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)

OPENING BRIEF ON THE MERITS

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2. Whether the Court below erred in holding that the secondary factors in the *Borello* test pertain to the generic type of work being performed, rather than the specific features of the relationship between the individual performing the work and the putative employer.

INTRODUCTION

For more than 20 years, this Court's decision in *Borello* has provided guidance to California courts, businesses, and workers seeking to determine whether a worker is properly classified as an employee or as an independent contractor. Under *Borello*, as under the common-law employment principles that it applied, a court must look to the service recipient's right to control the manner and means by which the work is performed, as well as a set of "secondary" factors designed to illuminate "the nature of [the] service relationship." (*Borello*, *supra*, 48 Cal.3d at p. 350.) Those factors, this Court has explained, "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Id.* at p. 351 [internal quotation marks and citation omitted].)

The plaintiffs in this case are newspaper carriers who allege that they have been improperly classified as independent contractors rather than employees. The trial court denied a motion to certify a class, noting

variations among the members of the putative class in numerous secondary factors, including whether the carriers use substitutes to perform their services, when they perform their services, how they perform their services, whether they do other work, and whether they have established separate business entities.

The Court of Appeal reversed, concluding that all of those factual variations are irrelevant. In its view, 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.) Because the "kind of work" is the same for all of the carriers, the Court determined that a class could be certified notwithstanding the variations in the secondary factors. In so holding, the Court fundamentally misunderstood *Borello*, collapsing its multi-factor balancing test into an inquiry with a singular focus on the "kind of work" performed. That decision should be reversed.

STATEMENT

1. Plaintiffs are current and former newspaper delivery contractors or "carriers" of the *Antelope Valley Press* ("AVP"), a daily newspaper in Palmdale, California. Each of the carriers has signed a delivery agreement with AVP. Because different carriers have different degrees of experience and sophistication, AVP does not have a uniform approach to negotiating delivery agreements. (Appellants' Appendix ("AA"), at vol.10, p. 2069, ¶ 4.) Generally, it proposes a piece-rate compensation arrangement under which it pays a specified amount for each newspaper delivered, with the rate varying based on the characteristics of the particular delivery route, such as the number of subscribers, the route density, and the driving distances. (*Id.* at ¶ 7.) Many carriers accept the proposed rate, but some do not, and the rates are subject to individual negotiation. (*Id.* at ¶ 8.)

The agreements specify that newspapers must be delivered to subscribers by a particular time—usually 5:00 a.m. on weekdays and 6:00 a.m. on weekends, though carriers serving outlying routes can negotiate a later deadline. (AA, at vol. 10, at pp. 2071-72, ¶¶ 23-24.) But the method of accomplishing the deliveries is left to carriers. For example, carriers alone determine whether, and if so when and how, to use "helpers" or substitutes to deliver papers for them (*id.* at pp. 2078-79, ¶¶ 54-55); where to pick up newspapers (AVP's Palmdale warehouse or alternate locations) (*id.* at pp. 2082, ¶¶ 73-75); where and how to assemble them for delivery (*id.* at ¶¶ 76-77; *id* at p. 2084, ¶¶ 85-87); the order in which to deliver them to customers (*id.* at pp. 2090-91, ¶¶ 118-121); which vehicle or vehicles to use for deliveries (*id.* at p. 2095, ¶ 144), and whether to deliver other publications at the same time or to engage in other income-generating activities (*id.* at ¶¶ 149-52; *id.* at p. 2096, ¶¶ 154-55).

Each carrier's route is unique in its length, topography, number of subscribers, and distance from the pick-up location. (AA, at vol. 10, at p. 2070, ¶ 11.) Some, but not all, carriers have multiple routes. (*Id.* at p. 2074, ¶ 30.) As a result, the length of time each carrier works on a given day can vary significantly. (*Id.* at pp. 2098-99, ¶ 164.) Some carriers complete their daily deliveries in three to four hours, others in much less time. (*Id.* at p. 2099, ¶ 165.)

2. Plaintiffs filed this lawsuit on behalf of a putative class of carriers, alleging that they were misclassified as independent contractors rather than employees and that, as a result of the misclassification, AVP had violated various statutes. The complaint included eight causes of action: (1) failure to pay overtime wages; (2) failure to provide meal periods or compensation in lieu thereof; (3) failure to provide rest periods or compensation in lieu thereof; (4) failure to reimburse for reasonable business expenses; (5) unlawful deductions from wages; (6) failure to

provide itemized wage statements; (7) failure to keep accurate payroll records; and (8) unfair business practices. (AA, at vol. 1, at pp. 1-21.) Plaintiffs sought to certify a class of all carriers who had signed delivery agreements with AVP after December 5, 2004. (AA, at vol. 19, at p. 4377 (Court's Ruling and Order Re: Plaintiff's Motion For Class Certification, filed Aug. 19, 2011 ["Trial Ct. Opn."]) at p. 2.)

The trial court denied class certification. It agreed that the membership of the proposed class was ascertainable and that the class was numerous, consisting of 528 current and former carriers. (Trial Ct. Opn. at p. 5.) But the court concluded that plaintiffs had "not demonstrated that common questions of law or fact predominate." (*Id.* at p. 7.) It observed that "no commonality exists regarding the right to control," and it also identified numerous "individual inquiries" that would be "necessary to determine whether a person is or is not a member of the class." (*Ibid.*) In particular, the trial court found that individual issues predominated on such questions as

- "who performs the services at issue"—some of the carriers used helpers or substitutes from time to time, others on a regular basis, still others not at all (*ibid.*);
- "when carriers are to perform their services"—some of the carriers' contracts specified a time at which papers were to be picked up, while others did not (*ibid.*);
- "where carriers perform services"—some carriers picked up their papers at the Palmdale warehouse, while others picked them up "from drop sites closer to where they are," and "[c]arriers fold[ed] newspapers at various locations of their choosing" (*id.* at pp. 8-9);
- "how the carriers perform their services"—some carriers received training from AVP, while others did not, and some said that they

were required to bag newspapers, while others said they were not (*id.* at pp. 9-10);

- whether "carriers delivered other publications, including competing newspapers, when delivering for AVP" (*id.* at p. 13);
- whether carriers "created a business entity and/or bank accounts for their delivery work" (*id.* at p. 14); and
- how much time the carriers spent "in performance of their duties" (*ibid.*).

