ESSAY

THE FUTURE OF FAST FOOD GOVERNANCE

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INTRODUCTION

The Fast Food Forward movement has swelled into one of the largest protests by low-wage workers in U.S. history,[1] animating efforts at all levels of government to raise and enforce workplace standards.[2] One such strategy is to hold fast food franchisors accountable as joint employers of their franchisees' employees. In what may be a watershed moment, New York Attorney General Eric Schneiderman (NYAG) recently filed suit against Domino's Pizza, the franchisor, for wage-and-hour-law violations in its franchisees' stores across New York State.[3]

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1 *See* Steven Greenhouse & Jana Kasperkevic, *Fight for $15 Swells into Largest Protest by Low-Wage Workers in US History*, GUARDIAN (Apr. 15, 2015), http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston [https://perma.cc/8TX7-UCGB] (discussing the nationwide fight to raise the minimum wage to fifteen dollars).

2 *See* Harry Bruinius, *The Brewing Liberal Labor Revolution*, CHRISTIAN SCI. MONITOR (June 28, 2016), http://www.csmonitor.com/USA/2016/0628/The-brewing-liberal-labor-revolution [https://perma.cc/5KZA-NVMK] (explaining how grassroots successes in the movement for higher wages have catalyzed legislative efforts to improve labor laws).

3 Affirmation of Terri Gerstein in Support of Verified Petition, New York v. Domino's Pizza, Inc., No. 450627/2016 (N.Y. Sup. Ct. May 23, 2016) [hereinafter Aff. Supp. V. Pet.]; *see also* Michelle Chen, *This Lawsuit Against Domino's Could Be Huge for Workers*, NATION (May 30, 2016), https://www.thenation.com/article/this-lawsuit-against-dominos-could-be-huge-for-workers [https://perma.cc/CUL5-YCPS] ("According to a lawsuit filed by New York Attorney General Eric Schneiderman's office last week, the Domino's pizza empire and its franchise operators share the blame for years of cheating workers out of tipped wages and overtime pay. Both the parent company

Fast food store employees report widespread wage-and-hour law violations,[4] and the NYAG's *Domino's* lawsuit appears to confirm this trend within one of the largest fast food brands in the United States.[5] The NYAG's suit is similar to successful nonfranchisor–franchisee wage-and-hour litigation, where courts have assigned liability to lead firms because their subcontractors' employees economically depend on them. But courts presented with similar evidence in the franchisor–franchisee context have been reluctant to consider franchisors to be joint employers.[6] What accounts for this difference?

The purpose of this Essay is to provide one answer to this question. This Essay argues that the franchise relationship is often misunderstood by the judiciary as an arms-length relationship when, in fact, it is frequently characterized by ongoing dependence.[7] This is an important misapprehension because dependence lies at the heart of how courts evaluate franchisor liability under wage-and-hour and franchise laws. It leads many courts to assume that the franchise agreement reflects an independent relationship between franchisors and franchisees and to disregard the supervisory controls that franchisors write into franchise agreements as routine quality standards.

The difference in judicial interpretations of the franchise relationship relative to other contracting arrangements suggests that improving fast food franchise store compliance with wage-and-hour law requires a reexamination of the franchise relationship. The Essay explores the regulation of franchising under wage-and-hour law and franchise law, finding that both legal regimes create perverse incentives for franchisees to violate wage-and-hour law. This Essay argues that improving wage-and-hour law compliance in franchise stores will require a reconfiguration of the franchise relationship to incentivize

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and the franchise operators are targeted as joint employers, charged with failing to adhere to wage-and-hour laws for workers.").

4 DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 130 (2014) [hereinafter WEIL, THE FISSURED WORKPLACE] ("An estimated 18.2% of workers in the [fast food] sector experienced minimum wage violations, 69.7% overtime violations, and 74.2% off-the-clock violations.").

5 According to the NYAG's *Domino's* suit, all twelve of the investigated Domino's franchisees not named in the suit admitted violations of wage-and-hour laws. Aff. Supp. V. Pet., *supra* note 3, ¶¶ 34, 36, 40-45.

