No. 22-865

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF HOWARD JARVIS TAXPAYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY
Counsel of Record
HOWARD JARVIS TAXPAYERS FOUNDATION
1201 K Street, Suite 1030
Sacramento, CA 95814
Telephone: (916) 444-9950
Email: laura@hjta.org
Counsel for Amicus Curiae
Howard Jarvis Taxpayers Association

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS

Amicus Curiae Howard Jarvis Taxpayers Association (HJTA) submits this brief[1] in support of the Petition for Writ of Certiorari.

HJTA is a California non-profit public benefit corporation with over 200,000 members and counting. 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 tens of thousands of fixed-income Californians secure in their ability to remain in their own homes by limiting the ad valorem property tax rate and annual escalation of property taxes, stabilizing household budgets.

As part of HJTA's ongoing activities, it files amicus briefs in cases affecting taxpayers, including cases involving taxpayer initiatives. The initiative power is a precious right for taxpayers and for all California citizens on issues where the loyalties of politicians are not aligned with the public interest.

HJTA thus has a decades-long history of defending the California citizens' initiative power. This reserved power of the people is a powerful tool of direct

---

[1] Per Rule 37.2, on March 23, 2023, all parties of record received notice from amicus of intent to file this brief. Per Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made any monetary contribution intended to fund the preparation of this brief.

democracy, often used to enact taxes and to reduce or repeal taxes at all levels of government.

The California law known in this case as "AB5" unduly burdens the citizens' initiative power and curtails direct democracy. Given these high stakes, HJTA supports the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The feasibility of signature gathering, the most essential tool of direct democracy, is at stake here. The arbitrary classifications imposed under California's Assembly Bill 5 ("AB5"), implicating the First Amendment and creating conflict among the circuits, must therefore be reviewed as soon as possible for the sake of democracy itself.

This case concerns the classification of initiative signature gatherers (also known as canvassers, circulators, or doorknockers) as independent contractors or employees. With Circuit Judge VanDyke dissenting, the Ninth Circuit Court of Appeals has found that the California Legislature may treat them differently from other solicitors by classifying them as employees. (*Mobilize the Message, LLC v. Bonta* (9th Cir. 2022) 50 F.4th 928.)

Until the California Legislature passed AB5 in 2019, partially codifying *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, signature gatherers were independent contractors. AB5 specifically

and arbitrarily transformed them into employees, putting direct democracy—a fundamental constitutional practice of California and most western states—at risk of extinction for all but the extremely wealthy.

AB5 made a long list of occupations to which *Dynamex* applies, and a long list of occupations 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 state supreme court decision applies to one list of occupations and another decision applies to a separate list of occupations should raise eyebrows and many legal questions. The case at bar concerns the classification of one specific group: persons who are compensated by initiative sponsors for gathering signatures on initiative petitions.

Under AB5's arbitrary division of occupations, signature gatherers cannot work to gather signatures unless they are hired as employees, dangerously driving up the cost of direct democracy. And yet, paradoxically, direct salespersons—who equally engage in direct communication with private individuals intended to persuade them to a particular decision—are exempted as independent contractors. The only significant difference between direct salespersons and signature gatherers is the content of their speech. This implicates the First Amendment. By driving up the cost of all grassroots initiatives, the California Legislature is limiting political speech. This is happening in real time with no justification, damaging democracy daily.

HJTA thus agrees with the Ninth Circuit's 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 at 1007-1008, VanDyke, J., dissenting.)

ARGUMENT

I. The Ninth Circuit's Decision In *Mobilize the Message* Is Inconsistent With The *Austin* And *Reed* Signage Cases Because AB5 Commits Content-Based Discrimination Among Solicitors.

"No Solicitors" is a sign that many people post on their door. It implies all solicitors, including salespersons with kitchen knives, fundraisers with magazines, Girl Scouts with cookies, people with any idea, political, religious, or otherwise, and, most pertinent here for democracy's concern, canvassers with petitions. "No Solicitors" refers to all the above.

California's AB5 divides occupations for hire, including solicitors, into two categories based on two different California Supreme Court decisions. (Cal. Labor Code, §§ 2775-2787; see *id*. at § 2783(e) [exempting direct salespersons from employee status].) These decisions provide different analyses for determining whether an individual is an independent contractor or an employee. (*Dynamex Operations West, Inc. v.*

Superior Court (2018) 4 Cal.5th 903; *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341.) This alone is suspect. The distinction we are concerned with here is based on the content of the solicitor's speech.