The trial court concluded that "[b]ased on the evidence before the Court, the independent contractor-employee issue is not amenable to class treatment." (Trial Ct. Opn. at p. 16.)

3. The Court of Appeal affirmed in part and reversed in part. The Court affirmed the trial court's order to the extent that it denied certification of the claims based on overtime and meal and rest breaks. (Opn. at pp. 20-21.) But it reversed the trial court's determination that plaintiffs had failed to show that common issues predominated with respect to misclassification, and it remanded with instructions that the trial court certify a class for the remaining causes of action unless it identified some other reason not to do so. (*Id.* at pp. 17-20, 22.)

The Court of Appeal began by considering evidence of AVP's right to control the carriers' work. It acknowledged that, during the class period, AVP used basic forms of agreements with carriers that were broadly similar among carriers but that also contained some terms specific to each carrier, which were sometimes subject to individual negotiation. (Opn. at p. 9.) The Court then discussed other documents that, plaintiffs alleged, demonstrated AVP's right to control. As the trial court had noted, the record reflected divergent testimony on whether the documents represented mandates or were merely suggestions. (*Id.* at pp. 11-12.) The Court also discussed the evidence of AVP's conduct that, according to plaintiffs,

showed AVP's right to control their work. It noted that AVP's evidence showed that many of the alleged indicia of control varied from carrier to carrier. (*Id.* at pp. 12-15.)

The Court of Appeal next observed that although plaintiffs had submitted purportedly "common" evidence related to some of the secondary factors in the *Borello* test, AVP had submitted evidence showing a lack of commonality as to many of the other secondary factors. The Court of Appeal described the evidence as follows:

> (1) some carriers delivered other publications (such as the Los Angeles Daily News or the Los Angeles Times) at the same time they delivered for AVP; (2) some carriers have set up formal business entities to conduct their delivery business, or consider their delivery work to be an independent business; (3) some carriers provide their contact information to subscribers and/or deal directly with subscribers regarding complaints or special requests; (4) some carriers have other jobs in addition to their delivery work; (5) some carriers choose to use AVP's facilities to assemble and fold their newspapers while others do not; (6) some carriers purchase supplies from AVP but others choose not to; (7) some carriers take advantage of opportunities to increase their compensation by generating new subscribers, taking on additional routes, using substitutes or helpers efficiently, or avoiding customer complaint charges by re-delivering; (8) some carriers delivered for as little as one day while others delivered for many years; and (9) many contractors, unlike the named plaintiffs, understood they were independent contractors and intended to be independent contractors.

(Opn. at p. 16.)

In reviewing the evidence, the trial court had found that individual issues predominated because of the variations in the carriers' work experiences and in their interactions with AVP. (Trial Ct. Opn. at pp. 7-16.) But the Court of Appeal concluded that the record instead reflected disputes as to the import of evidence common to all class members. (Opn.

at pp. 17-19.) With respect to the right to control, for example, the Court stated that AVP's evidence that "the way that the carriers accomplished their work varied widely" constituted evidence of an overall lack of control, rather than evidence that the control question needed to be assessed on a carrier-by-carrier basis. (*Id.* at p. 19.)

Turning to the secondary factors, the Court of Appeal stated that 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," and that "the individual choices the carrier makes" do not affect the analysis of the secondary factors "if other choices are available." (Opn. at p. 19; *id.* at p. 2 ["almost all of those factors relate to the type of work involved"].) The Court therefore concluded that AVP's evidence of material variability in the secondary factors simply established that "the type of work involved often is done by independent contractors" but did not establish the predominance of individual issues. (*Id.* at p. 19)

4. AVP filed a petition for rehearing, which the Court of Appeal denied.

SUMMARY OF ARGUMENT

A party seeking certification of a class bears the burden of establishing that there is a well-defined community of interest within the class. Such a community of interest exists only when the issues in the litigation can be decided on the basis of common proof.

In this case, because the Labor Code only applies to employees, the threshold underlying question is whether plaintiffs were misclassified as independent contractors rather than employees. That question is governed by this Court's decision in *Borello*, which holds that independent contractor status is determined by applying a balancing test that considers the service recipient's right to control the manner and means by which the work is

performed as well as a set of secondary factors that assess the nature of the service relationship. Under that test, no single factor is dispositive, and all of the factors must be balanced against each other.

The premise of the decision below is that the *Borello* secondary factors are aimed at determining the "type of work" being performed, and that a class of putatively misclassified employees may be certified as long as they all perform the same type of work. That is incorrect. *Borello* makes clear that the secondary factors assess not just the kind of work, which is itself one of the factors, but rather the totality of the service relationship. Indeed, most of the secondary factors have nothing to do with the type of work being performed. The error in the Court of Appeal's analysis is further demonstrated by the many cases finding that workers within the same industry—all of whom are engaged in the same kind of work—can be either employees or independent contractors, depending on their individual circumstances. And the Court of Appeal's approach is also contrary to that of other jurisdictions that, like California, apply common-law principles in determining independent contractor status. Finally, because of both its novelty and its vagueness, the new independent contractor analysis announced by the Court below would, if upheld, be difficult for courts, businesses, and workers to understand and apply.

Under a proper understanding of the *Borello* test, the trial court's decision not to certify a class in this case should be affirmed. The Court of Appeal did not dispute that there is significant variation in many of the secondary factors among the members of the putative class. And because all of those factors are relevant to the assessment of independent contractor status, a class action in this case would either devolve into an unworkable series of mini-trials or force the trial court to make the case manageable by preventing AVP from presenting evidence that would establish a defense to

plaintiffs' claims. The trial court did not abuse its discretion in determining that class certification was inappropriate.

ARGUMENT

The Trial Court Correctly Determined that Material Variations in the *Borello* Secondary Factors Preclude Class Certification in this Case.

A. Class certification is appropriate only when the trial court determines that common issues predominate.

1. This Court has held that a party seeking class certification bears the burden of "demonstrat[ing] the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1021 (*Brinker*); see also *Washington Mut. Bank, F.A. v. Super. Ct.* (2001) 24 Cal.4th 906, 913 (*Washington Mutual*).) The requirement of a "community of interest" incorporates three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Brinker*, *supra*, 53 Cal.4th at p. 1021 [quoting *Fireside Bank v. Super. Ct.* (2007) 40 Cal.4th 1069, 1078].)

