

**IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION ONE**

WILLIAM L. DORSEY,)	Arizona Court of Appeals
)	No. 1 CA-SA 15-0140
Plaintiff/Petitioner,)	
)	
v.)	Maricopa County Superior
)	Court No. TX2014-000757
THE HONORABLE CHRISTOPHER)	
WHITTEN, Judge of the SUPERIOR)	
COURT OF THE STATE OF ARIZONA,)	
in and for the County of MARICOPA,)	
)	
Respondent Judge,)	
)	
STATE OF ARIZONA, <i>ex rel.</i> , ARIZONA)	
DEPARTMENT OF ECONOMIC)	
SECURITY,)	
)	
Real Party In Interest.)	

**BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
IN SUPPORT OF WILLIAM DORSEY’S PETITION FOR SPECIAL ACTION**

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INTRODUCTION

The privilege against self-incrimination is among our most cherished and essential individual rights. The Superior Court refused to allow an individual the benefit of this privilege simply because the testimonial act the government sought to compel involved the records of a corporation he operated, despite the fact that there is no real dispute that the compelled act could incriminate him personally. The Superior Court thus failed to grasp the fundamentally personal nature of the privilege and failed to realize that United States Supreme Court precedent never required that outcome, and especially does not now after recent watershed decisions expanding the constitutional rights enjoyed by corporations and the people who operate them.

Accordingly, Arizona Attorneys for Criminal Justice (“AACJ”) writes in support of William Dorsey’s Petition for Special Action. AACJ urges this Court to accept jurisdiction and uphold Mr. Dorsey’s claim of privilege because this is an essential personal right, the appropriate exercise of which in the context of the act of production of corporate records has never been explained by any Arizona court. It is an issue of statewide importance that is sure to recur, and in light of the United States Supreme Court’s recent expansions of corporate constitutional rights, Arizona’s lower courts require this Court’s guidance to navigate this altered terrain.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals 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 defense lawyer.

AACJ offers this brief because the issue presented concerns the right of citizens to assert the privilege against self-incrimination, one of the bedrock protections of the Bill of Rights. The Tax Court ruling in this case essentially guts that right for any person who makes the business decision to operate a one-person business in the form of a corporation instead of as a sole proprietorship. Such an arbitrary distinction cannot withstand constitutional muster, and the Tax Court misapplied existing law in requiring Petitioner to produce the documents described in the subpoena duces tecum.

Furthermore, as will be shown in this brief, in recent years the United States Supreme Court has dramatically altered the landscape of "individual versus

corporation” jurisprudence such that decades-old cases cannot be said to carry the same precedential weight. Finally, Arizona courts have the power and the duty to offer expanded protections for its citizens and extend state constitutional provisions beyond their federal counterparts when federal law fails to provide just results; and this case provides an excellent opportunity for this Court to recognize that article II, section 10 of the Arizona Constitution should protect a person from giving evidence against himself.

ARGUMENTS

I. The Superior Court’s Ruling Does Not Respect the Essential and Personal Privilege Against Self-Incrimination.

The privilege against self-incrimination is deeply embedded in “the roots of our concepts of American criminal jurisprudence.” *Miranda v. Arizona*, 384 U.S. 436, 439 (1966). This right, along with the right to counsel, are “precious rights [that] were fixed in our Constitution only after centuries of persecution and struggle.” *Id.* at 442. The right “had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons. . . [s]o deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law.” *Brown v. Walker*, 161 U.S. 591, 596 (1896).

The United States Supreme Court has long recognized that this protection applies not only to oral testimony, but to the act of producing documents: “The act

of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena." *Curcio v. United States*, 354 U.S. 118, 125 (1957).

This protection, by its terms, does not depend on the person's role in the conduct under investigation, nor on the nature of the conduct. Rather, it requires only two things: that the testimony be *compelled*, and that it be *incriminating* of the person being compelled. *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005). Neither the Fifth Amendment nor the Arizona Constitution by its terms limits this right to testimony or testimonial acts committed in any particular capacity. Instead, as the Supreme Court has repeatedly emphasized, "the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person. . . ." *Couch v. United States*, 409 U.S. 322, 328 (1973).