In *City of Austin v. Reagan Nat'l Adver. of Austin, LLC* (2022) ___ U.S. ___, 142 S.Ct. 1464, and *Reed v. Town of Gilbert* (2015) 576 U.S. 155, this Court examined whether sign ordinances were content-neutral. In *Austin*, signs were regulated based on location only, and the regulations were therefore content-neutral. But if, as in *Reed*, the legislation is not content-neutral, it demands strict scrutiny under the First Amendment. AB5 equally demands strict scrutiny. It discriminates based on the type of speaker (commercial versus political), and thus inherently discriminates on the content of the message.

Where categories are speaker-based, this Court has reminded: "And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.'" (*Reed v. Town of Gilbert* (2015) 576 U.S. 155, 157, citing *Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 658.) Here, the California Legislature is clearly favoring direct salespersons over initiative signature gatherers by dividing them into different worker categories with dramatically different attendant costs and procedures. The favoritism of the California Legislature is clear: Direct salespersons are

tolerable. Circulators of initiatives that often wrest control over lawmaking decisions from the Legislature's hands, are not tolerable. All should be wary of this division. This bias against political messaging is unacceptable for free speech and direct democracy. The future of signature gathering and the viability of the initiative process must be considered on Certiorari and time is of the essence.

Signature gathering has been at stake before, and its urgent need for survival is no less here. In *Meyer v. Grant* (1988) 486 U.S. 414, Colorado had expressly banned paid signature gatherers. Certain initiative proponents filed suit. The trial court upheld the ban, but the appellate court reversed, and this 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.) This Court recognized that "the solicitation of signatures for a petition involves protected speech." (486 U.S. at 422, fn. 5.) It is no different here.

Though affected in a more circuitous manner by AB5, signature gathering deserves immediate strict scrutiny review because AB5 has the same inevitable and dangerous effect of obliterating political speech. In other words, its strike at direct democracy is "more subtle" but no less real. (*Reed*, 576 U.S. at 163.) 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.) Here, banning independent contract workers—many

of whom need the flexibility of a self-determined work schedule—from gathering signatures for initiatives likewise reduces the total quantum of speech on public issues. AB5 not only robs those who need to be independent contractors of their livelihood, but by reducing the supply of, and therefore competition among, signature gatherers, it also makes direct democracy too expensive for all but the very rich. And in the economic conditions of the 21st century, no amount of volunteer labor can be presumed.

The Ninth Circuit overlooked the content-based discrimination against signature gathering in reviewing AB5. With no explanation of the difference in work, the Ninth Circuit describes the distinction of signature gatherers from direct salespersons as "a regulation of economic activity, not speech." (50 F.4th at 937.) It expresses satisfaction with AB5 because it "applies across California's economy." (*Id*. at 936.) But a regulation can apply across an economy and still involve the First Amendment by regulating content.

It can only be presumed that the distinction in "economic activity" here is based on the speaker: a commercial one versus a political one. Judge VanDyke was right to point out this Court's jurisprudence holding that regulation on the basis of the speaker should not allow a "shift [of] focus away from the content of the speech." (*Id.* at 1010, VanDyke, J., dissenting, citing *Barr v. American Association of Political Consultants, Inc.* (2020) 140 S.Ct. 2335; *Reed*, 576 U.S. 155; and *Citizens United v. FEC* (2010) 558 U.S. 310.) The content of the speech is the only real distinction here because

salespeople and signature gatherers are subject to the same "No Solicitors" sign. And since that distinction discriminates against political speech, it touches the core of the First Amendment. As this Court explained in *Meyer v. Grant*, political speech is entitled to greater First Amendment protection, not less. "The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'" (486 U.S. at 421-22) where "First Amendment protection . . . is at its zenith." (*Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 187 (1999).)

The Ninth Circuit cavalierly acknowledges "greater costs on hiring entities" and even "fewer overall job opportunities." (50 F.4th at 935.) Out of touch with how direct democracy functions, however, the Ninth Circuit fails to acknowledge that direct democracy itself, and the rights of individuals to participate in that process, are damaged by AB5.