To establish that common issues predominate, a party must do more than just raise common *questions*—it must show that those questions are *answerable* through common proof. (*Washington Mutual*, *supra*, 24 Cal.4th at pp. 913-14; see also *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 933 [ordering certification because "[t]he one decisive issue pervading the litigation . . . will not be decided on the basis of facts peculiar to each class member, but rather, on the basis of a single set of facts applicable to all members"]; *City of San Jose v. Super. Ct.* (1974) 12 Cal. 3d 447, 460.) The United States Supreme Court made that point forcefully in *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S. Ct. 2541 (*Wal-*

Mart Stores), observing that an allegedly "common contention . . . must be of such a nature that it is capable of classwide resolution." (*Id.* at p. 2551.) As the Court explained, "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." (*Ibid.* [quoting Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L. Rev. 97, 132] [emphasis omitted].)

It follows that a class cannot be certified when liability is contingent, at least in part, on facts particular to individual claimants, so that the only means of separating the injured from the non-injured would be a series of mini-trials. (*Brinker*, *supra*, 53 Cal.4th at pp. 1051-52.) For that reason, California courts routinely deny class certification where individualized proof of liability will be necessary. (See, e.g., *Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1430 [trial court "has discretion to deny certification when it concludes the fact and extent of each member's injury requires individualized inquiries that defeat predominance"]; *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1430 [affirming denial of certification where "each class member would need to establish entitlement to damages as well as the amount of damages"]; *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29, 40 ["[W]here, after the common questions have been determined, each class claimant would still have to litigate a number of substantial questions peculiar to himself in order to recover, there does not exist a necessary community of interest," and "[a] class action is therefore improper."] [quoting *Reyes v. San Diego Cnty. Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1281] [first brackets in original].)

2. The responsibility for determining whether common questions predominate is committed, in the first instance, to the trial court.

As this Court has recognized, "trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action." (*Linder v. Thrifty Oil Co.*, (2000) 23 Cal.4th 429, 435.) For that reason, "they are afforded great discretion in granting or denying certification," and their decisions on certification are reviewed deferentially. (*Ibid.*) So long as it is supported by substantial evidence, a trial court ruling on certification "generally will not be disturbed unless (1) improper criteria were used; or (2) erroneous legal assumptions were made." (*Ibid.* [internal quotations and citation omitted].) And "where a certification order turns on inferences to be drawn from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 328 [quoting *Massachusetts Mut. Life Ins. Co. v. Super. Ct.* (2002) 97 Cal.App.4th 1282, 1287].) The appellate court should not engage in "any reweighing" of the evidence, and it "is not authorized to overturn a certification order merely because it finds the record evidence of predominance less than determinative or conclusive." (*Id.* at p. 338.)

B. *Borello* requires courts to balance multiple intertwined factors in determining independent contractor status.

In *Borello*, this Court observed that "[t]he principal test of an employment relationship" has traditionally been "whether the person to whom service is rendered has a right to control the manner and means of accomplishing the result desired." (*Borello*, *supra*, 48 Cal.3d at p. 350 [quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946] [brackets in original].) But the Court went on to explain that "the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements." (*Ibid.*) Instead, it held, the determination of independent contractor status requires application of a multi-factor test that considers not only the right to control but also a set of

"secondary" factors designed to illuminate "the nature of [the] service relationship." (*Ibid.*; see *id.* at p. 351, fn. 5 ["control of work details is not necessarily the decisive test for independent contractorship"] [internal quotation marks omitted].)

Those secondary factors include whether the service recipient has "the right to discharge at will, without cause." (*Borello*, *supra*, 48 Cal.3d at pp. 350-51 [quoting *Tieberg*, *supra*, 2 Cal.3d at p. 949].) Additional secondary factors are "derived principally from" Section 220 of the *Restatement (Second) of Agency*. (*Borello*, *supra*, 48 Cal.3d at p. 351.) The *Restatement* factors include

> (a) whether the one performing services is engaged in a distinct occupation or business; (b) 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; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

(*Ibid.*) The *Borello* Court went on to hold that, in assessing independent contractor status, a court must also take account of "the six-factor test developed by other jurisdictions." (*Id.* at p. 354.) In addition to the right to control, that test looks to

> (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

(*Id.* at pp. 354-55.)[1]

Borello emphasized that the secondary factors "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (*Id.* at p. 351 [internal quotation marks and citation omitted].) In other words, *Borello* requires a factfinder to consider all relevant aspects of a service relationship in order to determine whether a worker is an independent contractor or an employee. As the Court put it, "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." (*Id.* at p. 354.)

C. The *Borello* secondary factors explore the totality of the service relationship, not just the kind of work performed.

The key premise of the decision below is that "the focus of the secondary factors" in the *Borello* test "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; see also *id.* at p. 2.) Based on that premise, the Court of Appeal concluded that variations among members of the putative class with respect to the secondary factors were irrelevant because "a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available." (*Id.* at p. 19.) That reasoning reflects a fundamental misunderstanding of the *Borello* test.

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[1] Although the *Borello* Court discussed those additional factors in the context of applying the workers compensation statute, courts have also applied them in other contexts, and the Court of Appeal in this case recognized that they are relevant to an assessment of plaintiffs' status. (Opn. at p. 8; see also *Sotelo*, *supra*, 207 Cal.App.4th at pp. 656-57; *JKH Enterps., Inc. v. Dep't of Indus. Relations* (2006) 142 Cal.App.4th 1046, 1064, fn. 14.)

1. *Borello* makes clear that the secondary factors explore the complete nature of the service relationship.

As explained above, *Borello* prescribes a multi-factor balancing test that examines not only whether a service recipient has the right to control the manner and means by which a putative employee performs services but also a variety of secondary factors. The Court of Appeal effectively collapsed that test into a rigid two-step inquiry: (1) who has the right to control the manner and means by which the work is peformed? and (2) what kind of work is it? That analysis cannot be squared with *Borello*, which makes clear that the purpose of the secondary factors is to examine the totality of the "nature of [the] service relationship." (*Borello*, *supra*, 48 Cal.3d at p. 350; accord, *Vernon v. State* (2004) 116 Cal.App.4th 114, 124 [in considering whether a person is an employee or independent contractor, courts "consider the 'totality of circumstances' that reflect upon the nature of the work relationship of the parties"].) In other words, the secondary factors are designed to identify not the nature of the service, but the nature of the service relationship.

