No. 21-1172

In the Supreme Court of the United States

AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, INC., *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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QUESTIONS 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 independent contractor. As presently structured, California's Labor Code "establishes a default rule" applying a three-part test from *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018), "unless an arrangement falls within an exemption, in which case [it] applies" a multi-factor test from *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). Pet. App. A-16. Petitioners raise a First Amendment challenge to one set of exemptions, contained in California Labor Code Section 2778, on the ground that those exemptions result in the *Borello* test being applied to certain occupations, while some of petitioners' members are subject to the *Dynamex* test. The questions presented are:

1. Whether the court of appeals correctly rejected petitioners' argument that Section 2778 is an impermissible content-based restriction on speech.

2. Whether Section 2778 is subject to heightened scrutiny under the First Amendment because of incidental effects on speech.

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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." Jurisdictions apply a variety of tests to determine how to classify particular workers.[1] Before 2018, California generally applied a balancing test. *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989). That "*Borello*" test considered a variety of factors, *see id.* at 349-351, with a particular focus "on the hiring entity's right to control the worker," Pet. App. A-6.[2]

In 2018, the California Supreme Court concluded that a different test governs worker classification for purposes of California wage orders, which regulate wages, hours, and certain other working conditions. *See Dynamex Operations W., Inc. v. Superior Ct. of L.A.*, 4 Cal. 5th 903, 913-914, 916-917 (2018). Under that test, known as the "ABC" test, workers are classified as independent contractors if they (a) are "free

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[1] *See generally* Shimabukuro, Cong. Research Serv., R46765, Worker Classification 9 (2021), https://crsreports.congress.gov/product/pdf/R/R46765 (last visited May 19, 2022).

[2] Although petitioners and their amici repeatedly suggest otherwise, the *Borello* test does not inevitably lead to a determination that a worker is an independent contractor. *See, e.g.*, *Ali v. L.A. Focus Publ'n*, 112 Cal. App. 4th 1477, 1484-1486 (2003) (a reasonable trier of fact could conclude that a newspaper community affairs editor was an employee under *Borello*), *disapproved of on other grounds by Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010); *Cybernet Entm't, LLC Dba Kink.com*, 2015 WL 10058906, at *4 n.6 (Cal. Dep't of Indus. Relations, Occupational Safety & Health Appeals Bd. Apr. 20, 2015) (employer acknowledged that "videographers, editor production assistants, video editors, [and] photo editors" were employees under *Borello*).

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 Legislature enacted A.B. 5, which codified the *Dynamex* ABC test for wage orders and expanded it to provisions of California's Labor and Unemployment Insurance Codes. *See* 2019 Cal. Stat. 2888-2899. 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[.]" *Id.* at 2890. But A.B. 5 "did not apply *Dynamex* across the board[.]" Pet. App. A-7. It provided that certain workers were exempt from the ABC test and would remain subject to the *Borello* test. *See id.* at A-7-8. In deciding which types of work would be subject to exemptions, the Legislature considered a range of factors, including "the workers' historical treatment as employees or independent contractors, the centrality of their task to the hirer's business, their market strength and ability to set their own rates, and the relationship between them and the clients." Pet. App. A-22 (citing Cal. S. Comm. on Labor, Pub. Emp't & Ret., Analysis of A.B. 5 (July 10, 2019)). Under exemptions adopted by the Legislature, for example, the *Borello* test continues to apply to certain licensed professionals (such as doctors and lawyers), Cal. Labor Code § 2783(b), (c), "commercial fisher[s]" working on American vessels, *id.* § 2783(g), and home inspectors, *id.* § 2778(c)(2); *see also id.* §§ 2776-2784 (additional exemptions).

