No. 22-865

In the Supreme Court of the United States

MOBILIZE THE MESSAGE, LLC, *et al.*,

Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Like other jurisdictions, California distinguishes between "employees" and "independent contractors" for purposes of certain labor and employment statutes, and applies specific tests to determine whether a particular worker is an employee or an independent contractor. California's Labor Code establishes a default rule applying a three-part "ABC" test from *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018). Workers who fall within certain exemptions are subject to a multi-factor test from *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). The question presented is:

Whether the court of appeals correctly held that petitioners are unlikely to succeed on their claim that the Labor Code violates the First Amendment by applying the ABC test to classify most workers, including workers petitioners wish to hire, while applying the *Borello* test to classify certain other workers, including direct sales salespersons, newspaper distributors, and newspaper carriers.

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STATEMENT

1. In California and other jurisdictions, labor and employment laws sometimes turn on whether a worker is classified as an "employee" or an "independent contractor." States apply a variety of tests to determine how to classify particular workers.[1] Before 2018, California generally applied a balancing test to make that classification. *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels.*, 48 Cal. 3d 341, 350-351 (1989). That "*Borello*" test considered a number of factors, with a particular focus on the hiring entity's "right to control" the worker. *Id.* at 350.

In 2018, the California Supreme Court concluded that a different test governs worker classification for purposes of state wage orders, which regulate wages, hours, and certain other working conditions. *See Dynamex Operations W., Inc. v. Superior Ct.*, 4 Cal. 5th 903, 913-914 (2018). Under that test, known as the "ABC" test, workers are classified as independent contractors if they (A) are "free from the control and direction of the hirer in connection with the performance of the work," (B) perform "work that is outside the usual course of the hiring entity's business," and (C) are "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 916-917.

In 2019, the California Legislature enacted A.B. 5, which codified the ABC test and expanded it through provisions of California's Labor and Unemployment Insurance Codes. *See* 2019 Cal. Stat. 2888-2899; *see*

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[1] *See generally* Jon Shimabukuro, Cong. Rsch. Serv., R46765, Worker Classification 9 (2021), https://crsreports.congress.gov/product/pdf/R/R46765 (last visited May 8, 2023).

generally Cal. Lab. Code § 2775. The purpose of A.B. 5 was to ensure that workers were not "misclassified as independent contractors instead of recognized as employees [who] have the basic rights and protections they deserve under the law." 2019 Cal. Stat. at 2890. Although A.B. 5 established the ABC test as the default rule governing worker classification, it also provided that certain occupations and work arrangements were exempt from the ABC test and would remain subject to the *Borello* test. *Id.* at 2889. In deciding which types of work would remain subject to *Borello*, the Legislature considered a range of factors, including (among others) "the workers' historical treatment as employees or independent contractors," how central their work is to the hirer's business, and "their market strength and ability to set their own rates." *See Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 965 (9th Cir. 2021) (*ASJA*) (citing Cal. S. Comm. on Lab., Pub. Emp. & Ret., A.B. 5 (July 10, 2019)), *cert. denied*, No. 21-1172 (June 27, 2022).[2] Under exemptions enacted by the Legislature, for example, the *Borello* test continues to apply to workers fulfilling a contract for "professional services," Cal. Lab. Code § 2778, certain licensed professionals (such as doctors and lawyers), *id.* § 2783(b), (c), and "manufactured housing salesperson[s]," *id.* § 2783(f). *See also id.* §§ 2776-2784 (additional exemptions).

2. The First Amendment claim advanced by petitioners in this case focuses on two such exemptions. First, the *Borello* test continues to apply to a "direct sales salesperson as described in Section 650 of the Unemployment Insurance Code, so long as the condi-

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[2] The cited state legislative report is available at https://tinyurl.com/yhaf2men (last visited May 8, 2023).

tions for exclusion from employment under that section are met." Cal. Lab. Code § 2783(e). The cross-referenced provision, which has been in place for decades, excludes a "direct sales salesperson" from unemployment and disability insurance benefits if: (a) the worker is licensed under statute, or "engaged in the trade or business" of "primarily inperson demonstration and sales presentation of consumer products" or "sales . . . for resale" under certain other circumstances; (b) the worker's compensation "is directly related to sales or other output . . . rather than to the number of hours worked"; and (c) the worker's services are performed pursuant to a written contract stating that the worker will not be treated as an employee for state tax purposes for those services. Cal. Unemp. Ins. Code § 650.