The error in the Court of Appeal's analysis is particularly apparent because the type of work performed is *itself* one of the secondary factors. In *Borello*, this Court articulated that factor as "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." (*Borello*, *supra*, 48 Cal.3d at p. 351 [citing *Restatement (Second) of Agency* § 220].) It would make little sense to identify the type of work as one of many secondary factors if the secondary factor inquiry as a whole were directed at determining what type of work was performed. In elevating the "type of work" factor over the other secondary factors it discussed (Opn. at pp. 7-8), the Court below failed to appreciate the significance of *Borello*'s admonition that "the individual factors cannot be applied mechanically as

separate tests; they are intertwined and their weight depends on particular combinations." (*Borello*, *supra*, 48 Cal.3d at p. 351; see also *Narayan v. EGL, Inc.*, (9th Cir. 2010) 616 F.3d 895, 901 [A court must "assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive."] [quoting *NLRB v. Friendly Cab Co. Inc.* (9th Cir. 2008) 512 F.3d 1090, 1097].)

The Court of Appeal's conclusion that the secondary factors are largely aimed at identifying the type of work also mischaracterizes the other secondary factors, most of which have nothing to do with the type of work at issue. Only one other secondary factor—the skill needed to perform the work—pertains directly to the generic type of work performed. The remaining secondary factors do not. For example:

Right to terminate relationship at will: Whether the putative employer has the right to "fire" the service provider without cause depends on the terms of the service agreement between the parties, and not the type of work being performed. Depending on the nature of the particular service relationship, a service recipient either may or may not be able to terminate its relationship with workers performing the same type of work. (Compare, e.g., *Batt v. San Diego Sun Publ'g. Co.* (1937) 21 Cal.App.2d 429, 437 [newspaper publisher could terminate carrier's independent contractor agreement only with cause]; with *Rathbun v. Payne* (1937) 21 Cal.App.2d 49, 51 [carrier's arrangement with newspaper publisher could be terminated by either party at will].)

Distinct occupation or business: This factor considers whether a worker operates a business independent from that of the putative employer, which can be a powerful indicator of independent contractor status. In applying this factor, courts consider facts such as whether a putative employee uses substitutes and helpers, has an established business, performs work for other clients, uses business cards, or advertises. (See,

e.g., *Narayan v. EGL, Inc.* (N.D. Cal. 2012) 285 F.R.D. 473, 478-79 [discussing whether particular putative employees used substitutes or helpers or contracted with other clients in conjunction with "distinct business" factor]; *Torres v. Reardon* (1992) 3 Cal.App.4th 831, 834, 838 [concluding that gardener was independent contractor after considering evidence that he had maintained an "independently established business" for eight years, performing services for a number of clients, making substantial investments in his business, and employing others to assist him].) It has nothing to do with the type of work at issue. In any industry, it is possible to work for oneself or to be employed by another.

***Supplier of tools and place of work*:** This factor asks whether the putative employee or the employer provides the tools, equipment, and place of work. While an employee generally uses the equipment provided by the employer, an independent contractor often supplies his or her own equipment. (See, e.g., *Varisco v. Gateway Sci. & Eng'g, Inc.*, (2008) 166 Cal.App.4th 1099, 1106 [finding putative employee to be an independent contractor, in part because he "supplied his own clothes and equipment" for his work as a construction inspector].) For example, in *Lara v. Workers' Comp. App. Bd.* (2010) 182 Cal.App.4th 393, the Court of Appeal concluded that a gardener was an independent contractor because, among other things, he "brought all the equipment he needed to do the job, including a trimmer, rake, a broom, and a blower, which tools he own[ed]." (*Id.* at p. 397.) But there is nothing inherent in the nature of gardening that requires a gardener to supply his own tools; many homeowners, after all, own rakes and brooms that a gardener could use in providing services. This factor, too, is about the details of a particular service relationship between two parties—not the type of work.

Length of relationship: How long a service provider provides services to a service recipient also has nothing to do with the type of service being provided. For example, one accountant may have a one-time contract to prepare a company's tax return. Another may maintain the company's books year-round and may have done so for many years. That factual distinction between the two accountants bears on their potential employee status, but not because it suggests anything about the intrinsic nature of accounting.

Method of payment: This factor explores whether the service recipient pays the service provider "by the time," which is indicative of employee status, or "by the job," which suggests independent contractor status. (*Borello*, *supra*, 48 Cal.3d at p. 351.) But workers performing the same type of work can be paid under different compensation schemes. (See, e.g., *Sotelo*, *supra*, 207 Cal.App.4th at p. 659 [noting trial court's finding that some newspaper carriers were paid on a buy/sell basis and others by a piece rate].)

Parties' belief: Whether the parties believed they were forming an employer-employee relationship is highly relevant to the assessment of whether they did, in fact, create such a relationship, but it turns on the parties' state of mind, not on the nature of the work being performed. (*Sotelo*, *supra*, 207 Cal.App.4th at pp. 656-57 [discussing varied evidence about newspaper carriers' understanding of the nature of their relationship with newspaper publishers]; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, petn. filed (Jan. 22, 2013), as modified on denial of reh'g. (Jan. 8, 2013) (*Bradley*) [discussing specific record evidence that workers either believed they were misclassified as independent contractors or believed they were employees].)

Opportunity for profit or loss: The service provider's opportunity to profit or loss "depending on his managerial skill" is suggestive of

independent contractor status, but determining whether such an opportunity exists requires consideration of the facts specific to a given service relationship, rather than an evaluation of the generic type of work at issue. (*Borello*, *supra*, 48 Cal.3d at p. 355; see *Sotelo*, *supra*, 207 Cal.App.4th at pp. 658-59 [noting that as a practical matter newspaper carriers who employed others to make their work more efficient had a greater opportunity for profit based on their entrepreneurial and management skills].)

