LHO, J.

IN THE CALIFORNIA SUPREME COURT

No. S206874

MARIA AYALA et al.,

Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.

Defendant and Respondent.

After a Decision by the California Court of Appeal,
Second Appellate District, Division Four
Case No. B235484

Appeal from the California Superior Court, Los Angeles County
Case No. BC403405 (Judge Carl J. West)

REPLY BRIEF FOR THE PETITIONER

Sue J. Stott, State Bar No. 91144 Jenica D. Mariani, State Bar No. 266982 PERKINS COIE LLP Four Embarcadero Center, Suite 2400 San Francisco, CA 94111-4131 Telephone: 415-344-7000 Facsimile: 415-344-7050 SStott@perkinscoie.com JMariani@perkinscoie.com	Eric D. Miller, State Bar No. 218416 PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 Telephone: 206-359-8000 Facsimile: 206-359-9000 EMiller@perkinscoie.com

Attorneys for Defendant-Respondent

IN THE CALIFORNIA SUPREME COURT

No. S206874

MARIA AYALA et al.,

Plaintiffs and Appellants,

v.

ANTELOPE VALLEY NEWSPAPERS, INC.

Defendant and Respondent.

After a Decision by the California Court of Appeal,
Second Appellate District, Division Four
Case No. B235484

Appeal from the California Superior Court, Los Angeles County
Case No. BC403405 (Judge Carl J. West)

REPLY BRIEF FOR THE PETITIONER

Sue J. Stott, State Bar No. 91144 Jenica D. Mariani, State Bar No. 266982 PERKINS COIE LLP Four Embarcadero Center, Suite 2400 San Francisco, CA 94111-4131 Telephone: 415-344-7000 Facsimile: 415-344-7050 SStott@perkinscoie.com JMariani@perkinscoie.com	Eric D. Miller, State Bar No. 218416 PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 Telephone: 206-359-8000 Facsimile: 206-359-9000 EMiller@perkinscoie.com

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

I. INTRODUCTION AND SUMMARY

Plaintiffs begin their Answer to the Petition for Review with a critical misstatement of the procedural posture of this case. In the first sentence of their Answer, they assert (Answer at p. 1) that Defendant Antelope Valley Newspapers ("AVP") "seeks review of an opinion affirming certification of a class of newspaper home delivery carriers" who allege that they have been improperly classified as independent contractors rather than as employees of AVP. In fact, the Court below did not affirm the trial court's decision to certify a class but instead reversed the trial court's decision to deny certification. (Opn. at p. 2.) In so doing, the Court of Appeal failed to accord the deference that this Court has held to be due to a trial court's decision whether to certify a class. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

The error of the Court of Appeal extended far beyond its misapplication of the standard of review: its decision rests on a fundamental misunderstanding of the law governing independent contractor status. For more than two decades, California courts have determined whether a service provider is an employee or an independent contractor by applying the multi-factor balancing test prescribed in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 ("*Borello*"). Under that test, courts must evaluate not only the principal's right to control the service provider but also a set of "secondary factors," some drawn from the *Restatement (Second) of Agency* and some drawn from decisions in other jurisdictions. (*Id.* at pp. 351, 354-55.) The test requires weighing all of the factors against each other, and no single factor is dispositive. (*Id.* at p. 351.) The Court below, however, believed that all of the factors reduce to one: whether the job "involves the kind of work that may be done by an independent contractor or generally is done by an employee." (Opn. at p. 19.) Based on that misunderstanding of the *Borello* test, the Court reversed

the denial of class certification in the face of the trial court's findings of significant variations among many of the secondary factors. Its decision directly conflicts with *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639 ("*Sotelo*"), and *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333 ("*Ali*"), which both recognized that material variation in the secondary factors precludes class certification in cases brought by allegedly misclassified independent contractors.