Any given individual will, in his lifetime, occupy a significant number of roles: child, parent, employee, employer, spouse, and agent, to suggest a few possibilities. Yet a criminal prosecution of that individual draws no distinction; if he is convicted and sent to prison, it makes no difference whether he acted, in committing the criminal act, as a spouse or as an employee; the *person* will be

punished. Correspondingly, regardless of which “hat” he is wearing when subpoenaed, the privilege does not permit the government to compel him to be a witness incriminating himself as a person.

In failing to recognize Mr. Dorsey’s personal privilege to refuse to be compelled to engage in an act that incriminates not Pinnacle Employee Group, Inc., but rather Mr. Dorsey himself, the Superior Court has impermissibly trampled on an individual right which is, by all accounts, essential and foundational.

II. *Braswell* Was Never Correct.

The decision on which the Superior Court relied, *Braswell v. United States*, 487 U.S. 99 (1988), is premised on a fundamentally mistaken notion: that a corporation’s lack of privilege somehow overrides a natural person’s right to assert his own personal privilege. The Superior Court, in reliance on *Braswell* and its mistaken logic, denied the privilege not only to a corporation (which never sought to assert the privilege to begin with), but to a human being, Mr. Dorsey. For this among other reasons, *Braswell* has been heavily criticized as incoherent and largely unsupported. *See, e.g.*, Scott D. Price, *Braswell v. United States: An Examination of a Custodian’s Fifth Amendment Right to Avoid Personal Production of Corporate Records*, 34 Vill. L. Rev. 353, 395 (1989); 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, 44.

A. The “Agency Rationale” Fails to Support the Result in *Braswell*.

The *Braswell* opinion is firmly premised on what the Court calls the “agency rationale,” its understanding that

the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents, and 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. Under those circumstances, the custodian’s act of production is not deemed a personal act, but rather an act of the corporation.

Braswell, 487 U.S. at 109-10 (internal citation omitted). Because the act is really the act of the corporation, the Court reasoned, a personal assertion of the privilege is really an assertion of privilege by the corporation, which fails because the corporation does not have a privilege. *Id.*

This reasoning might support a refusal to apply the privilege if the agent could never face personal criminal liability for the testimonial acts he undertakes, or testimony he gives, while acting as an agent of the corporation. But this, of course, is not the case. Mr. Dorsey could produce documents as custodian of records for Pinnacle, and the government could ultimately use the testimonial aspects of that act of production in a prosecution of Mr. Dorsey, not only of Pinnacle. Thus, while his act does indeed have a representative aspect—it is the act of Pinnacle—it is *also*, inescapably, an act of Mr. Dorsey himself.

The Court’s assertion in *Braswell* thus boils down to this: when a single act

has both an unprotected corporate aspect and a protected personal aspect, the corporation's lack of protection trumps the individual's personal protection. A "nothing" beats a very real personal constitutional right. This defies both common sense and foundational constitutional principles. A simple absence of protection for Pinnacle cannot rationally be said to somehow override Mr. Dorsey's own essential personal rights. No other privileges are similarly disregarded. For instance, a husband cannot be forced to provide testimony against his wife simply because the same testimony would also incriminate a third party who is not entitled to the privilege. The absence of protection is simply not an interest that can override an individual's essential constitutional right, and the *Braswell* Court was wrong to suggest that it did.

B. Increased Burden on Government Investigators Cannot Justify Sacrifice of a Core Constitutional Right.

In addition to the deeply flawed agency rationale, *Braswell* rests on what is perhaps its more honest underpinning: "recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities." 487 U.S. at 115.

This concern cannot seriously support a refusal to recognize an individual's constitutional rights. The government would of course have a much easier time prosecuting crimes of all sorts if we completely did away with the Fourth, Fifth, and

Sixth Amendments. Police could collect evidence much more easily without the warrant requirement, and could certainly extract significantly more confessions without *Miranda* warnings. Yet our society recognizes that the rights of the individual are simply more important than expediency in prosecution. The Bill of Rights was enacted precisely to protect Americans from this type of governmental overreaching, and it is patently wrong for the Court to premise its limiting interpretation of essential protections on the government's desire to prosecute more easily.