Use of helpers and substitutes: As with the factors above, whether a given contractor used substitutes or helpers is a question specific to a particular service relationship. It may be germane to independent contractor status whether a given service provider subcontracts the work or employs helpers to assist her with its completion. But, at least in most industries, workers performing the same type of work either may or not may use helpers or substitutes in a given case. (See, e.g., *Sotelo*, *supra*, 207 Cal.App.4th at p. 658 [noting that some carriers in putative class employed others to assist them on a regular basis, while others did not]; *Fleming v. Foothill-Montrose Ledger* (1977) 71 Cal.App.3d 681, 685-86 [contrasting newspaper carriers' ability to use helpers or substitutes as they saw fit with the facts of *Cal. Emp't. Comm'n. v. L.A. Down Town Shopping News Corp.* (1944) 24 Cal.2d 421, in which a newspaper allowed carriers to use only a single, preapproved helper]; see also *Borello*, *supra*, 48 Cal.3d at p. 356 [farmers who were determined to be employees were prohibited from using helpers other than family members].)

***Degree of investment*:** This factor is related to whether service providers hold themselves out as independent businesses, use helpers or substitutes, and supply their own tools and equipment. It, too, has more to do with the approach the contractors take to their work than with the intrinsic nature of that work.

In sum, as is apparent on their face, the focus of the secondary factors is not on 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.) To the contrary, as stated in *Borello*, the secondary factors are designed to aid in defining the nature of the service relationship. The specific facts matter.

2. The Court of Appeal's analysis is belied by the many cases determining that workers performing the same "type of work" are or are not employees based on the specific facts.

If the Court of Appeal were correct in holding that the secondary factors mostly pertain to whether a particular type of work is "independent contractor" work or not, then the independent contractor determination would tend to be made on an industry-by-industry basis. At least for workers who are similarly situated with respect to the right-to-control test, courts would find that all workers in a given industry are independent contractors or that all workers in the industry are employees, and any other variations in their factual circumstances would be irrelevant. For example, imagine a business that employs a lawyer as an in-house counsel but that also contracts with an outside counsel. The outside counsel might differ from the in-house counsel by supplying his or her own tools, providing legal services to other businesses, and subcontracting some of the work he or she performs. But because both lawyers would be engaged in the same kind of work—providing legal services—the Court of Appeal's test would require them both to be treated the same in the secondary factors analysis. The only question would be whether they were equally subject to the principal's control.

That is not the law. Instead, determining whether a given worker is an employee or an independent contractor is "inherently difficult," and there are many examples of courts reaching different conclusions about

whether employees performing the same kind of work are independent contractors or employees based on the nature of the specific service relationship at issue. (*Borello*, *supra*, 48 Cal.3d at p. 355; compare, e.g., *Chin v. Namvar* (2008) 166 Cal.App.4th 994 [painter was independent contractor], with *Daniels v. Johnson* (1940) 38 Cal.App.2d 619 [painter was employee]; *Millsap v. Fed. Express Corp.* (1991) 227 Cal.App.3d 425 [parcel delivery worker was independent contractor], with *JKH Enterprises, supra,* 142 Cal.App.4th at p. 1065 [parcel delivery worker was employee]; *Lara*, *supra,* 182 Cal.App.4th at p. 393 [gardener was independent contractor], with *Cal. Comp. Ins. Co. v. Indus. Accident Comm'n* (1948) 86 Cal.App.2d 861, 862 [gardener was employee].)

That is also true in the newspaper industry. Newspaper carriers have traditionally been regarded as independent contractors. (See 22 Cal. Code Regs. § 4304-6(c)(4) [recognizing that "[t]he fact that a principal and carrier agree that the carrier shall deliver a newspaper to each customer on his or her route in a timely manner and in a readable condition"—the basic feature of a newspaper carrier's agreement with the newspaper—generally "shall not be evidence of an employment relationship"].) But as one court has observed, in any given case "a newspaper carrier can be an independent contractor as a matter of law; in others, an employee as a matter of law; and in still others, the status of the newspaper carrier to the newspaper is a factual issue." (*Larson v. Hometown Comm'cns, Inc.* (Neb. Ct. App) 526 N.W.2d 691, 698, affd. (Neb. 1995) 540 N.W.2d 339; see also *Harper ex rel. Daley v. Toler* (Fla. Dist. Ct. App. 2004) 884 So.2d 1124, 1133, quoting *Keith v. News & Sun Sentinel Co.* (Fla. 1995) 667 So.2d 167, 170 [noting that "whether a particular newspaper carrier is an employee or an independent contractor depends on the particular relationship the carrier has with the newspaper" and "'the facts peculiar to each case govern the decision.'"].) Cases from California and elsewhere reflect those principles.

Some find newspaper delivery persons properly classified as independent contractors based on the combination of the right to control and the secondary factors.[2] Other courts, presented with different facts, have concluded that newspaper delivery persons were instead properly classified as employees.[3]

Likewise, if the Court of Appeal's "type of work" analysis were correct, then varied evidence of secondary factors would almost always be irrelevant on class certification, as the Court of Appeal effectively deemed it to be here. Because a well-defined class of putatively misclassified workers always performs the same type of work, it would always be true that, in such a class, "[a]ll of the factors may be determined based upon common proof." (Opn. at p. 19.) There should therefore be no cases denying certification of classes of putatively misclassified independent contractors because of variations in the secondary factors, at least where all of the class members did the same kind of work. In fact, however, there are many such cases, because courts have recognized that "[f]or purposes of class certification, the issue is whether these [secondary] factors may be applied on a classwide basis, generating a classwide answer on the issue of employee status, or whether the determination requires too much individualized analysis." (*Narayan, supra*, 285 F.R.D. at pp. 477-78 [applying California law].) Factual variations among putative class

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[2] See, e.g., *Fleming, supra,* 71 Cal.App.3d 681; *Taylor v. Indus. Accident Comm'n* (1963) 216 Cal.App.2d 466; *Hartford A. & I. Co. v. Indus. Accident Comm'n* (1932) 123 Cal.App. 151; see also *LaFleur v. LaFleur* (Iowa 1990) 452 N.W.2d 406; *Cable v. Perkins* (Ill. Ct. App. 1984) 459 N.E.2d 275; *Neve v. Austin Daily Herald* (Minn. Ct. App. 1996) 552 N.W.2d 45; *Lewiston Daily Sun v. Hanover Ins. Co.* (Me. 1979) 407 A.2d 288; *Brown v. NLRB* (9th Cir. 1972) 462 F.2d 699; *Ross v. Post Publ'g Co.* (Conn. 1943) 29 A.2d 768.