Second, the *Borello* test applies to "a newspaper carrier" or "[a] newspaper distributor working under contract with a newspaper publisher." Cal. Lab. Code § 2783(h)(1). As defined, a "newspaper carrier" is a person (other than "an app-based driver") "who effects physical delivery of the newspaper to the customer or reader." *Id.* § 2783(h)(2)(D). "'Newspaper distributor' means a person or entity that contracts with a publisher to distribute newspapers to the community." *Id.* § 2783(h)(2)(C). And a "'[n]ewspaper' means a newspaper of general circulation, as defined in Section 6000 or 6008 of the Government Code, and any other publication circulated to the community in general as an extension of or substitute for that newspaper's own publication, whether that publication be designated a 'shopper's guide,' as a zoned edition, or otherwise." *Id.* § 2783(h)(2)(A). The exemption for newspaper carriers and distributors "shall become inoperative on January 1, 2025, unless extended by the Legislature." *Id.* § 2783(h)(4).

3. Petitioners hired workers in California to "knock on doors on behalf of candidates" and "gather signatures to qualify ballot measures." D. Ct. Dkt. 1 at 2; *see also* Pet. App. 67a. Petitioners allege that they previously hired these "doorknockers" and "signature gatherers" as independent contractors. D. Ct. Dkt. 1 at 8; *see also* Pet. 8-9. Under A.B. 5, those workers are now subject to the default ABC test for determining whether they are employees or independent contractors. *See* Cal. Lab. Code § 2775(b)(1). After the Legislature enacted A.B. 5, petitioner Mobilize the Message alleges that it "abandoned the California market." D. Ct. Dkt. 1 at 11; *see also* Pet. App. 69a. Petitioner Starr Coalition for Moving Oxnard Forward alleges that it "currently refrains from hiring signature gatherers solely because" their employment status would be governed by the ABC test, and that it "must rely on volunteers" instead. D. Ct. Dkt. 1 at 12, 13; *see also* Pet. App. 75a.

Nearly two years after the Legislature enacted A.B. 5, petitioners sued the Attorney General and sought a preliminary injunction barring the application of the ABC test to the workers they would like to hire. Pet. App. 33a-34a. Petitioners contend that the State engages in unlawful content-based discrimination because the Labor Code applies the default ABC test to doorknockers and signature gatherers, while applying the *Borello* test to direct sales salespersons and newspaper carriers and distributors. *Id.* at 10a-11a.

The district court denied petitioners' request for a preliminary injunction, concluding that petitioners neither established a likelihood of success on the merits nor demonstrated irreparable harm. Pet. App. 11a. The court of appeals affirmed. *Id.* at 19a-20a. It held

that petitioners were unlikely to succeed on the merits, reasoning that the Labor Code does not violate the First Amendment by applying the *Borello* test to classify direct sales salespersons and newspaper deliverers while applying the default ABC test to most other workers, including those hired by petitioners. *Id.* at 12a-20a.

The court of appeals principally relied on its prior decision in *ASJA*, which rejected a similar First Amendment challenge focused on a provision of the Labor Code that exempts certain contracts for professional services from the ABC test. *See* 15 F.4th at 960-964. That decision recognized that the government may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 960 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). But it held that the challenged statutory scheme "regulates economic activity"—not speech—by establishing tests for classifying workers that "understandably vary based on the nature of the work performed or the industry in which the work is performed." *Id.* at 961. The court further reasoned that the Labor Code did not "impose content-based burdens on speech" because "its applicability does not turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged." *Id.* at 963.

