No. 21-55855

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOBILIZE THE MESSAGE, LLC; MOVING OXNARD FORWARD INC.; AND STARR COALITION FOR MOVING OXNARD FORWARD,

Plaintiffs-Appellants,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Defendant-Appellee.

On Appeal from an Order of the United States District Court
for the Central District of California, The Hon. Virginia A. Phillips
(Dist. Ct. No. 2:21-cv-05115-VAP-JPR)

BRIEF OF AMICUS CURIAE HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

Jonathan M. Coupal, SBN 107815
Timothy A. Bittle, SBN 112300
Laura E. Dougherty, SBN 255855
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950

Attorneys for Amicus Curiae
HOWARD JARVIS TAXPAYERS ASSN.

RULE 26.1 DISCLOSURE STATEMENT

The Howard Jarvis Taxpayers Association (HJTA) is a 501(c)(3) nonprofit public benefit corporation. It has no parent corporation. No publicly held corporation owns stock therein.

Date: November 3, 2022

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Laura E. Dougherty
Laura E. Dougherty

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Amicus Curiae Howard Jarvis Taxpayers Association (HJTA) submits this brief in support of the petition for rehearing *en banc*[1].

HJTA is a California non-profit public benefit corporation with over 200,000 members. The late Howard Jarvis, founder of HJTA, utilized the People's reserved power of initiative to sponsor California's well-known Proposition 13 in 1978. Proposition 13 was overwhelmingly approved by California voters and added Article XIII A to the California Constitution. Proposition 13 has kept thousands of fixed-income Californians secure in their ability to stay in their own homes by limiting the ad valorem property tax rate and annual escalation of property taxes. As part of HJTA's ongoing activities, it files amicus briefs in cases affecting taxpayers. These cases regularly involve the initiative power. HJTA also continues to support taxpayer protection initiatives.

HJTA thus has a decades-long interest in the initiative power of California citizens. This reserved power of the people is used to enact taxes and to reduce or repeal taxes. The law known in this case as "AB5" burdens the initiative power and curtails direct democracy.

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[1] All parties consented to the filing of this brief. (Ninth Circuit Rule 29-2(a).) No counsel for a party authored this brief in whole or in part, and no party or party counsel contributed money to fund this brief. No person other than amicus curiae made any monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION

This case concerns the classification of initiative signature gatherers (also known as canvassers or circulators) as independent contractors or employees. Until the California Legislature passed Assembly Bill 5 in 2019, partially codifying *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, signature gatherers were considered independent contractors. AB5 specifically and arbitrarily makes them employees, putting direct democracy, a fundamental constitutional practice of California and most western states in this district, at risk.

AB5 has made a long list of professions to which *Dynamex* applies, and a long list of profession to which the former leading case known as *Borello* applies. (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341.) Legislating that one Supreme Court decision applies to one list of professions and another Supreme Court decision applies to another list of professions should raise many eyebrows. But here, the question of a legitimate classification must only be asked for one.

Presently, per AB5's arbitrary division of professions, signature gatherers are employees. Paradoxically, direct salespersons — who equally engage in direct communication with private individuals intended to produce a particular output — are independent contractors under AB5. The only difference between direct salespersons and petition canvassers is the content of the speech. This implicates the First Amendment and drives up the cost of all grassroots initiatives, reducing political speech.

As to the First Amendment and whether to apply strict scrutiny analysis, HJTA agrees with the dissenting Judge VanDyke that strict scrutiny should apply because the only difference between salespeople and signature gatherers is "the content of the message being shared with the public." (*Mobilize the Message, LLC v. Bonta* (9th Cir. 2022) 50 F.4th 928, VanDyke, J., dissenting at Slip Op. 3.) This is thoroughly addressed in the petition for rehearing *en banc*.

ARGUMENT

I. In California, The Initiative Power Has Been "Jealously Guarded" For Over 100 Years.

In 1911, California voters passed Proposition 7 by 76.43%, declaring the initiative and referendum powers of the people. (Voter Information Guide for 1911, General Election, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1023&context=ca_ballot_props.) And it was not merely a declaration, but a *reservation* of power. (Cal. Const., art. IV, § 1 ["The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."].) The people's power of initiative is thus not dependent on a grant of power in the California Constitution. It is "inherent." (Cal. Const., art. II, § 1 ["All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."].)