[3] See, e.g., *Grant v. Woods* (1977) 71 Cal.App.3d 647, 652; *Cal. Emp't. Comm'n, supra*, 24 Cal.2d 421.

members as to the secondary factors do matter for class certification purposes.

For example, in *Ali*, the Fourth Appellate District affirmed the denial of certification of a class of taxi drivers where, among other things, some (but not all) class members testified that they supplied their own tools, held themselves out as independent businesses, and understood themselves to be independent contractors. In light of those factual variations among the class, the *Ali* Court held that the trial court had "reasonably rejected the argument that a single set of facts predominate[d]"; instead, "the testimony of putative class members would be required on the issues of employment." (*Ali*, *supra*, 176 Cal. App. 4th at p. 1350.)

Similarly, in *Sotelo*, the First Appellate District affirmed the denial of certification of a class of allegedly misclassified newspaper carriers. The Court noted that the record reflected variation in four of the secondary factors: "(1) whether the one performing services is engaged in a distinct occupation of business; (2) the method of payment; (3) whether or not the parties believe they are creating an employer-employee relationship; [and] (4) the hiree's opportunity for profit or loss depending on his or her managerial skill." (*Sotelo*, *supra*, 207 Cal.App.4th at pp. 657-58.) As the Court explained, "[e]ven though the [trial] court found variability among the class in only a few of the factors"—and even though all of the carriers were performing the same kind of work—the trial court correctly determined that "the multi-factor test 'requires that the factors be examined together.'" (*Id.* at p. 660.) *Sotelo* and *Ali* reflect a correct understanding of the secondary factors, and the Court below erred in departing from them.

3. The secondary factors reflect the choices made by the parties to a service relationship.

The Court of Appeal attempted to justify its narrow focus on the type of work performed—and its failure to acknowledge the significance of

the other secondary factors—by suggesting that "a carrier's employee status cannot be based upon the individual choices the carrier makes, if other choices are available." (Opn. at p. 19.) That is incorrect. To the contrary, the purpose of the secondary factor analysis is to explore the actual nature of a service relationship, which necessarily depends on the "choices" made by the parties to that relationship.

That error by the Court of Appeal reflects its conflation of the "right to control" analysis with the secondary factors. The scope of a carrier's abstract freedom to make choices may indeed bear on whether the worker or the putative employer had the right to control the manner and means of performing the work. Thus, if a worker has the right to control the manner and means by which he performs the work, he may well be an independent contractor even if he does not choose to exercise that right as fully as he might. Conversely, if the service recipient has the right to control the manner and means by which the work is performed, then even if that right is not exercised, the service provider may be an employee.

The secondary factors are different. Many of the factors would be meaningless, and would add nothing to the analysis, if they did not entail an examination of the actual choices made by the worker and the service recipient. For example, courts considering whether a given worker is engaged in a distinct occupation or business do not ask if a worker could engage in other work. After all, almost all workers *could* pursue other work in their spare time. Rather, courts ask whether the particular worker *does* engage in other work. (*Lara, supra*, 182 Cal.App.4th at p. 400 [noting that worker performed work in question "as part of his own occupation as a gardener, which he had been doing independently for approximately 25 years" and that while he "does not advertise, he has several different clients"]; *Chin, supra*, 166 Cal.App.4th at pp. 1000, 1008 [given that painter had "other clients," he was "in fact engaged in an independently

established painting business"]; *Torres*, *supra*, 3 Cal.App.4th at p. 838 [determining that gardener was independent contractor where he provided tree-trimming service in the course of his own business].) So too, with regard to who provides the tools, equipment, and place of work, courts examine which party actually provided these things, and not who theoretically could do so. A worker's contractual right to use her own tools to do a job says something about the service recipient's right to control. But if that worker in practice chooses to use the service recipient's tools instead of her own, that fact is still relevant to the secondary factor analysis. Likewise, with regard to the duration of the service relationship, a worker could always choose to enter into a service contract of a different length or terminate a service relationship at a particular time. That factor would be meaningless unless it called for courts to consider the actual duration of the service relationship in question.

Thus, the secondary factors do depend on the actual circumstances of individual contractors—the "choices" that they have made about their work lives. To the extent the holding of the Court below is premised on the notion that individual choices do not matter to the independent contractor analysis, it is tantamount to saying that all that matters is the abstract right to control. But that is directly contrary to *Borello*, which held that the right to control, considered "in isolation," is of "little use in evaluating the infinite variety of service arrangements." (*Borello*, *supra*, 48 Cal.3d at p. 350; see also *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303 [holding that courts must consider the secondary factors, and that it was reversible error to instruct a "jury that the right of control, *by itself,* gave rise to an employer-employee relationship"] [emphasis in original].)

4. The Court of Appeal's analysis is inconsistent with the decisions of other jurisdictions.

In setting out the secondary factors and their purpose, the *Borello* Court was not writing on a blank slate. Instead, it was articulating California's version of the traditional common-law independent contractor test, as described in the *Restatement*, and as refined by reference to decisions in other jurisdictions. (*Borello*, *supra*, 48 Cal.3d at p. 354 ["We adopt no detailed new standards for examination of the issue. To that end, the Restatement guidelines heretofore approved in our state remain a useful reference."].) Consistent with *Borello*, courts in other jurisdictions applying variants of the *Restatement* test also recognize that it is designed to evaluate the totality of the facts shedding light on the objective nature of a service relationship, and not just the type of work at issue. (See, e.g., *United States v. Bonds* (9th Cir. 2010) 608 F.3d 495, 504-05 [applying common-law agency principles as part of an analysis of the admissibility of hearsay under the Federal Rules of Evidence, and stating that "[i]n applying the Second Restatement [§ 220] factors, a court will look to the totality of the circumstances"]; *Porter v. City of Manchester* (N.H. 2007) 921 A.2d 393, 398 ["To determine whether an employee-employer relationship exists we examine the totality of the circumstances, which requires consideration of many factors, including those set forth in" Section 220 of the *Restatement*]; *Silver v. Statz* (Ohio App. 2006) 849 N.E.2d 320, 323 [discussing multi-factor right-to-control test and noting that "the objective nature of the relationship is determined by an analysis of the totality of the facts and circumstances of each case"]; *Blankenship v. Overholt* (Ark. 1990) 786 S.W.2d 814, 815 ["In drawing th[e] line between independent contractor and servant, we look at the totality of the circumstances. Section 220 of the *Restatement* sets out the various circumstances or facts which are to be weighed in drawing the line."] [citations omitted].)