In this case, the court of appeals applied *ASJA* and reasoned that the provisions challenged by petitioners likewise impose a "regulation of economic activity, not speech." Pet. App. 17a. Even "accept[ing], for present purposes," petitioners' assertions that applying the default ABC test might result in their workers being classified as employees, which might in turn increase their costs, "[s]uch an indirect impact on speech . . .

does not violate the First Amendment." *Id.* at 17a-18a. The court also rejected petitioners' claim that the statutory exemptions for direct sales salespersons, newspaper distributors, and newspaper carriers "constitute content-based discrimination." *Id.* at 18a. It explained that the exemptions "do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations." *Id.* at 19a.

Judge VanDyke dissented, on the view that the exemptions at issue here "are genuinely content-based." Pet. App. 24a. Petitioners then filed a petition for rehearing en banc, which the court of appeals denied without any judge requesting a vote. C.A. Dkt. 44.

ARGUMENT

In holding that petitioners are unlikely to succeed on their First Amendment claim, the court of appeals applied the settled principle that laws "target[ing] speech based on its communicative content . . . are presumptively unconstitutional" and are subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The statute challenged here does not restrict any speech based on its content or otherwise. It merely sets a default test for classifying workers as either employees or independent contractors, while directing that some occupational categories are subject to a different test. Under either test, that classification serves to determine whether and how certain labor laws apply to workers—not to prohibit any speech by workers or by the entity that hires them.

The decision below is consistent with *Reed* and other recent First Amendment precedent from this Court. The purported "circuit conflict" (Pet. 25) over the meaning of *Reed* is illusory. And petitioners' as-

sertion that the statute "prevent[s]" them from "circulating ballot petitions and campaigning," and from hiring workers to engage in those expressive activities, *id.* at i; *see id.* at 11, is incorrect. The petition for a writ of certiorari should be denied.

1. Petitioners claim that the State engages in content-based discrimination because of the statutory exemptions directing that the multi-factor *Borello* test determines the employment status of newspaper distributors, newspaper carriers, and direct sales salespersons. Pet. 16-20. The court of appeals properly applied settled First Amendment precedent in holding that petitioners' claim is unlikely to succeed.

The governing legal framework here "is clear" (Pet. 16) and undisputed. *Compare* Pet. App. 12a-13a, *with* Pet. 16-17. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only" if they survive strict scrutiny. *Reed*, 576 U.S. at 163. A law "'target[s] speech based on its communicative content' . . . if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed*, 576 U.S. at 163). Under that test, "overt subject-matter discrimination is facially content based," as is a regulation that "swap[s] an obvious subject-matter distinction for a 'function or purpose' proxy" to "achieve identical results." *Id.* at 1474 (quoting *Reed*, 576 U.S. at 163).

But this Court has distinguished "restrictions on protected expression" from "restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The "First Amendment does not prevent restrictions

directed at commerce or conduct from imposing incidental burdens on speech." *Id.* The Court has held, for example, that it is "beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). And the Court has repeatedly rejected First Amendment challenges to economic regulations that impose incidental burdens on speech-based professionals and businesses. *See, e.g.*, *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 192-194 (1946) (wage regulation); *Associated Press v. NLRB*, 301 U.S. 103, 130-133 (1937) (labor law); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (antitrust law); *Leathers v. Medlock*, 499 U.S. 439, 447-449 (1991) (taxes).

In *ASJA v. Bonta*, the court of appeals held that A.B. 5 "fits within this line of cases because it regulates economic activity rather than speech." 15 F.4th 954, 961 (9th Cir. 2021) (Callahan, J.), *cert. denied*, No. 21-1172 (June 27, 2022). The decision below reached the same conclusion. Pet. App. 17a. By applying the ABC test as the default classification rule for most occupations, but continuing to apply the *Borello* test to certain other occupations, the "statutory scheme does not restrict what, when, where, or how a worker may communicate." *Id.* Instead, it addresses "a traditional sphere of state . . . regulation of economic activity," by directing what test determines whether a worker is classified as an "employee or an independent contractor." *Id.* (quoting *ASJA*, 15 F.4th at 961).

The court of appeals also correctly rejected petitioners' contention that the statutory exemptions at issue here amount to content-based discrimination.