In fact, in recent years the Supreme Court has made a seismic shift toward recognizing that this balance should tip in favor of the rights of citizens. *See, e.g., Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (“the general importance of the government’s interest in [combating drunk driving] does not justify departing from the warrant requirement without showing exigent circumstances. . .”); *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (reversing a generation-old doctrine, holding that “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (reversing rule set in 1980s that allowed judges to determine facts that increased maximum sentence); *id.* at 498 (Scalia, J., concurring) (responding to Justice Breyer’s dissent, which “sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave

criminal justice to the State.”). The Arizona Supreme Court is also mindful of the balance in favor of the citizen, even when officer safety is invoked:

It would perhaps reduce the danger inherent in the job if we allowed the police to do whatever they felt necessary, whenever they needed to do it, in whatever manner required, in every situation in which they must act. However, there is a Fourth Amendment to the Constitution which necessarily forecloses this possibility.

State v. Fisher, 226 Ariz. 563, 567 ¶ 16, 250 P.3d 1192, 1196 (2011) (quoting *United States v. Colbert*, 76 F.3d 773, 776 (6th Cir. 1996)). For these reasons, *Braswell*'s policy rationale is also gravely undermined.

In any event, giving proper effect to the privilege against self-incrimination in protecting individuals from compelled production where the act of production would be personally incriminating would not have the dire effect the *Braswell* Court supposed. For one thing, not every subpoena to a collective entity will implicate an act-of-production privilege; the individual asserting the privilege must still establish that the act of producing the documents would incriminate him, which will certainly not always be the case. The Court has, for instance, recognized a significant category of cases in which the existence of the documents is a foregone conclusion, and the act of production thus not protected. *See, e.g., Fisher v. United States*, 425 U.S. 391, 410 (1976); *United States v. Bright*, 596 F.3d 683, 692-93 (9th Cir. 2010). Moreover, many corporate custodians may have no personal exposure at all, and thus the issue would never come up.

Additionally, in many cases, the government may direct the subpoena to the entity, rather than to an individual. Larger entities will often have a range of possible custodians, so even if one person could assert the privilege, another may produce the documents on the entity's behalf. And of course, the government always retains the option of granting statutory immunity; indeed, the very existence of this mechanism reflects Congress's well-considered balancing of the needs of law enforcement with the sacrosanct privilege against self-incrimination. The notion that allowing individuals to retain their personal privilege when employed by corporations would somehow frustrate all access to corporate records is thus grossly overblown.

To suggest that an individual's personal right not to be forced to be a witness against himself should suffer because it makes prosecution difficult is to ignore the very purpose of individual constitutional rights. This Court should not allow such reasoning to stand.

C. Individuals Do Not Waive Their Core Personal Rights By Operating Corporations.

The *Braswell* Court also suggested that individuals like Mr. Dorsey voluntarily surrender their personal privilege by choosing to conduct business using the corporate form: "Had petitioner conducted his business as a sole proprietorship, *Doe* would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form." 487 U.S. at 104. In other words, the Court

seems to be saying that Braswell had voluntarily surrendered his personal privilege by choosing to operate a corporation.

This argument, too, ignores the core principles of interpretation of individual constitutional rights. The Court has long “indulge[d] every reasonable presumption against waiver of fundamental constitutional rights and [does] not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted). Indeed, the voluminous body of case law surrounding *Miranda* waivers is evidence enough that we cannot presume an individual voluntarily surrendered his rights without understanding that he had done so. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (“[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege.”).

The *Braswell* Court did not even pause to consider what standard should apply for the waiver of the right against self-incrimination by participation in a collective entity. This is a weighty question, and the Court has generally been reluctant—and rightly so—to find a waiver where there is any ambiguity as to whether the defendant recognized and intended to surrender his rights. Given the unsettled nature of the law in this area and the increasing prevalence with which small business owners are using corporate and other collective forms, *see Cole*, 2005 Colum. Bus. L. Rev. at

77-79, there is no reasonable argument that choosing to incorporate constitutes an implied waiver of the privilege against self-incrimination.

III. The Supreme Court Has Expanded the Constitutional Rights of Corporations in Recent Years, Drastically Altering the Landscape In This Area of Law.