The other states applying variants of the *Restatement* test thus describe the basic purpose of the factors it sets out in terms comparable to *Borello*. By contrast, the Court below identified no decision supporting its view that the secondary factors "relate to the type of work involved" and "focus 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 pp. 2, 19.) That interpretation of the test is entirely novel.

5. The Court of Appeal's novel independent contractor test cannot be effectively applied.

The Court of Appeal's approach is flawed for the additional reason that it will create uncertainty for businesses and workers by unsettling the previously well-understood *Borello* test. To be sure, the decision below provides a kind of superficial clarity by reducing the multi-factor, totality-of-the-circumstances analysis of *Borello* to one that focuses more narrowly on the right to control and the kind of work performed. But it does so at the cost of ignoring the complexities that characterize "the infinite variety of service arrangements." (*Borello*, *supra*, 48 Cal.3d at p. 350.) The Court in *Borello* understood, as the Court below did not, that in separating employees from independent contractors, "as so often in other branches of the law, the decisive distinctions are those of degree and not of kind," and "[l]ife in all its fullness must supply the answer to the riddle." (*Welch v. Helvering* (1933) 290 U.S. 111, 114-15 (Cardozo, J.).) The supposed clarity of the Court of Appeal's test will prove illusory as courts struggle to reach sensible results when applying it to real-world employment situations.

Significantly, trial courts have many years of experience applying the *Borello* test and its common-law antecedents. By contrast, the Court of Appeal's novel "type of work" analysis provides little guidance to trial

courts because it leaves entirely unclear how to gauge whether the "type of work" is of the kind performed by employees or independent contractors. In one passage in its opinion, the Court of Appeal suggested that its test requires an inquiry into what kind of arrangement is theoretically possible, that is, whether the job is one "that *may* be done by an independent contractor." (*Ibid.* [emphasis added].) But such a theoretical inquiry will do nothing to decide concrete cases because there is no inherent reason why any particular type of work can only be performed by employees or independent contractors. As discussed above, it depends on the facts of the specific situation. In the very same sentence, however, the Court of Appeal suggested that its test calls for an inquiry into the usual practice in the relevant market, that is, whether the job "*generally* is done by an employee." (*Ibid.* [emphasis added].) Under that test, expert testimony would seem to be required in every independent contractor case, which would devolve into an analysis of what *other* parties in the same industry do. Because the test is entirely novel, existing precedent governing independent contractor status provides no guidance, and under either interpretation, it is difficult to see how the test could be practically applied in the future.

The difficulty of applying the Court of Appeal's test will be particularly acute in the context of class actions. Because it believed that the secondary factors all relate to the type of work performed, the Court concluded that, in this case, "[a]ll of the factors may be determined based upon common proof." (Opn. at p. 19.) Elsewhere in its opinion, however, the Court suggested that at least some of the secondary factors do not relate to the type of work. (Opn. at p. 2 ["*almost* all of those [secondary] factors relate to the type of work involved"] [emphasis added]; *ibid.* [the secondary factors in this case "may be established *for the most part* through common proof"] [emphasis added].) The Court did not say which factors it had in

mind, however, leaving future trial courts to guess whether, or on what basis, they will be able deny certification in cases presenting variations in the secondary factors among the members of the putative class.

D. The trial court did not abuse its discretion in determining that individual issues predominate in this case, making class certification inappropriate.

1. A class of allegedly misclassified employees cannot be certified when there is material variation in the secondary factors among the members of the class.

Under settled principles of the law governing class actions, a class cannot be certified when facts relevant to liability are not common to the class but instead require the development of facts specific to each class member. As relevant here, a class of allegedly improperly classified contractors therefore cannot be certified when there is material variation in the *Borello* secondary factors among the members of the class. In such a case, "even if [some secondary] factors were able to be determined on a class-wide basis, those 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.) Liability would turn on facts specific to individual class members. As this Court has observed, however, 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." (*Brinker*, *supra*, 53 Cal.4th at pp. 1051-52.) Class certification in such a case would therefore be inappropriate.

A trial court might attempt to make such a class action manageable by adopting a trial plan that would prevent the parties from introducing evidence pertaining to secondary factors as to which there is variation between class members. But doing so "would be tantamount to making a substantive finding that this evidence cannot change the outcome," which

would improperly constitute "prejudging the weight of the evidence," potentially depriving the defendant of its due process right to present a defense. (*Narayan*, *supra,* 285 F.R.D. at p. 480 [applying California law and concluding that, given variation in "distinct occupation" secondary factor, individual issues predominated]; see also *Wal-Mart Stores*, *supra*, 131 S.Ct. at p. 2561 ["[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims."].)

That is not to say that a trial court would always abuse its discretion by certifying a class of allegedly misclassified independent contractors. For example, a court might find that there is no record evidence of material variation as to the putative employer's right to control or as to the relevant secondary factors. (See, e.g., *Bradley*, *supra*, 211 Cal.App.4th at pp. 1146-48.) Similarly, one can imagine a case in which many of the secondary factors are susceptible to common proof, and those factors are sufficient to allow the Court to determine independent contractor status as a matter of law, making the factors as to which there is variation immaterial to the analysis. But where, as here, the trial court identifies material variation in the secondary factors, class treatment is not appropriate.

2. The variation in secondary factors in this case precludes class certification.

In this case, the trial court concluded that variations in the secondary factors meant that "numerous individual inquiries" would be "required to determine whether carriers are members of the class." (Trial Ct. Opn. at p. 16.) The Court of Appeal did not seriously take issue with that finding but reversed the trial court only because it erroneously construed the *Borello* test to focus on the kind of work involved, making the variations in the individual secondary factors irrelevant. The correctness of the trial court's

determination is vividly demonstrated by considering the differences between Rene Diaz and Osman Nunez, two members of the putative class.