Pet. App. 18a-19a. Many statutes that set out general economic policies or requirements contain exemptions. *See, e.g.*, *Okla. Press*, 327 U.S. at 193 (noting the Fair Labor Standards Act's exemption for "seamen, farm workers and others"); *Leathers*, 499 U.S. at 442, 447 (noting exemptions from Arkansas's sales tax). The fact that those exemptions are (or are not) applicable to workers who engage in speech does not necessarily make the statute a content-based speech restriction. *See generally Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity . . . whenever speech is a component of that activity").

In deciding whether the default ABC test should "appl[y] to a given occupation," the California Legislature weighed a variety of factors having nothing to do with the content of speech, including the workers' "historical treatment as employees or independent contractors" and their "market strength," "ability to set their own rates," and "relationship [with] their clients." *ASJA*, 15 F.4th at 965 (citing Cal. S. Comm. on Lab., Pub. Emp. & Ret., A.B. 5 (July 10, 2019)). As *ASJA* recognized, "[i]t is certainly conceivable that differences between occupations warrant differently contoured rules for determining which employment test better accounts for a worker's status," and "that misclassification was more rampant in certain industries and therefore deserving of special attention." *Id.*

The particular exemptions targeted by petitioners here are consistent with the "historical treatment" of the relevant occupations. *ASJA*, 15 F.4th at 965. California has identified direct sales salespersons as a distinct occupation—and expressly excluded those workers from the State's unemployment and disability insurance regimes—for fifty years. Cal. Unemp. Ins.

Code § 650; 1983 Cal. Stat. 2213. More generally, state and federal laws have long distinguished salespersons by carving them out of the definition of employee in various circumstances. *See* Cal. Lab. Code § 1171; Cal. Code Regs. tit. 8, § 11070(1)(C); 26 U.S.C. § 3508(b)(2).

As for newspaper distributors and carriers, the Legislature adopted a time-limited exemption to the ABC test because the newspaper industry had previously relied on a 1987 state regulation that specifically governed worker classification for those occupations. *See* Cal. S. Comm. on Lab., Pub. Emp. & Ret., A.B. 170, at 2 (Sept. 12, 2019).[3] Given that "uniquely complex regulatory and legal history," it made sense to allow the newspaper industry additional time "in order to come into compliance with" the ABC test adopted by A.B. 5. *Id*. at 2, 3. Like the exemption for "direct sales salespersons," the newspaper-related exemptions distinguish between workers based on industry and occupation—not speech.

2. Petitioners contend that the decision below "conflicts with this Court's precedent" (Pet. 16) and improperly "reads *Austin* as having overruled *Reed*" (*id*. at 21). That is incorrect.

In *Reed*, the Court addressed the constitutionality of a local ordinance restricting the size, timing, and location of signs according to whether the message on the sign was "[i]deological," "[p]olitical," or "[d]irectional." 576 U.S. at 159-161. That ordinance was "content based on its face" because the speech restrictions that applied to any given sign "depend[ed] entirely on the communicative content of the sign." *Id*.

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[3] *Available at* https://tinyurl.com/4nz2ynv4 (last visited May 8, 2023).

at 164. In *Austin*, the Court reiterated that "[a] regulation of speech is facially content based under the First Amendment if it 'target[s] speech based on its communicative content.'" 142 S. Ct. at 1471 (quoting *Reed*, 576 U.S. at 163). It also acknowledged that "First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473. Consistent with that precept, the Court held that an ordinance distinguishing between on-premises and off-premises signs was not content-based, reasoning that the ordinance "require[d] an examination of speech only in service of drawing neutral, location-based lines." *Id.*

The court of appeals below faithfully applied those precedents, including *Reed*'s test for identifying content-based regulations. Pet. App. 13a. Turning to the facts of this case, it recognized that the exemptions challenged here "do not depend on the communicative content, if any, conveyed by the workers but rather on the workers' occupations." *See* Pet. App. 19a; *supra* pp. 9-10. And "[a]lthough determination of whether an individual is, for example, a direct salesperson might require *some* attention to the individual's speech," the court of appeals observed that this "Court has rejected 'the view that *any* examination of speech or expressions inherently triggers heightened First Amendment concern.'" Pet. App. 19a (quoting *Austin*, 142 S. Ct. at 1474). In quoting *Austin* for that proposition, the court of appeals never held or suggested that *Austin* "constructively abrogat[ed] *Reed*." Pet. 22. To the contrary, as this Court explained in *Austin*, the principle that mere "examination of speech or expression" does not "inherently trigger[]" heightened scrutiny is based in precedent that long pre-dates both cases. *Austin*, 142 S. Ct. at 1474.