The initiative power was meant to be "independent of the legislature" and activated through "the presentation to the secretary of state of a petition certified as herein provided to have been signed by qualified electors." (Senate Constitutional Amendment No. 22, October 10, 1911, Voter Information Guide for 1911, General Election, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1023&context=ca_ballot_props.) This independent means of legislation has been upheld and preserved.

There are both state and local initiative and referendum powers. The state powers are found in article II, sections 8 – 10 of the California Constitution. The local power is governed by the Legislature under article II, section 11, and the implementing statutes are in the California Elections Code.

California courts have recognized and upheld the initiative and referendum powers of the people. A prime example is *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245. It reiterated that the initiative power is "one of the most precious rights of our democratic process." (*Id.* at 250.)

The same is true at the local level. In 1976, for example, the California Supreme Court validated zoning by initiative, regardless of constraints formerly seen as necessary but impossible for proponents to overcome because only city officials could perform them. (*Associated Homebuilders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582 [zoning by initiative approved despite inability of initiative proponents to hold public

hearing as city officials ordinarily would, overruling *Hurst v. Burlingame* (1929) 207 Cal. 134].) This helped further recognize the initiative power in California, overcoming CEQA, general plan amendment processes, etc. (*Tuolumne Jobs & Small Business Alliance v. Superior Ct.* (2014) 59 Cal.4th 1029; *DeVita v. County of Napa* (1995) 9 Cal.4th 763.)

Most critical for taxpayers is the ability to use the initiative process to control government's most draconian power – the power to tax. (See *Rossi v. Brown* (1995) 9 Cal. 4th 688.) Voters enshrined the initiative power to reduce or repeal taxes in the California Constitution shortly after *Rossi* in 1996 — alsothrough the initiative process — in Proposition 218, The Right to Vote on Taxes Act. (Cal. Const., art. XIII C, § 3.)

The California Supreme Court recognizes the judiciary's duty to "jealously guard" the initiative power. (*Associated Homebuilders*, 18 Cal.3d at 591; see also *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934.) Under this standard, AB5, with its arbitrary classification of paid signature gatherers for initiative petitions as employees, is facially suspect. AB5 restricts the people's initiative power by raising the cost of gathering signatures to a new level of unaffordability. Direct democracy is under attack by AB5 and there is no rationale for this classification when salespeople without political content in their message are still considered independent contractors.

There is no compelling state interest in treating these two professions differently, as there is no compelling state interest in stifling political speech.

II. Affordable Signature-Gathering Is Vital To Qualifying Grassroots Non-Profit Legislation By Initiative.

Legislation by initiative was already very expensive before AB5. Knocking on doors and gathering signatures at grocery stores takes time and stamina, not to mention the organizational effort to initiate and coordinate the entire process. Volunteer signature gathering still occurs, but, in reality, most initiatives in recent decades rely on paid canvassers. In California, the cost of qualifying an initiative for the ballot was at least $1 million as of 2012 according to the National Conference of State Legislatures. (https://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx.) Paid canvassers generally receive $1 to $3 per signature. (*Ibid.*)

The fact the Mobilize the Message, LLC ("MTM") has left California due to AB5 ought to alarm this court and everyone interested in direct democracy. (Pet. at 8, citing ER-25, ¶ 9.) The fact that Moving Oxnard Forward, Inc. and Starr Coalition for Moving Oxnard Forward cannot afford signature gatherers post-AB-5 should also be alarming because they are established organizations. (Pet. at 8-9, citing ER-21, ¶ 12, ER 21-22, ¶ 13.) If established organizations cannot handle the change caused by AB5, and leave the State as a result, the people will have fewer options, and less ability, to exercise their legislative power.

There are only a handful of petition management firms. In 2020, seven signature gathering companies helped initiatives to qualify for the ballot in California.

(https://ballotpedia.org/Petition_drive_management_companies.) Each of these companies could easily make the same decision as MTM, assuming they haven't already. And for those who can afford to try to continue under AB5, the cost to initiative proponents will inevitably skyrocket, effectively discouraging the use of the initiative power.