This case concerns the exemption in California Labor Code Section 2778. That statute directs that the *Borello* test continues to apply to workers who are party "to a contract for 'professional services,'" Cal. Labor Code § 2778(a), and who meet certain additional criteria, including the ability to set their own rates and maintain a business location "that is separate from the hiring entity," *id.* § 2778(a)(1), (3). As defined by the statute, workers who provide "professional services" include, for example, marketing professionals, *id.* § 2778(b)(2)(A), human resources administrators, *id.* § 2778(b)(2)(B), travel agents, *id.* § 2778(b)(2)(C), graphic designers, *id.* § 2778(b)(2)(D), and licensed barbers and cosmetologists, *id.* § 2778(b)(2)(L). Of particular relevance here, the "professional services" category also includes workers providing services as "a freelance writer, translator, editor, copy editor, illustrator, or newspaper cartoonist," provided that certain criteria are met. *Id.* § 2778(b)(2)(J); *see also id.* § 2778(b)(2)(I)(i) (similar provision for "still photographer, photojournalist, videographer, or photo editor"); *id.* § 2778(b)(2)(K) (similar provision for "content contributor, advisor, producer, narrator, or cartographer for a journal, book, periodical, evaluation, [or] other publication"). As originally enacted, those additional criteria included submitting fewer than 35 pieces of work to a single entity in a given year. 2019 Cal. Stat. 2893.

The Legislature amended the "professional services" exemption in 2020 (after petitioners filed this lawsuit and after the district court granted the State's motion to dismiss, *see infra* p. 4). 2020 Cal. Stat. 1842-1843. The 2020 amendment eliminated the 35-submission limit. *Id.* Instead, it provided that the professional services exemption applies to designated freelance workers who satisfy the general criteria and

who "work[] under a written contract that specifies the rate of pay, intellectual property rights, and obligation to pay by a defined time." Cal. Labor Code § 2778(b)(2)(J); *see also id.* § 2778(b)(2)(I)(i) (similar); *id.* § 2778(b)(2)(K) (similar). But the exemption does not apply if the worker (1) "directly replac[ed]" an employee who performed the same work at the same volume for the hiring entity, (2) "primarily perform[s] the work at the hiring entity's business location," and (3) is "restricted from working for more than one hiring entity." *E.g.*, *id.* § 2778(b)(2)(J). The statute also specifies that the exemption does not apply to photographers, videographers, and certain other professionals who work on "motion pictures." *Id.* § 2778(b)(2)(I)(i).

2. Petitioners are two organizations that represent freelance writers and "visual journalists." Pet. App. G-4-5. They filed this lawsuit shortly after the Legislature enacted A.B. 5. *Id.* at G-22. Their complaint alleged that A.B. 5 violated the First Amendment and the Equal Protection Clause by treating individuals differently based on whether they worked on motion pictures and whether they submitted 35 or more pieces of work a year to a single entity. *Id.* at G-13-20. After denying petitioners' motion for a preliminary injunction, *id.* at D-1-32, the district court granted the State's motion to dismiss and entered a final judgment, *see id.* at A-9, B-1-3, C-1-6.

While petitioners' appeal of that judgment was pending, the Legislature amended the professional services exemption to A.B. 5. *See supra* p. 3. After concluding that the amendment did not moot the appeal, Pet. App. A-11 n.5, the court of appeals affirmed the district court's judgment in a unanimous opinion

written by Judge Callahan and joined by Judge Forrest and Judge Seeborg (sitting by designation). Pet. App. A-1-24.

The court of appeals rejected petitioners' argument that Section 2778 is an impermissible "content-based preference[] for certain kinds of speech." Pet. App. A-13. The court reasoned that Section 2778 "regulates economic activity rather than speech." *Id.* at A-14. It "does not, on its face, limit what someone can or cannot communicate" or "restrict when, where, or how someone can speak." *Id.* Instead, it "governs worker classification by specifying whether *Dynamex*'s ABC test or *Borello*'s multi-factor analysis applies to given occupations under given circumstances." *Id.* Because the decision about which test to apply "does not turn on what workers say but, rather, on the service they provide or the occupation in which they are engaged," the court concluded that Section 2778 does not "impose content-based burdens on speech." *Id.* at A-18. The court acknowledged that applying the ABC test to some freelancers might "make it more likely that some of [petitioners'] members are classified as employees," which could potentially "mean fewer overall job opportunities for workers, among them certain 'speaking' professionals." *Id.* at A-15. But the court held that such "an indirect impact on speech" did not violate the First Amendment. *Id.* It further reasoned that Section 2778 does not violate the First Amendment because it does not "target certain types of speech" or "the press or a few speakers," but instead "applies across California's economy." *Id.* at A-16.