Nor does the decision below conflict with *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020). *See* Pet. 18. The statute invalidated in that case "prohibit[ed] robocalls to cell phones and home phones" but "allow[ed] robocalls that [were] made to collect debts owed to or guaranteed by the Federal Government." 140 S. Ct. at 2343 (plurality opinion). The lead opinion reiterated that "'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'" *Id.* at 2347 (plurality opinion). But the distinction in the challenged statute was "about as content-based as it gets": the statute either prohibited or allowed speech based "on whether the caller is *speaking* about a particular topic." *Id.* at 2346, 2347 (plurality opinion); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (invalidating content-based ordinance that banned commercial magazines, but not newspapers, from public newsracks). That is not remotely comparable to the law here, which does not prohibit any speech and merely assigns an appropriate worker-classification test based on longstanding distinctions between occupational categories.

3. Petitioners also contend that review is warranted because of a "wide[] 3-2 disagreement" between the circuits regarding the meaning of this Court's decision in *Reed*. Pet. 23. There is no such conflict. The circuit cases cited by petitioners (at 23-25) are all case-specific applications of *Reed*'s uncontested rule that regulations on speech are content-based when they "target speech based on its communicative content." 576 U.S. at 163.

For instance, in *Aptive Environmental, LLC v. Town of Castle Rock*, 959 F.3d 961, 979-986 (10th Cir.

2020), the Tenth Circuit rejected the defendant's threshold argument that the First Amendment did not apply at all to an ordinance that forbade commercial solicitation (but not noncommercial solicitation) at certain times of day. The court held that the ordinance was content-based because it "distinguish[ed] between the commercial and noncommercial content of the solicitors' speech" to determine whether their speech was permissible after 7 p.m. *Id.* at 982; *see id.* at 982 n.6. Similarly, in *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015), the Fourth Circuit held that a law was "facial[ly]" content-based because it prohibited robocalls "with a consumer or political message" but not "calls made for any other purpose."

On different facts, circuits have applied *Reed* and rejected First Amendment challenges. In *March v. Mills*, 867 F.3d 46, 51, 56 (1st Cir. 2017), for example, the First Circuit considered a statute prohibiting loud noises that were made with the intent to jeopardize or interfere with health services and met various other statutory criteria. The court held that the statute was not content-based on its face: it prohibited *any* loud noises (even noises that "convey[ed] no message at all") that "are made with the specified disruptive intent"; and it allowed "loud noise—no matter the topic discussed or idea expressed—if the noise is made *without* the specified disruptive intent." *Id.* at 57. In *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1322 (11th Cir. 2020), the Eleventh Circuit surveyed the parties' arguments about whether a regulation of outdoor live music was content-based, but did not "definitively decide" that issue. Invoking "judicial minimalism," in light of "the posture of the case" and "the lack of a fully-developed record," the court merely held that it was not an abuse of discretion for the district court to deny provisional relief based on the plaintiff's

failure to establish a likelihood of success on the merits. *Id.*[4]

None of these decisions creates any "circuit conflict" (Pet. 25) regarding the meaning of *Reed*. And none holds or suggests that *Austin* "overruled *Reed*." *Id.* at 21. Indeed, every one of the cited decisions predates *Austin*. Even if there were confusion regarding the interrelationship between *Austin* and *Reed*, moreover, plenary review by this Court would be premature until additional circuit decisions have applied the principles recently discussed in *Austin*—and would be more appropriate in a case (like *Austin* and *Reed*) involving an actual restriction on speech.