Nearly a century ago, in *Hale v. Henkel*, the Supreme Court declared that a corporation did not have the Fifth Amendment privilege. 201 U.S. 43, 75 (1906). The Court explained that “we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen.” *Id.* at 74. More than forty years ago, in *Bellis v. United States*, 417 U.S. 85 (1974), the Court reaffirmed that collective entities, including small partnerships, could not assert a Fifth Amendment privilege against self-incrimination to refuse to produce business records. The *Bellis* Court explained that “[t]he framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations. . . .” 417 U.S. at 91. These legacy decisions underlie the Court’s now more than quarter-century-old decision in *Braswell*. AACJ, like Mr. Dorsey, believes that *Braswell* would not require this result even if it retained its vitality. However, *Braswell* and

the opinions on which it relies have been called into serious question by the Court's sweeping decisions of the last five years.

A. The Supreme Court's Recent Decisions Significantly Alter the Landscape.

In 2010, the Supreme Court delivered an opinion that upended the Court's approach to corporate constitutional rights. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Court held that corporations' right to free speech, which it had long acknowledged, was more robust and far-reaching than had previously been understood and included the right to make independent expenditures in support of candidates in political campaigns. The decision generated an enormous public outcry for the expansiveness with which it treated corporate constitutional rights, along with literally thousands of law review articles,¹ and has already been cited in more than 700 court opinions.

Four years later, the Court further shook the foundations of our understanding of corporate constitutional rights, declaring that the rights of the *owners* of a closely held corporation dictated the limitations that could be placed on the corporation itself. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014). In other words, the personal rights of the people who formed and operated the corporation overrode any absence of right that the corporate entity itself had in that area. Although *Hobby Lobby* was

¹ A LexisNexis search for law review articles citing the decision run on May 14, 2015 yielded 2,100 results.

ultimately resolved on statutory grounds, the Court expressed deep concern about the rights of the *individuals* who make use of the corporate form. The Court explained:

A corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people . . . protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

Hobby Lobby, 134 S. Ct. at 2767. The Court was crystal clear that individuals did not surrender their core constitutional rights—in that case to religious freedom—by operating as a corporation. The corporation itself may still be an artificial creature of state law, but the rights of individuals operating as a corporation remain sacrosanct.

This shift embodied in *Citizens United* and *Hobby Lobby* has been widely recognized as a monumental one. Justice Stevens, dissenting in *Citizens United*, recognized the Court’s zealous protection of corporate free speech rights as a “novelty,” 558 U.S. at 414, that “marks a dramatic break from our past,” *id.* at 394, and “rejects a century of history.” *Id.* at 395. And Justice Ginsburg explained, dissenting in *Hobby Lobby*, that “[t]here is in [prior] case law no support for the notion that free exercise rights pertain to for-profit corporations,” 134 S. Ct. at 2794, and we are sure to see claims “proliferate” due to the Court’s new “expansive notion of corporate personhood.” *Id.* at 2797. In other words, the Court’s recent decisions

worked a sweeping and significant change in the law at the intersection of constitutional rights and corporations.

B. Recent Changes Require Reexamination of Corporate Rights.

Whether right or wrong, these decisions marked a significant departure from the Court's prior treatment of corporations and the rights of individuals who operate them. These watershed changes go to the core of the Court's jurisprudence on corporate constitutional rights, including the Fifth Amendment privilege. Lower courts can no longer safely rely on old cases premised on the notion that the rights were originally created to protect individuals rather than corporations in resolving questions about which rights individuals retain when operating corporations. *Citizens United* and especially *Hobby Lobby* have pulled the rug out from under cases like *Hale* and *Bellis* by recognizing that, contrary to the prior background assumption, it may be necessary to imbue a corporation with certain rights to protect the inalienable rights of the individuals who operate them. This pronouncement changes everything.

Nor is it safe to assume that corporations themselves continue to lack the right to assert the privilege. Although Mr. Dorsey has not claimed that Pinnacle has its own privilege to assert, and it is not Pinnacle but Mr. Dorsey personally who has been denied the privilege here, a recognition that corporations may now also have such rights of course drastically alters the analysis of Mr. Dorsey's personal claim

in this situation. And recent cases suggest that it may be time for just such a recognition.

At *Hale*'s core was the assertion that the state need not respect the privilege in a corporation for no reason other than that it was a corporation, *i.e.* "a creature of the state," rather than a natural person; because the State creates the corporation, unlike a natural person it holds rights "subject to the laws of the State." 201 U.S. at 74-75. This status alone was, at the time, sufficient to support the Court's conclusion that the corporation had no Fifth Amendment privilege. *Citizens United*, however, firmly "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.'" 558 U.S. at 343. Thus, mere status as a corporation rather than a natural person is no longer sufficient to justify different treatment. *Hale*'s basic premise has fallen, and a reanalysis of the application of the Fifth Amendment privilege to corporations is required. Although Mr. Dorsey seeks here only to assert his own personal privilege, which the Superior Court denied him even though it is preserved under *Hale*, the Court should seriously consider whether corporations may continue to be denied the privilege at all, let alone to such an extent that it be permitted to interfere with the definite rights of a natural person.