The court of appeals also rejected petitioners' argument that applying the ABC test to some freelancers working on motion pictures violated the First Amend-

ment by "burden[ing] the right to film matters of public interest." Pet. App. A-19-20. The court reasoned that "'motion pictures' refers to an industry or medium through which content is conveyed, and such distinctions do not typically implicate the First Amendment." *Id.* at A-20; *see id.* (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 660 (1994), for its observation that "'the fact that a law singles out a certain medium . . . is insufficient by itself to raise First Amendment concerns'").

Finally, applying rational basis review, the court of appeals rejected petitioners' equal protection claim. Pet. App. A-20-24. The court recognized that "California weighed several factors" in determining "whether and under what conditions *Dynamex*'s ABC test" should apply to a class of workers, including whether the workers had historically been treated as employees or independent contractors, how central their task was to the hiring business, and the relationship between the workers and the business's clients. *Id.* at A-21-22. The court reasoned that "[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 it is "also conceivable that misclassification was more rampant in certain industries and therefore deserving of special attention." *Id.* at A-22. "And even if California could have better addressed misclassification some other way, or with greater precision, the Equal Protection Clause does not require it." *Id.*

Petitioners sought rehearing en banc. No judge of the court of appeals requested a vote on whether to hear the case en banc. *See* Pet. App. E-1-2. Petitioners then filed this petition for a writ of certiorari focused exclusively on First Amendment issues.

ARGUMENT

Petitioners' principal claim is that California Labor Code Section 2778 is an impermissible content-based restriction on speech. But Section 2778 does not restrict speech or differentiate between speakers based on their message. It regulates economic activity: directing which of two tests applies to determine whether particular workers are employees or independent contractors for purposes of state labor and employment laws. As the court of appeals correctly held, the statute's application of different tests for determining employment status for different categories of workers does not violate the First Amendment. Section 2778 "does not turn on what workers say, but, rather, on the service they provide or the occupation in which they are engaged." Pet. App A-18. The decision below is consistent with this Court's precedents and does not create any conflict with other lower court authority. There is no need for further review.

1. Petitioners first argue that this Court should grant certiorari to consider whether Section 2778 is content-based. Pet. 17-24. But they fail to support their assertion that the decision below "conflict[s] with decisions of this Court," Pet. 17, or to identify any other persuasive reason for plenary review.

a. Laws that "restrict expression because of its message, its ideas, its subject matter, or its content" are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A "regulation of speech is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* To determine whether a law is content-based, courts consider

whether it "defin[es] regulated speech by particular subject matter" or "by its function or purpose." *Id.*

This Court has also recognized a distinction between "restrictions on protected expression" and "restrictions on economic activity[.]" *E.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). While the First Amendment "may prohibit the former, it 'does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'" Pet. App. A-13 (quoting *Sorrell*, 564 U.S. at 567). 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 it has rejected First Amendment challenges to a wide range of generally-applicable laws that cover speech-based professionals and businesses, including laws regulating the media. *See Okla. Press Publ'g 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).

Here, the court of appeals correctly determined that Section 2778 "regulates economic activity rather than speech." Pet. App. A-14. As Judge Callahan explained, the statute does not "limit what someone can or cannot communicate" or "restrict when, where, or how someone can speak." *Id.* Instead, it specifies which of two tests—"*Dynamex*'s ABC test or *Borello*'s multi-factored analysis"—will apply to determine whether a particular worker is classified as an employee or an independent contractor for purposes of

certain state labor and employment laws. *Id.* While the applicable test will "vary based on the nature of the work performed or the industry in which the work is performed," that is no different from many other employment-based rules. *Id.* Indeed, federal employment regulations draw distinctions similar to those challenged here. *Id.* at A-14 n.6 (citing 29 C.F.R. Subpt. D).

Nor does Section 2788 "target certain types of speech and thereby raise the specter of government discrimination." Pet. App. A-16 (discussing *Minneapolis Star & Tribune Co.*, 460 U.S. at 578-579). It merely "establishes a default rule applying *Dynamex*'s ABC test to the classification of all work arrangements unless an arrangement falls within an exemption, in which case *Borello* applies." *Id.* Freelance writers and photographers who are subject to the ABC test are not in any sense "uniquely burdened" by this system. *Id.* at A-17. To the contrary, the same test applies to "many occupations," while some other workers fall within statutory exemptions calling for the application of the *Borello* test. *Id.* at A-16-17; *supra* pp. 2-3. As the court of appeals recognized, Section 2778 is "not rendered generally inapplicable just because" certain categories of workers are subject to a different test. Pet. App. A-17. Almost every law setting out a generally applicable policy or requirement contains certain exemptions or exceptions. *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).

b. Petitioners argue that the decision below conflicts with this Court's decision in *Reed*, which in petitioners' view compels the conclusion that Section 2778

is content-based. Pet. 17-18. But petitioners misunderstand this Court's precedent.