4. Petitioners also substantially overstate the practical significance of this case. Petitioners and their amici contend that A.B. 5 "prevent[s] Petitioners from circulating ballot petitions and campaigning." Pet. i; *see, e.g.*, Br. of Howard Jarvis Taxpayers Ass'n 16 (describing A.B. 5 as a "ban[]" on speech). That is simply incorrect. Nothing in A.B. 5 restricts petitioners from speaking about political campaigns or prevents petitioners from hiring workers to speak on their behalf. It merely provides that petitioners' workers—like most other workers in the State—are subject to the ABC test for purposes of classifying them as either employees or independent contractors.

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[4] In the other Eleventh Circuit case cited by petitioners, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291-1294 (11th Cir. 2021), the court held that a local rule barring people from providing food, clothing, shelter, or medical care in public parks was not content-based. It reasoned that those actions "usually do not involve expressive conduct" and, in any event, the application of the rule did "not vary based on any message conveyed." *Id.* at 1292.

And petitioners have not substantiated their assertion that A.B. 5 "den[ies]" them "the ability to hire independent contractors." Pet. i; *see id.* at 10-11. The ABC test is a three-part test; it does not invariably classify workers as employees. *See supra* p. 1. In their complaint, petitioners alleged that their workers *would* pass the "A" and "C" elements to be classified as independent contractors. D. Ct. Dkt. 1 at 11. Petitioners assumed, however, that their workers "could *probably* not pass the 'B' portion . . . , because their work falls within the usual course of [petitioners'] businesses." *Id.* (emphasis added). But it remains an open question how that fact-dependent inquiry would play out—particularly as to petitioners Moving Oxnard Forward and Starr Coalition, which appear to have agendas and activities that extend well beyond door-knocking and signature gathering. *See id.* at 3.[5] Petitioners' assertion that this case "does not turn on any disputed or even disputable facts" (Pet. 27) ignores that uncertainty.

Even if petitioners were correct in assuming that their workers must be hired as employees under the ABC test, *see* Pet. 10-11, that hardly amounts to a "[l]ack of access to paid signature gatherers" or door-knockers, *id.* at 11. Temporary and part-time employment arrangements are allowed under California law and are a routine feature of California's economy. *See,*

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[5] Conversely, and contrary to petitioners' premise (*see* Pet. i), the *Borello* test does not inevitably lead to a determination that a newspaper worker or direct sales salesperson is an independent contractor. *See, e.g.*, *Espejo v. The Copley Press, Inc.*, 13 Cal. App. 5th 329, 352 (2017) (determining that newspaper carriers were employees under *Borello*); *Harris v. Vector Marketing Corp.*, 656 F. Supp. 2d 1128, 1141 (N.D. Cal. 2009) (genuine dispute of material fact over whether sales representative was employee under *Borello* factors).

e.g., *Smith v. Superior Ct.*, 39 Cal. 4th 77, 81 (2006) (describing temporary employment arrangement for "one day's work"). Worker benefits are often tied to the duration of employment; employers generally have fewer (or less significant) legal obligations with respect to temporary employees. *See, e.g.*, Cal. Lab. Code § 246(a) (exempting employer from paid sick leave obligations for employees who work fewer than 30 days during a calendar year).

Finally, petitioners ignore an additional reason why this case is not "an ideal vehicle" (Pet. 25): It remains uncertain whether petitioners could obtain the relief they seek if they ultimately succeeded on the merits of their First Amendment claim. The statutory scheme challenged here contains a severability clause. *See* Cal. Lab. Code § 2787; *see also id.* § 2775(b)(3); *see generally Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 n.26 (1981) (where "ordinance contains a severability clause, determining the meaning and application of that clause is properly the responsibility of the state courts"). When a court "confronts an equal-treatment constitutional violation" in a statute that "contains a severability clause," the typical remedy is to "sever[] the discriminatory exception or classification, and thereby extend[] the relevant statutory benefits or burdens to those previously exempted." *Barr*, 140 S. Ct. at 2354 (plurality opinion); *cf. Tahoe Reg'l Plan. Agency v. King*, 233 Cal. App. 3d 1365, 1408-1409 (1991). If applied here, that typical approach would eliminate the exemptions for direct sales salespersons and newspaper carriers and distributors, but leave petitioners' workers subject to the ABC test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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