Grassroots initiatives from all political perspectives need to remain at least as "affordable" as they were before AB5. There is a vibrancy to protect in all political activity from left to right. HJTA is especially concerned for its ability to advocate for taxpayers and homeownership. Advocates for all causes must be equally concerned. Every state in this Circuit has an initiative process and thus has an interest in the outcome in this case.

For HJTA, Propositions 13 and 218 remain robust examples of the power of initiative. It was after fifteen years of volunteer efforts that, in 1977, the United Organization of Taxpayers (led by Howard Jarvis and Paul Gann) collected 1.5 million signatures from registered voters, qualifying Proposition 13 for the ballot. When voters overwhelmingly passed Proposition 13, it added article XIII A to the California Constitution. In 1979, a follow-up voter initiative, Proposition 4, overwhelmingly passed to cap the growth of government spending, adding Article XIII B. In 1996, HJTA authored and principally sponsored Proposition 218, entitled "Voter Approval for Local Government Taxes. Limitations on Fees, Assessments, and Charges."

Voters passed Proposition 218 as well, adding articles XIII C and XIII D to the California Constitution.

But since that time, it has taken larger organizations with far greater financing to sponsor tax reform initiatives. For example, Proposition 26 amended the California Constitution again in 2010, amending articles XIII A and XIII C to close more government-created tax loopholes. The proponents (not HJTA in this case) hired National Petition Management which collected 1.1 million signatures at a cost of $2,341,023. Forcing these companies to use employees rather than independent contractors to do the actual signature gathering will cause the costs to rise so high as to prevent all non-profit organizations from attempting to promote any form of grassroots change.

III. Prohibiting Independent Contractors From Gathering Signatures Invokes First Amendment Strict Scrutiny.

While there is no rational basis for the division of direct salespersons from signature gatherers, strict scrutiny applies here. It is clear enough from *Meyer v. Grant* (1988) 486 U.S. 414 that free political speech is being seriously burdened and harmed.

HJTA is extremely concerned for the initiative power in California, as well as all Ninth Circuit states. AB5 threatens First Amendment rights by substantially increasing the financial burden of exercising that "most precious right." (*Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal.3d at 250.) The burden is inevitable.

Political speech is now significantly abridged because AB5 prohibits signature gathering as independent work.

In *Meyer*, Colorado had banned paid signature gatherers completely and certain initiative proponents filed suit. The trial court upheld the ban, but the appellate court reversed, and the Supreme Court affirmed the reversal, saying "[w]e fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny." (486 U.S. at 420.) It specifically recognized that "the solicitation of signatures for a petition involves protected speech." (486 U.S. at 422, fn. 5.)

As protected speech, signature gathering deserves strict scrutiny review whenever it is affected, such as here by AB5. In *Meyer*, "the prohibition against the use of paid circulators ha[d] the inevitable effect of reducing the total quantum of speech on a public issue." (486 U.S. at 423) Banning independent contract workers from gathering signatures for initiatives likewise reduces the total quantum of speech on public issues.

Independence itself is a deciding factor for many workers today. We are living in a time called the "Great Resignation" because many are quitting traditional employment. Among those who remain employed, two out of five Americans choose a "side hustle" to supplement their income *after* employment. Signature gathering is no doubt a great seasonal side hustle, inclusive of the opportunity to express one's views. AB5 has banned intentionally independent workers from speaking politically in a

meaningful and productive manner in order to qualify legislation for the ballot as citizens. It does not matter if "other avenues of expression remain open" to them. (486 U.S. at 424.)

AB5's prior restraint means that true grassroots efforts to qualify initiatives measures will rarely succeed because of the prohibitive costs imposed.

CONCLUSION

AB5 creates an arbitrary barrier to direct democracy, one which will inevitably prevent the circulation of potential initiatives by anyone but the wealthy and powerful. This case deserves the attention of an *en banc* rehearing.

Date: November 3, 2022

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/Laura E. Dougherty
Laura E. Dougherty

Attorneys for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: November 3, 2022

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/Laura E. Dougherty
Laura E. Dougherty

Attorneys for Amicus Curiae