Reed addressed the constitutionality of a local ordinance that regulated the size, timing, and location of signs according to whether the message on the sign was "[i]deological," "[p]olitical," "[d]irectional," or for another purpose. 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.* at 164. For example, the signs that gave rise to the dispute in *Reed* "invit[ed] people to attend . . . worship services" and were "treated differently from signs conveying other types of ideas." *Id.*

Section 2778 presents no similar concern. It does not restrict speech, *see supra* p. 8, nor does it differentiate between speakers based on their message. As the court of appeals recognized, the application of different tests for employment status under Section 2778 "does not turn on what workers say, but, rather, on the service they provide or the occupation in which they are engaged." Pet. App. A-18.

Petitioners disagree, arguing that "[w]hether a freelancer's work falls within Section 2778's exemptions for marketing, graphic design, grant writing, fine art, or speech related to sound recordings and musical compositions 'depends entirely on its communicative content.'" Pet. 18 (quoting *Reed*, 576 U.S. at 164) (brackets omitted). That is incorrect. Under the professional services exemption, most freelancers who meet the general criteria in subsection (a) (*see supra* p. 3) are subject to the *Borello* test, *see* Cal. Labor Code § 2778(b)(2)(J), just like people who work in marketing, *see id.* § 2778(b)(2)(A), graphic design, *see id.* § 2778(b)(2)(D), grant writing, *see id.* § 2778(b)(2)(E),

and so forth. The only freelancers who do not qualify for that exemption are certain visual artists who work on "motion pictures" (regardless of content), *see id.* § 2778(b)(2)(I)(i), and freelancers who replace certain employees under particular conditions (again, regardless of the content of their expressive work), *see, e.g.*, *id.* § 2778(b)(2)(J). The inquiry into how these provisions apply to a particular worker does not focus on "'the content of a worker's message'" (Pet. 17) but instead typically examines other factors, such as the terms of the worker's contract, the nature of the work, the job title, and the type of industry. *See, e.g.*, Cal. Labor Code § 2778(a), (b)(2)(A)-(O).[3]

Moreover, as the court of appeals noted, even assuming that Section 2778 did entail some consideration of a worker's speech to determine what particular subsection applies, that would not make the statute content-based. *See* Pet. App. A-18 n.8. Even laws that directly regulate speech "may require some evaluation of the speech and nonetheless remain content neutral." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, No. 20-1029, slip op. at 8-9 (U.S. Apr. 21, 2022) (discussing solicitation regulations). This Court has squarely rejected the argument "that *any* examination of speech or expression inherently triggers heightened

[3] Petitioners are also incorrect in suggesting (at 18) that the *Borello* test applies to *all* those working in "marketing, graphic design, grant writing," and the like. As noted above, under the general provisions of the professional services exemption, that test applies only to workers who both provide those services *and* meet certain criteria, including (for example) retaining the "ability to set or negotiate their own rates for the services performed," Cal. Labor Code § 2778(a)(3), and maintaining a "business location . . . that is separate from the hiring entity," *id.* § 2778(a)(1); *see supra* p. 3.

First Amendment concern." *Id.* at 10. And that conclusion surely applies with even greater force to an economic regulation like Section 2778, which does not directly regulate any speech at all. *See supra* pp. 8-9.