Plaintiffs barely acknowledge this critical flaw in the reasoning of the Court below. Instead, Plaintiffs focus almost entirely on factual differences between this case and *Sotelo* and *Ali*. Facts, however, are not the source of the conflict on which this Petition is based. Rather, the conflict reflects irreconcilable understandings of the black letter law. The opinion below treats *Borello*'s multi-factor balancing test for determining independent contractor status as a two-factor test: (1) who has the right to control the means and manner of the work? and (2) what "kind of work" is it? *Sotelo* and *Ali* (and *Borello* itself) do not. The cases cannot be distinguished or harmonized on this point; they simply reflect fundamentally different views of the law. As a result, if not corrected by this Court, the decision below will cause grave uncertainty for lower courts, for California businesses and any other service recipients that engage independent contractors, and for individuals who, as independent contractors, provide business services. This Court's review is warranted.

II. THE DECISION BELOW CREATES A CONFLICT AMONG THE COURTS OF APPEAL

As explained in the Petition (at pp. 12-15), the published opinion of the Second Appellate District in this case directly conflicts with the decisions of the First Appellate District in *Sotelo*, *supra*, 207 Cal.App.4th 639, and the Fourth Appellate District in *Ali*, *supra*, 176 Cal.App.4th 1333. In all three cases, the plaintiffs were independent contractors who alleged

that they were misclassified as contractors and were instead employees. In all three cases, the trial court denied class certification, determining that individual issues predominated because *Borello*'s multi-factor test required examining the characteristics of each individual contractor's relationship with the putative employer.

In *Sotelo* and *Ali*, the Courts of Appeal affirmed the denial of class certification, holding that variability in the "secondary" independent contractor factors precluded class certification because "even if other factors were able to be determined on a class-wide basis, [the variant secondary] factors would still need to be weighed individually, along with the factors for which individual testimony would be required." (*Sotelo*, *supra*, 207 Cal.App.4th at p. 660; accord *Ali*, *supra*, 176 Cal.App.4th at pp. 1349-52.) Here, by contrast, the Court held that such variations are irrelevant because "a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available." (Opn. at p. 19.) Instead, the Court reasoned, "the focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor or generally is done by an employee." (*Ibid.*) In the Court's view, that question is susceptible to common proof, making class certification appropriate. (*Ibid.*)

Plaintiffs assert (Answer at p. 1) that "[t]he opinion below adopted the same law as the Courts of Appeal in" *Sotelo* and *Ali*. With the supposed aid of side-by-side comparison charts, they establish the unremarkable propositions that all three decisions (1) cited *Borello* and purported to apply the rule it prescribes (Answer at pp. 2-3, 4), (2) recognized that class certification is appropriate only when common issues of law and fact predominate (Answer at pp. 4, 5), and (3) quoted *Borello*'s enumeration of the secondary factors (Answer at pp. 7-8). Those observations are correct, but they are irrelevant to the questions presented here, which are (i) whether

a trial court lacks discretion to deny certification of a class of individuals claiming to be employees when there is material variation in the secondary factors (*Sotelo* and *Ali* say no; the Court below says yes), and, relatedly, (ii) whether the secondary factors require examining all aspects of the relationship between the service provider and the service recipient (as *Borello* holds, and as *Sotelo* and *Ali* recognize), or simply the "the kind of work" involved, whatever that may mean (as the Court below held).

According to Plaintiffs (Answer at p. 9) "there are significant factual variations" between this case and *Sotelo* and *Ali*, and those variations "are at the root of the decisions made by the Courts of Appeal in each of the cases." That argument echoes the Court of Appeal's conclusory assertion that *Sotelo* and *Ali* "involved facts and positions unique to the parties." (Opn. at p. 18, fn. 8.) While Plaintiffs have improved upon the Court of Appeal by at least attempting to articulate specific factual distinctions, the distinctions they claim to have identified are either nonexistent or legally irrelevant.