II. The Ninth Circuit's Decision Jeopardizes The Initiative Power And Direct Democracy.

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

In 1911, California voters passed Proposition 7 with 76.43% support, 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 guaranteed, "under procedures that the Legislature shall provide," in article II, section 11, and its implementing statutes in the California Elections Code.

California courts have recognized the special role of the initiative and referendum powers in preserving self-governance. 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 certain state environmental review, 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.)

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—also through 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 solicitors without political content in their messages are still categorized as independent contractors. There is no compelling state interest in stifling political speech.

B. Affordable Signature Gathering Is Vital To Qualifying Grassroots Legislation By Initiative.

Legislation by initiative was already very expensive before AB5. Gathering signatures by knocking on doors or approaching shoppers at 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.) At that time, paid canvassers generally charged $1 to $3 per signature. (*Ibid*.) After AB5 took effect, HJTA was one of many associational and corporate contributors who helped fund the qualification of an initiative where the price per signature was as high as $10.

The price per signature jumped because it costs more for a business to hire employees than to use independent contractors. For every employee, the business must pay payroll taxes, including Social Security, Medicare, Federal Unemployment, State Unemployment, and Workers Compensation. The business must also carry Employer's Liability Insurance, as it is now responsible for the acts of its employees. Moreover, employees paid by the hour whether they bring in signatures or not have less incentive to produce results than an independent contractor who is paid per signature.

The destructive effects of AB5 are happening in real time. The fact the Mobilize the Message, LLC ("MTM") has left California due to AB5 ought to alarm everyone interested in direct democracy. (50 F.4th at 933.) The fact that Moving Oxnard Forward, Inc. and Starr Coalition for Moving Oxnard Forward cannot afford signature gatherers post-AB5 should be further alarming because they are established organizations. (50 F.4th at 933-934.) If established organizations cannot afford to operate due to the changes caused by AB5, and leave California as a result, the people will have fewer signature gathering options, and less ability to exercise their legislative power.

There are only a handful of petition management firms in California. 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, whether it comes from the left or the right. HJTA is especially concerned for its ability to advocate for taxpayers and homeownership. But, advocates for all causes must be equally concerned. In many other states, the people have also reserved the

initiative power to themselves and need to know that those rights cannot be curtailed.

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 statewide 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.

C. AB5's Prohibition Of Independent Contractors From Gathering Signatures Will Destroy Direct Democracy Because It Will Only Be Affordable For The Extremely Wealthy.

While strict scrutiny applies to AB5, there is not even a rational basis for the division of direct salespersons from signature gatherers. It is clear enough from *Meyer v. Grant*, 486 U.S. 414, that core political speech is being seriously burdened and harmed.

HJTA is thus extremely concerned for the initiative power in California, as well as all other states where the people have reserved their rights to legislate by initiative. AB5 threatens the First Amendment rights to initiate and promote grassroots legislation 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 increased financial burden will stymie direct democracy. The burden is inevitable and will block innumerable ideas for grassroots legislation by eliminating the independence of the workforce.

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. Intentionally independent workers should not be foreclosed from political expression.

We are also living in a time of affordability challenges in households. Among those who remain in an employee-employer relationship, two out of five of those

Americans now must devise a secondary source of income to supplement the salary they receive from their primary employment. Having a second employee-employer relationship would be unduly arduous if not impossible. Signature gathering is a great seasonal "side hustle," that includes the opportunity to express one's political views. AB5 has banned these (and all) intentionally independent workers from speaking politically in a meaningful and productive manner to qualify legislation for the ballot. And it does not matter if "other avenues of expression remain open" to them. (*Meyer*, 486 U.S. at 424.) They are being cut short, along with direct democracy itself.

AB5's prior restraint means that true grassroots efforts to qualify initiatives measures will rarely succeed, or even commence, because of the prohibitive costs imposed. 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. In effect, AB5 is a de facto amendment to the California Constitution limiting the people's power of initiative.

CONCLUSION

To protect direct democracy and free political speech, the Petition for Writ of Certiorari should be granted.

DATED: April 5, 2023

Respectfully submitted,

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY
Counsel of Record
HOWARD JARVIS TAXPAYERS FOUNDATION
1201 K Street, Suite 1030
Sacramento, CA 95814
Telephone: (916) 444-9950
Email: laura@hjta.org
Counsel for Amicus Curiae
Howard Jarvis Taxpayers Association