Even if this Court does not see fit to analyze, in this case, the body of law concerning the application *vel non* of the privilege against self-incrimination to

corporations generally, it must at least recognize that *Braswell* has been seriously undermined. At the core of *Braswell* is the reasoning 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.” 487 U.S. at 110. In other words, Randy Braswell could not rely on his personal privilege—which everyone agreed he had—because to allow such a thing would be to imbue the corporation with rights it did not otherwise have. *Hobby Lobby* put this argument firmly to bed with its recognition of the validity of “protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel” when necessary to protect “the religious liberty of the humans who own and control those companies.” 134 S. Ct. at 2767. Its core reasoning thus decimated by *Hobby Lobby*, *Braswell* cannot support a refusal to recognize Mr. Dorsey’s privilege. This Court must analyze and reexamine Mr. Dorsey’s claim in light of the Court’s current thinking on the right of individuals who operate corporations, and must not rely on outdated jurisprudence including *Braswell*.

Read through the lens of the Court’s recent friendliness to corporate constitutional rights, there is no question that *Braswell*, unsound from the outset, cannot endure. Yet the Superior Court’s decision was not only an application, but an expansion of *Braswell*, given the reservation in footnote 11 of rights for those operating single-person corporations. See *Petition for Special Action*, Argument

Section I.B. There is simply no justification for *expanding* the reach of *Braswell* when the winds are blowing firmly in the opposite direction.

IV. The Arizona Constitution Separately Protects This Right.

A. Arizona may interpret its constitution more broadly than its federal counterpart.

Justice Brandeis famously wrote that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This beloved and much-quoted principle serves to remind states that they need not limit themselves to the programs and protections mandated by the federal government; rather, they can, within the boundaries of the Constitution, strike out to explore and recognize new frontiers in running a free and just society.

Arizona’s Constitution reflects the courage invoked by Justice Brandeis in its bold protection of individual rights. “The Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.” *State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). As one Justice has put it, ours is “an exceptionally progressive constitution providing several protections that appear to be broader than those available at the federal level.” Rebecca White Berch *et al.*, *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468 (2012).

Indeed, the wording of the Arizona Constitution’s protection against self-incrimination is broader than that in the federal Constitution, protecting not just being “a witness against himself,” U.S. Const. amend. V, but forbidding the government to require a person “to give evidence against himself,” Ariz. Const. art. II, § 10. Arizona courts should give effect to these distinctions by recognizing the different, and more expansive, protections they offer to Arizonans.

In deciding whether to extend the protections of our state constitution beyond those of the corresponding provision of the bill of rights, our Supreme Court primarily considers whether a state-based rule is needed to honor the spirit of the rights of the individual. For instance, in *State v. Bolt*, 142 Ariz. 260, 264, 689 P.2d 519, 523 (1984), our Supreme Court recognized that a very recent United States Supreme Court case with similar facts, *Segura v. United States*, 468 U.S. 796 (1984), interpreted the Fourth Amendment to allow police to secure a premises from within rather than using a perimeter stakeout. Yet, our Supreme Court went on to reach the opposite conclusion under article II, section 8 of the Arizona Constitution, citing “our people’s fundamental belief in the sanctity and privacy of the home,” which “caused the framers of our constitution to settle upon the specific wording” of the state provision. *Id.* at 265, 689 P.2d at 524. *See also Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261 (1984) (“We acknowledge that uniformity is desirable. However, the concept of federalism assumes the power, and duty, of independence

in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly.”).