As an initial matter, many of Plaintiffs' arguments for distinguishing this case from *Sotelo* and *Ali* rest on the flawed premise that, in this case, AVP had "uniform policies." (Answer at p. 12; *see id.* at p. 10 ["identical contracts"].) Contrary to Plaintiffs' suggestion, AVP never conceded the existence of "common policies," because in fact there were none. Rather, as the Court of Appeal explained, AVP conceded only that there were common "requirements about the result of the work"—*i.e.*, the timely delivery of newspapers to customers—but no common requirements as to the "manner and means used to accomplish that result," which was up to the contractors. (Opn. at p. 18.) Similarly, Plaintiffs make much of the form contracts between AVP and its contractors (Answer at p. 10), but they overlook that the terms of the written contracts were subject to individual negotiation and—as the trial court found—varied in critical details, such as

pick-up locations, rates, and route details. (Los Angeles Super. Ct. Ruling and Order Re: Plaintiffs' Motion for Class Certification, dated Aug. 19, 2011, Appellants' Appendix ("AA") at volume ("vol.") 19, pp. 4382-89.) Plaintiffs also point out (Answer at p. 13) that contractors received route lists and "bundle tops," which conveyed information about customer addresses and dates for stopping and starting delivery. By its nature, however, the route-specific information in the bundle tops was constantly changing and was different for each route and thus for each contractor, which is one reason why the trial court found "a wide variance as to how the carriers perform their services." (AA, at vol. 19, at p. 4384.)

Moreover, even if there were *some* common features of the relationship between AVP and its contractors, that would not distinguish this case from *Sotelo* or *Ali*. The Court in *Sotelo* specifically noted that the trial court in that case had found "little variance as to the issue of respondents' control over the details of putative class members' work." (*Sotelo, supra,* 207 Cal.App.4th at p. 657.) Likewise, the Court in *Ali* observed that the putative employer had a "standardized lease agreement" and a common "training manual." (*Ali, supra,* 176 Cal.App.4th at pp. 1338-39.) Both Courts nevertheless affirmed the denial of class certification, however, because there was significant variability in other factors. In other words, both Courts recognized that commonality in just a few of the factors in a multi-factor balancing test is not necessarily sufficient to establish that common questions predominate. (*Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1051-52 [Common issues do not predominate where liability is contingent, at least in part, on facts specific to individual plaintiffs, so that "proof of . . . liability would have had to continue in an employee-by-employee fashion."].)

Plaintiffs also assert (Answer at p. 10) that this case differs from *Sotelo* because here there is a single employer whereas in *Sotelo* there were

"approximately 30 alleged employers." Although the Court in *Sotelo* noted the existence of a large number of putative employers, it did so in the context of explaining why the trial court had no obligation to create multiple subclasses, not in the context of an inquiry into commonality. (*Sotelo, supra,* 207 Cal.App.4th at p. 662.) More to the point, the reason that there were multiple putative employers in *Sotelo* was that many of the contractors in that case used "helpers" or substitutes to deliver newspapers for them. (*Id.* at pp. 658-59.) That is equally true here. (AA, at vol. 19, at p. 4382.) To be sure, the proposed class definition in this case, unlike that in *Sotelo*, does not include the substitutes or helpers, but that does not mean that they are irrelevant for purposes of class certification. Where contractors used substitutes and helpers—and many often did—that fact directly affects "commonality" because it makes each such contractor very different from those who delivered newspapers by themselves, without regular or occasional assistance or substitution. The fact that Plaintiffs' counsel excluded the contractors' substitutes and helpers from the proposed class definition does not make the contractors "alike" or common.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *BORELLO*