Mr. Diaz submitted a declaration in which he said that he understood he was an independent contractor and knew the difference between an employee and an independent contractor. (AA, vol. 10, at p. 2160, ¶ 7 [Diaz Decl.].) He stated that he owned his own distribution business, "Diaz Distribution," which delivered the *Antelope Valley Press* and other publications, and that he also worked as the manager of an autoparts store and as a realtor. (*Id.* at pp. 2159-60, ¶¶ 3, 6-7.) On his tax returns, he deducted the expenses incurred in the course of his delivery business as business expenses. (*Id.* at p. 2162, ¶ 19.) He created his own delivery route to improve his efficiency and save time and gas (*id.* at p. 2161, ¶ 15), used his own vehicle to conduct his deliveries, folded his papers in his own vehicle, and chose whether and when to bag or rubber band newspapers and where to obtain those supplies. (*Id.* at pp. 2160-61, ¶¶ 10, 12.) He also used substitutes of his own selection from time to time. (*Id.* at pp. 2161-62, ¶ 18). On the other hand, he delivered the *Antelope Valley Press* for four years, an extended period of time. (*Id.* at p. 2159, ¶ 2.)

Mr. Nunez described his experience differently. Among other things, Mr. Nunez testified that he always followed driving instructions on a route list provided by AVP and did not deviate from that route (AA, vol. 11, at p. 2387:6-21 [Nunez Dep.]), that he was required to use rubber bands and plastic bags provided by AVP (*id.* at p. 2385:1-16), and that he folded newspapers on AVP's property and as "instructed" by AVP (*id.* at p. 2380:12-21; *id.* at p. 2381:10-16). On the other hand, Mr. Nunez supplied his own vehicle, had another job during the period he threw papers for AVP, and contracted with AVP for only a month, although he claims to have continued delivering the *Antelope Valley Press* for four months in

total. (*Id.* at p. 2384:2-12, *id.* at p. 2379:1-23; *id.* at pp. 2275-2289; [Stott Decl., Exs. 4 & 5]; AA, vol. 2, at p. 279, ¶ 2 [Nunez Decl.].)

AVP believes that both Mr. Diaz and Mr. Nunez are properly classified as independent contractors. However, one could argue that the case for independent contractor status is stronger with respect to Mr. Diaz than Mr. Nunez (but would not have to reach this conclusion). Significantly, the jury could credit the testimony of both Mr. Diaz and Mr. Nunez about their own unique experiences and reach different conclusions about their status as independent contractors. In short, the differences their testimony reveals are real and are highly relevant to the secondary factor analysis, but they cannot be uncovered absent, focused, individualized examination. (See *Wal-Mart Stores*, *supra*, 131 S. Ct. at p. 2551 ["Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."] [quoting Nagareda, *supra*, 84 N.Y.U. L. Rev. at p. 132].)

Trying this case as a class action would have forced the trial court to choose one of two equally unpalatable options. First, it could conduct a series of mini-trials, which would render the case unmanageable, since the putative class consists of 528 individuals. Second, it could try the case on generalized evidence, as plaintiffs urged below. But that would require placing arbitrary limits on AVP's ability to present relevant evidence and to counter plaintiffs' proof. That is, there would come a time at trial when AVP would attempt to present specific facts disproving liability to a particular carrier and the trial court, in order to keep the trial manageable, would be forced to say no. Or there would come a time where plaintiffs would present evidence of a survey of class members, and AVP would be precluded from cross-examining the members who participated in it to test the veracity of their answers. Basic principles of due process preclude courts from attempting to manage class action lawsuits by arbitrarily

limiting a defendant's ability to present relevant evidence in its own defense. (See, e.g., *City of San Jose*, *supra*, 12 Cal.3d at p. 462 ["Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."].) The trial court therefore did not abuse its discretion in declining to certify a class in this case.

3. Class treatment is not necessary in order to allow plaintiffs to litigate their claims.

In the Court of Appeal, plaintiffs argued that a class action is "the only effective recourse to prevent a wholesale failure of justice for the AVP newspaper carriers." (Appellants' [Plaintiffs'] Opening Brief, filed Feb. 15, 2012, at p. 43.) Even if that were true, it would not be a basis for certifying a class of plaintiffs whose claims cannot be resolved on the basis of common proof. In any event, the factual premise of plaintiffs' argument is flawed.

Unlike some class actions, this is not a case in which the amount of money at stake in an individual case is negligible, making it impractical for individual plaintiffs to litigate their cases separately. To the contrary, damages and penalties for misclassifying even a single worker as an independent contractor are significant, given the serious consequences that flow from a misclassification. In this case, for example, assuming that an individual plaintiff prevailed on all claims, he or she would potentially be entitled to damages and penalties including (1) unpaid overtime; (2) a 30-day waiting time penalty (Cal. Lab. Code § 203); (3) unpaid meal and rest periods; (4) up to two hours of penalty wages each day for missed meal and rest periods (*United Parcel Serv., Inc. v. Super. Ct.* (2011) 196 Cal.App.4th 57, 69); (5) up to $4,000 in damages for failure to provide wage statements (Cal. Lab. Code § 226); and (6) reimbursement of expenses and losses and

for alleged illegal deductions (Cal. Lab. Code §§ 201, 203, and 2802). Most importantly, a plaintiff who successfully asserted a claim for unpaid overtime could recover attorney's fees under Labor Code section 1194. In short, given the damages and penalties that result from misclassification—and the availability of attorneys' fees for prevailing plaintiffs—individuals who actually believe they were misclassified have every incentive to pursue their own claim. There is no need to allow class treatment in order to ensure that such claims can be litigated.[4]

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: March 1, 2013

Respectfully submitted,

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[4] In addition, plaintiffs have the ability to seek a hearing before the Labor Commissioner on wage and hour claims. (*Post v. Palo/Haklar & Assocs.* (2000) 23 Cal.4th 942, 947 [describing the procedures under Labor Code section 98 and explaining that hearings are intended to provide a "speedy, informal, and affordable method of resolving wage claims"].)

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OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned certifies that Respondent's brief is proportionately spaced, has type face of 13 points or more, and contains 10,359 words as calculated using the word count of the computer program used to prepare the brief, not including the cover, title page, table of contents, table of authorities, certificate of interested entities or persons, or this certificate of compliance.

DATED: March 1, 2013

PERKINS COIE LLP

By: _____
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PROOF OF SERVICE

Ayala, et al. v. Antelope Valley Newspapers, et al.
Los Angeles County Superior Court Case No. BC403405
Court of Appeal Case No. B235484

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

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Elizabeth Carmichael

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