B. Article II, section 10 provides broader protection than the Fifth Amendment.

The Arizona Supreme Court has explicitly interpreted the article II, section 10 privilege, and has recognized a strong state-law-based protection for the compelled act of producing documents. In *State v. Berg*, 76 Ariz. 96, 259 P.2d 261 (1953), *overruled in part on other grounds*, *State v. Pina*, 94 Ariz. 243, 383 P.2d 167 (1963), Arizona refused to apply the privilege to breath or blood samples in connection with a drunk driving investigation. Our Supreme Court acknowledged that such evidence is no more protected by article II, section 10 than it is by the Fifth Amendment.² In reaching the conclusion that a driver may not refuse a drunkometer test under article II, section 10, the *Berg* Court analyzed the contours of the privilege under state law. Relying on Wigmore, the court distinguished evidence obtained from the person’s body (unprotected) from evidence obtained from a person by way of response to a subpoena, the act of which *is* testimonial:

It follows that the production of documents or chattels by a person (whether ordinary witness or party-witness) in response to a subpoena, or to a motion to order production, or to other form of process treating him as a witness (i.e., as a person appearing before the tribunal to

² Notably, our Court reached this decision three decades before the United States Supreme Court decided *South Dakota v. Neville*, 459 U.S. 553 (1983), which was followed in *State v. Sup. Ct. of Ariz. in and for Pima Cnty. (Ahrens)*, 154 Ariz. 574, 744 P.2d 675 (1987).

furnish testimony on his moral responsibility for truth-telling), may be refused under the protection of the privilege; and this is universally conceded. For though the disclosure thus sought be not in oral form, and though the documents or chattels be already in existence and not desired to be first written and created by testimonial act or utterance of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the authenticity or origin of the articles produced.

It follows, on the other hand, that documents or chattels obtained from the person's control without the use of process against him as a witness are not in the scope of the privilege, and may be used evidentially; for obviously the proof of their authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility.

Id. at 100-01, 259 P.2d at 264 (quoting 8 Wigmore on Evidence, 3d ed., section 2264).³ The court cited with approval the Oregon Supreme Court's analysis with regard to its state constitutional provision in *State v. Cram*, 160 P.2d 283 (Or. 1945), and adopted that analysis as applicable to article II, section 10. Thus, Arizona

³ More recent editions of Wigmore provide more explicit protection for the person whose documents are sought:

It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded. No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court. Testimonial acts of this sort—authenticating or vouching for pre-existing chattels—are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege. Yet they are within the borders of its protection.

8 Wigmore on Evidence § 2264 (McNaughten rev. 1961).

recognizes a privilege for persons whose production of documents is a testimonial act against oneself, without any exception where the subpoenaed person is a corporate officer.

To be sure, *Berg* and *Cram* predate *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), which incorporated the Fifth Amendment to apply to states. But this is not to say that all pre-*Malloy* cases on the issue of the privilege against self-incrimination are purged from the law. As *Berg* was a case involving the seizure of physical evidence from the body to prove drunk driving, it is of little surprise—and of little consequence—that most cases citing to it are for the proposition that there is no compelled self-incrimination by the act of taking a chemical sample from the suspect. See *Campbell v. Superior Court*, 106 Ariz. 542, 547, 479 P.2d 685, 690 (1970) (citing *Berg* in discussion of reasonableness of bodily search for breath sample); *State v. Thomason*, 538 P.2d 1080, 1083 (Okla. Crim. App. 1975) (collecting cases from several states, including *Berg*). Only one case⁴ cites *Berg* in interpreting article II, section 10, and that case holds merely that article II, section 10 is not implicated by a suspect being fingerprinted. *State v. White*, 102 Ariz. 162, 163, 426 P.2d 796, 797 (1967). *Berg* interprets Arizona, not federal, law, and has

⁴ In *Anderson v. Coulter*, 16 Ariz.App. 27, 30-31, 490 P.2d 856, 859-60 (1971), this Court cited *Berg* favorably for the proposition, but the Supreme Court reversed, 108 Ariz. 388, 499 P.2d 103 (1972), based on the fact that the object of the subpoena *duces tecum*, an allegedly obscene film, had already been shown publicly.

never been overruled.

There is no authority in Arizona law for *Braswell*'s proposition that a person who has a right against self-incrimination in his production of document loses that right merely based on the decision to incorporate.