Although the issue was prominently featured in the Petition (at pp. 15-21), Plaintiffs have almost nothing to say about the conflict between the decision below and *Borello*. As explained above, the critical step in the reasoning of the Court of Appeal is that an individual service provider's "employee status cannot be based upon the individual choices the [individual] makes" because "the focus of the secondary factors is mostly on the job itself, and whether it involves the kind of work that may be done by an independent contractor, or generally is done by an employee." (Opn. at p. 19.) That holding is inconsistent with *Borello* because, under *Borello*, courts applying the secondary factors must evaluate much more than the

generic "kind of work" being performed. Instead, many of the factors turn on the specifics of the relationship between the principal and the service provider, and on the choices made by both the service provider and the service recipient. To take just one example, the inquiry into "the length of time for which the services are to be performed" and "the degree of permanence of the working relationship" necessarily turns on the *actual* length of the service contract and its *actual* permanence, even though a contractor could always choose to enter into a service contract of a different length or terminate a service relationship at a different time. (*Borello*, *supra*, 48 Cal.3d at pp. 351, 355.) Those factors would add nothing to the analysis unless they considered the actual characteristics of the particular service relationship in question.

On the other hand, the generic "kind of work" performed is *itself* one of the secondary factors. (See *Borello*, *supra*, 48 Cal.3d at p. 351 ["the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision"].) There would be no reason for "the kind of occupation" to be one of many secondary factors if the secondary-factor inquiry as a whole were directed at determining what "kind of work" was performed. The Court below has thus taken what should be one of many factors to be weighed against each other and elevated it to dispositive significance.

To the extent that Plaintiffs address this aspect of the decision below, they attempt to justify it (Answer at p. 14) on the ground that "the Court's determination regarding secondary factors was made in the context of the circumstances of this case where it is undisputed that there is a standard contract with work details signed by all class members and where it is further undisputed that the company has policies that apply to all class members." That argument is largely derivative of the flawed factual

distinctions that Plaintiffs attempted to draw between this case and *Sotelo* and *Ali*, and it fails for the reasons already discussed.

More fundamentally, Plaintiffs' argument is at odds with the way the Court of Appeal described its own holding. Had the Court believed, as Plaintiffs suggest, that a "standard contract" prescribed common "work details" for all class members, and that the same "policies . . . apply to all class members," then the Court could simply have determined that all of the secondary factors in this case were susceptible to common proof. Such a holding would have been inconsistent with the record and with the trial court's findings based upon a proper exercise of its discretion, but the Court would at least have reflected a correct understanding of the *Borello* test. This is, in fact, the holding in the recent Fourth Appellate District case on which Plaintiffs rely, *Bradley v. Networkers Internat. LLC* (2012) ___ Cal.App.4th ___, 2012 WL 6182473, in which the Court— observing that that "the focus is not on the particular task performed by the employee, but the global nature of the relationship between the worker and the hirer"— emphasized that the defendant had not identified evidence of material variation among the 140 class members. (*Id.* at pp. *5, *9-11.) Here, in contrast, the Court did not believe that the secondary factors were the same across all 500-plus putative class members, which is why it acknowledged that "individual choices" by contractors had led to variation in many of the secondary factors. (Opn. at p. 19.) The Court in the instant case reversed the denial of certification not because of its assessment of the facts relevant to the secondary factors, but because of a flawed understanding of *Borello*.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S REVIEW

As explained in the Petition (at p. 15), the decision below will confound trial courts confronted with putative classes of allegedly misclassified independent contractors by requiring the courts to choose

between the approach to the secondary factors embodied in *Sotelo* and *Ali* or the novel and unprecedented approach set out in the opinion below. Plaintiffs only response to that point is to observe (Answer at p. 17) that counsel for AVP represent the defendants in some other pending independent contractor class action cases. The relevance of that observation is puzzling, partly because Plaintiffs' counsel are also litigating multiple independent contractor class actions. Regardless of who represents the parties in such actions, the existence of a direct conflict on an issue of great importance in this State, and in current and future litigation in California, compels this Court's review.