City of Austin also forecloses petitioners' assertion that Section 2778 is content-based because it "target[s] the 'function or purpose' of speech[.]" Pet. 18. (quoting *Reed*, 576 U.S. at 163).[4] *Reed* observed that governments may impose content-based restrictions on speech through "subtle" means that "defin[e] regulated speech by its function or purpose." 576 U.S. at 163. But as *City of Austin* clarified, that observation "does not mean that any classification that considers function or purpose is *always* content based." *City of Austin*, slip op. at 11. Instead, it stands for the "straightforward" principle that a speech regulation cannot "escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* In both scenarios, the relevant question is whether distinctions are "drawn based on the message a speaker conveys." *Reed*, 576 U.S. at 163-164. Here, petitioners have never argued that the purpose of Section 2778 is to distinguish between workers based on the "communicative content," *id.* at 164, of their messages.[5]

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[4] Because *City of Austin* is consistent with the decision below, there is no basis for the Court to grant, vacate, and remand in light of that opinion, as some of petitioners' amici have suggested. *See* Br. of Independent Institute, *et al.* 4, 20-24.

[5] Petitioners also assert without elaboration that the decision below conflicts with this Court's decision in *Sorrell*. Pet. 20. It does not. The statute in *Sorrell* disfavored both "speech with a particular content" and "specific speakers" by barring any disclosure of

c. Petitioners next argue that review is warranted because "the circuit courts conflict" over the application of "*Reed*'s function or purpose test." Pet. 24. That argument is not persuasive.

To begin with, petitioners fail to establish that any real conflict exists. Most of the circuit cases cited by petitioners (at 21-24) are fact-intensive applications of *Reed*'s general principle: that regulations on speech are content-based when they "target speech based on its communicative content," whether by "defining regulated speech by particular subject matter" or "by its function or purpose." *Reed*, 576 U.S. at 163.[6] The remaining case, *Texas Entertainment Ass'n, Inc. v. Hegar*, 10 F.4th 495 (5th Cir. 2021), *petition for cert. pending*, No. 21-1258 (filed Mar. 14, 2022), applied this Court's precedents instructing that restrictions on

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"prescriber-identifying information" when used for certain purposes. *Sorrell*, 564 U.S. at 564. Moreover, in its "practical operation," that statute went "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* at 565. Section 2778 presents no comparable concerns.

[6] *Compare Cahaly v. Larosa*, 796 F.3d 399, 404-405 (4th Cir. 2015) (law barring robocalls "with a consumer or political message," but not others, is content based), *with Bruni v. City of Pittsburgh*, 941 F.3d 73, 84-88 (3d. Cir. 2019) (restrictions based on manner in which expressive activity occurs not content based), *cert. denied*, 141 S. Ct. 578 (2021), *March v. Mills*, 867 F.3d 46, 53-64 (1st Cir. 2017) (restriction based on noise level not content based), *cert. denied*, 138 S. Ct. 1545 (2018), *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1292-1294 (11th Cir. 2021) (prohibition on providing food, clothing, shelter, or medical care in public parks not content based), *and Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1318-1322 (11th Cir. 2020) (district court did not abuse discretion in concluding that plaintiffs were unlikely to succeed on claim that a prohibition on "live musical performances" was content based because the ordinance allowed the playing of "recorded music of any kind").

nude dancing are content-neutral if the record shows that the "governmental purpose in enacting the regulation is unrelated to the suppression of expression[.]" *Id.* at 509 (emphasis omitted) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)).

Even if this Court did perceive a conflict between those cases, however, it would not warrant plenary review in this case or at this time. Unlike this case, those cases involved First Amendment challenges to laws that directly regulated expressive conduct. *See supra* pp. 8-9, 13 & n.5. Moreover, last month's decision in *City of Austin* extensively discussed the "function or purpose" language from *Reed* that petitioners say was causing confusion in the lower courts. *See supra* pp. 11-12. To the extent there was any genuine confusion on that issue, it should be eliminated by the Court's recent guidance; at a minimum, further percolation would be appropriate before this Court offers still more guidance on that "straightforward" principle. *City of Austin*, slip op. at 11.

2. Petitioners also argue that this Court should grant review "to hold that exemptions to economic regulations that significantly burden speech" must receive "heightened scrutiny" under the First Amendment. Pet. 28; *see also id.* at 27 (asking the Court to "clearly define[] when a burden is incidental and when a law is an ordinary economic and social regulation"). That argument does not provide a persuasive basis for plenary review either.[7]

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[7] Petitioners did not squarely raise this argument in the lower courts. Instead, they argued that the *differential* burdens imposed by Section 2778 were impermissible because they "single out journalism for especially harsh treatment and because they evince a content preference against freelance journalism." C.A.

