions and other "collective groups").

2 *See also Burwell*, , 134 S.Ct. at 2768 ("[E]xtending Fourth Amendment protections to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies.").