At least one other state, Massachusetts, has rejected *Braswell* on state constitutional grounds:

The Commonwealth contends that we should adopt the rule enunciated in *Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988). In that case the Supreme Court held that a custodian of corporate records cannot rely upon the Fifth Amendment privilege against self-incrimination. *Id.* 108 S.Ct. at 2295. The Court reasoned that the custodian acts only as a representative, and that his act, therefore, is deemed to be one of the corporation only and not an act of the individual. *Id.* We decline to engage in such a fiction. The act of production is demanded *of the witness* and the possibility of self-incrimination is inherent in that act. The witness's status as a representative does not alter the fact that in so far as he is a natural person he is entitled to the protection of art. 12. It would be factually unsound to hold that requiring *the witness* to furnish corporate records, the act of which would incriminate him, is not *his act*. As we said in *Emery's Case*, 107 Mass. 172, 181 (1871), "[i]f the disclosure ... would be capable of being used against himself ... such disclosure would be an accusation of himself, within the meaning of the constitutional provision." The same is true here when the witness's act of production would incriminate him. His status as custodian of the corporation's records does not require that he lose his individual privilege under art. 12.

Commonwealth v. Doe, 544 N.E. 860, 862 (Mass. 1989). Indeed, other states have relied on their state privilege law to provide protections that are greater than those required by the federal constitution. New Jersey, for instance, has been active in

protecting state-specific self-incrimination rights of its defendants. *See State v. O’Neill*, 936 A.2d 438, 455 (N.J. 2007) (“We also have relied on our state law privilege when there has been a need to pursue a path consistent with our distinctive state interests that are directly at odds with federal precedent.”). And Michigan has long interpreted its corresponding Constitutional protection as providing somewhat different protections from the federal Constitution, despite its identical wording:

We are aware that holdings at variance with the above can be found in other jurisdictions, including holdings in the Federal courts. Nonetheless we adhere to our previous holdings, not alone on the ground of established precedent, but rather that the holdings in the above cited cases are essential to render fairly effective the quoted State constitutional provision against self-incrimination.

People v. Den Uyl, 29 N.W.2d 284, 287 (1947).

As these states have recognized, there is no need to wait around for the federal courts to recognize what is an inherently logical and just position. Arizona courts can and should recognize that our Constitution protects individuals from being compelled to engage in testimonial acts that could incriminate them, whether or not they operate businesses as corporations.

Several state courts have also answered a similar legal question—whether a witness in a grand jury investigation who invokes the privilege against self-incrimination must be given transactional immunity or only use immunity—on state grounds, reaching a result more protective than that required by the United States Supreme Court. *Compare Kastigar v. United States*, 406 U.S. 441 (1972) (Fifth

Amendment requires only use immunity), *with D'Elia v. Penn. Crime Com'n*, 555 A.2d 864 (Pa. 1989) (Article 1, Section 9 of Pennsylvania Constitution requires transactional immunity even if Fifth Amendment as interpreted by *Kastigar* does not); *State v. Miyasaki*, 614 P.3d 915, 922-23 (Haw. 1980) (“That transactional immunity had been ‘part of our constitutional fabric’ from 1893 could not have been lost to a convention that included lawyers among its members. . . . Transaction immunity is undoubtedly part of the ‘fabric’ of Article I, § 10 notwithstanding the tear in the ‘fabric’ of the federal constitution caused by *Kastigar*...”); *State v. Gonzalez*, 825 P.2d 920, 933 (Alaska App. 1992) (“the decisions in the four states that have declined to follow *Kastigar* are by far better reasoned and more persuasive than decisions from states⁵ following *Kastigar*, which, at best, tend to be conclusory.”).

The holding in *Braswell* is contrary to Wigmore; it is contrary to the policy in *Citizens United* and *Hobby Lobby*; and it is contrary to the spirit of the privilege against self-incrimination. This Court has the power and the obligation to breathe life into article II, section 10 of the Arizona Constitution and hold that Mr. Dorsey may invoke the privilege against self-incrimination against the government’s attempt to compel his testimonial act of production of documents.

⁵ Arizona is among the twelve states whose reasoning was described as conclusory. See *Patchell v. Hawkins*, 147 Ariz. 508, 711 P.2d 647 (App. 1985).

CONCLUSION

This Petition presents a legal issue of statewide importance. The Superior Court's decision fails to respect Mr. Dorsey's essential rights under the State and Federal Constitutions. This Court should accept jurisdiction and rule that Mr. Dorsey is entitled to assert the privilege against self-incrimination.

RESPECTFULLY SUBMITTED this 26th day of May, 2015.

KUYKENDALL & ASSOCIATES

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