This Court's review is also urgently warranted because of the conflict between the decision below and *Borello*. As a result of the decision in the instant case, it is no longer clear whether to apply the *Borello* test as it has traditionally been understood—that is, as a test that calls for an examination of the totality of the relationship between the service provider and the service recipient—or whether to apply the newly created test prescribed by the Court below without any legal precedent. To make matters worse, the test adopted by the Court below is itself profoundly vague and unclear. In particular, the Court of Appeal did not explain how to determine whether a job "involves the kind of work that may be done by an independent contractor, or generally is done by an employee." (Opn. at p. 19.) The phrase "may be done by an independent contractor" could be taken to call for an inquiry into what kind of arrangement is theoretically possible, but the phrase "generally is done by an employee" could instead be taken to call for an inquiry into the usual practice in the market. Of course there are many other interpretations of this pronouncement and parties could litigate endlessly over the enigma that the Court below created. Because the test is entirely novel, existing precedent governing independent contractor status provides no guidance.

If the decision below is not reviewed and corrected by this Court, businesses and service providers will lack a clear legal rule for structuring their relationships and will be uncertain whether they are creating an employment relationship as opposed to an intended independent contractor relationship. In light of the substantial penalties for misclassifying employees, that uncertainty will impose serious costs and unnecessary limitations on California businesses and service providers. (See California Employment Law Council *amicus* letter at pp. 6-7; California Chamber of Commerce *amicus* letter at pp. 2-3; Employers Group *amicus* letter at pp. 3-4.)

V. CONCLUSION

For the foregoing reasons and those stated in the Petition for Review, the Petition should be granted.

Respectfully submitted.

DATE: January 3, 2013

PERKINS COIE LLP

By: Sue Stott /JM

Sue J. Stott, State Bar No. 91144

Attorneys for Petitioner (Defendant-Respondent)
ANTELOPE VALLEY NEWSPAPERS, INC.

71240-0001/LEGAL25468743

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 8.204(c)
OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204(c) of the California Rules of Court, and in reliance on the word count feature of the software used to prepare this document, I certify that the attached Petition For Review contains 3,066 words, including footnotes and exclusive of those materials not required to be counted under Rule 8.204(c)(3); is proportionally spaced; and has a typeface of 13 points.

DATE: January 3, 2013

PERKINS COIE LLP

By: _____

Jenica D. Mariani, State Bar No. 266982

Attorneys for Petitioner (Defendant-Respondent)
ANTELOPE VALLEY NEWSPAPERS, INC.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to this action. My business address is 4 Embarcadero Center, Suite 2400, San Francisco, California 94111-4131.

On January 3, 2013, I caused to be served the following document:

REPLY BRIEF FOR THE PETITIONER

on the interested parties in this action by placing true copies of the document in sealed envelopes as set forth below, addressed as follows:

SEE ATTACHED SERVICE LIST

XXX **VIA FEDERAL EXPRESS**: I placed the document listed above in a sealed Federal Express envelope and affixed a pre-paid air bill, and caused the envelope to be delivered to a FEDERAL EXPRESS agent for delivery;

OR

XXX **VIA FIRST CLASS MAIL:** I caused each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Perkins Coie LLP.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at San Francisco, California, on January 3, 2013.

Elizabeth Carmichael

SERVICE LIST

Callahan & Blaine 3 Hutton Ctr. Dr., Ninth Flr. Santa Ana, CA 92707	ATTORNEYS FOR PLAINTIFFS BY FEDERAL EXPRESS
Camille Olson Seyfarth Shaw LLP 2029 Century Park East, Suite 3500 Los Angeles, CA 60087-3021	BY U.S. MAIL
Paul Grossman General Counsel of the California Employment Law Council 515 S. Flower Street, 25th Floor Los Angeles, CA 90071	BY U.S. MAIL
Heather Wallace Associate General Counsel California Chamber of Commerce 1215 K Street, Suite 1400 Sacramento, CA 95814	BY U.S. MAIL
Clerk of the Court California Court of Appeal Second Appellate District, Fourth Division Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	BY U.S. MAIL
Clerk of the Court California Superior Court County of Los Angeles 111 North Hill St. Los Angeles, CA 90012-3014	BY U.S. MAIL
Attorney General of California Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	BY U.S. MAIL
Los Angeles County District Attorney's Office 210 West Temple Street, Suite 18000 Los Angeles, CA 90012-3210	BY U.S. MAIL