The court of appeals observed that Section 2778 might "make it more likely that some of [petitioners'] members are classified as employees" instead of independent contractors, which could result in "fewer overall job opportunities for . . . certain 'speaking' professionals." Pet. App. A-15. But even assuming that the classification of a worker as an employee instead of an independent contractor might burden the worker's First Amendment rights to some degree, *see* Pet. 27, "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," Pet. App. A-15 (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986)). And as petitioners acknowledge, this Court has consistently held that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." Pet. 25 (quoting *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018)). Here, the court of appeals properly held that Section 2778 "fits within this line of cases because it regulates economic activity rather than speech" and its impact on speech is (at most) "indirect." Pet. App. A-14, A-15.

Petitioners concede that their challenge "does not fit perfectly into rules established in prior cases" decided by this Court. Pet. 27. And the cases they attempt to invoke in support of their argument (*see id.* at 28-29) are not on point. In *United States v. National*

Dkt. 7-1 at 17 (opening brief); *see also* C.A. Dkt. 41 at 14 (reply brief, arguing that Section 2778 violates the First Amendment because it imposes "restrictions only on unfavored speech"); Pet. App. A-13 (court of appeals' opinion, describing petitioners' claim in similar terms); *id.* at D-17 (district court opinion); *id.* at G-17-20 (complaint); D. Ct. Dkt. 37 at 5-11 (petitioners' opposition to motion to dismiss).

Treasury Employees Union, 513 U.S. 454 (1995), the Court addressed a law that "single[d] out expressive activity" by prohibiting federal employees from accepting compensation for making speeches or writing articles. *Id.* at 475. Section 2778 does not prohibit any speech and "does not target the press or a few speakers." Pet. App. A-16. The Court's decisions in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), both involved permitting schemes, which raised the risk that government officials would "disfavor speech based on its content" when deciding whether to grant or deny a particular permit. *Thomas*, 534 U.S. at 323 (citing *Forsyth*, 505 U.S. at 131). Section 2778, in contrast, does not "subject[] the exercise of First Amendment freedoms to the prior restraint of a license." *Forsyth*, 505 U.S. at 131.

Finally, petitioners again fail to substantiate their assertion that there is a "stark conflict" (Pet. 38) of authority in the lower courts. Each of the lower court decisions cited by petitioners (*see id.* at 31-38) agreed with the court of appeals below that the First Amendment "'does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'" Pet. App. A-13.[8] It should not be surprising

[8] *See Comcast of Me./N.H., Inc. v. Mills*, 988 F.3d 607, 613 (1st Cir. 2021); *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021); *Mo. Broads. Ass'n v. Schmitt*, 946 F.3d 453, 458-459 (8th Cir. 2020); *Billups v. City of Charleston*, 961 F.3d 673, 683-684 (4th Cir. 2020); *Wright v. City of St. Petersburg*, 833 F.3d 1291, 1295-1298 (11th Cir. 2016); *The Pitt News v. Fisher*, 215 F.3d 354, 366-367 (3d Cir. 2000); *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 300 (2012); *Leydon v. Town of Greenwich*, 257 Conn. 318, 336 n.22 (2001); *Blue v. McBride*, 252 Kan. 894, 921 (1993); *cf. Left Field Media LLC v. City of Chicago*, 822 F.3d 988, 990

that some of those decisions held that the challenged law imposed a (permissible) incidental burden on speech, while others held that the challenged law was an (impermissible) regulation of speech: the cases involved different types of laws, restricting a wide range of activities.[9] In this case, as the court of appeals correctly held, Section 2778 plainly "regulates economic activity rather than speech." *Id.* at A-14. Petitioners and their amici may disagree with the regulatory choices made by the Legislature in Section 2778, but they cannot establish that those choices are prohibited by the First Amendment.

(7th Cir. 2016) (holding that restriction on peddling near Wrigley Field was permissible "regulation of conduct" even though it applied to some people who wanted to "express an idea"), *cert. denied*, 137 S. Ct. 1065 (2017).

[9] *See, e.g.*, *Comcast of Me./N.H.*, 988 F.3d at 609-610 (challenge to requirement that cable operators offer "'à la carte'" programming); *Billups*, 961 F.3d at 683-684 (challenge to ordinance "completely prohibit[ing] unlicensed tour guides from leading visitors on paid tours").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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