6 *Compare* Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., No. 2:11-8557, 2014 WL 183956, at *7-17 (C.D. Cal. Jan. 14, 2014) (rejecting Wal-Mart's argument that it was not a joint-employer with its subcontractor under federal and state wage-and-hour laws based on evidence that Wal-Mart may have exercised a significant degree of supervisory control), *with* Singh v. 7-Eleven, Inc., No. 05-04534, 2007 WL 715488, at *3-6 (N.D. Cal. Mar. 8, 2007) (denying a joint-employer claim against a franchisor based on similar evidence contained in a franchise agreement).

7 *See* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933-37 (1990) (noting that a franchisee typically "purchases or leases virtually all of the franchised outlet's capital equipment," relies on the franchisor's "trademark and business format," and "pay[s] ongoing royalties to the franchisor").

franchisor monitoring of franchisee pay practices, notwithstanding the franchisor's joint-employer status.

This Essay proceeds as follows. Part I explores the franchise relationship, finding that franchising permits national fast food companies to centralize their operations through comprehensive operational standards that franchisees must follow at the risk of losing their investment in the franchise, creating dependency that can cause wage-and-hour-law violations. Part II examines the regulation of the franchise relationship under wage-and-hour and franchise laws. It explains why courts tend to be more skeptical about joint-employer claims in franchising arrangements than other types of contracting arrangements. Specifically, it argues that this skepticism is grounded in an incorrect assumption that franchise agreements are arms-length transactions. This permits franchisors to avoid joint-employer liability by characterizing supervisory control as a more generic form of quality control. Part III briefly explores the claims of the NYAG's *Domino's* lawsuit and explains why franchisors may respond with superficial changes to the franchise agreement instead of measures to improve franchisee compliance with the law. Finally, the Conclusion summarizes the implications of this analysis by identifying two routes to incentivize franchisors to monitor pay practices in franchise stores: (a) through wage-and-hour law, with deep factual records of franchising relationships to overcome the present judicial skepticism of franchisee dependency; and (b) through fraud and franchise laws, by imposing a duty on franchisors to ensure wage-and-hour law compliance in franchise stores, notwithstanding their joint-employer status.

I. FAST FOOD FRANCHISING TO CENTRALIZE OPERATIONS THROUGH FRANCHISEE DEPENDENCE

Franchising is a large and growing business model in the United States.[8] Fast food stores are overwhelmingly operated by franchisees. Domino's, for example, reports that over 90% of its 5273 domestic stores are franchise-owned, from which it collects over a quarter billion dollars in annual revenue.[9] Franchising is also a dominant operational form in a variety of other low-wage industries, including home health care, the janitorial industry, and hotels.[10]

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8 *See* Robert W. Emerson, *Assessing* Awuah v. Coverall North America, Inc.*: The Franchisee as a Dependent Contractor*, 19 STAN. J.L. BUS. & FIN. 203, 210-11 (2014) (noting that in the United States franchising accounts "for roughly 40% of all retail sales, with approximately 757,453 operating franchised units directly employing about 8.3 million people and . . . . yield[ing] about 1.5 trillion dollars in annual retail sales" (footnotes omitted)).

9 Aff. Supp. V. Pet., *supra* note 3, ¶ 18.

10 WEIL, THE FISSURED WORKPLACE, *supra* note 4, at 122-42 (discussing franchising in fast food, janitorial services, car rentals, hotels, and home health care).

Franchising permits national firms that operate through a geographically dispersed network of workplaces in the service economy to efficiently centralize operations, while controlling the costs of expanding store operations.[11] Franchising accomplishes this by shifting the cost of store operations to franchisees while imposing comprehensive operational standards that franchisees must follow to preserve their investment in the franchise.[12]

A. *Fast Food Franchising*

Fast food franchisors build dependence into their franchise agreements, beginning with their unequal bargaining position. National fast food brands are among the largest and most sophisticated firms in the United States,[13] while their typical entering franchisees have little or no previous business experience and operate only one or two franchise stores.[14] Franchisors extend this initially superior bargaining position into the franchise relationship with incomplete contract terms that shift risk to franchisees and leave the

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11 *See* DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 41-44 (2010) [hereinafter WEIL, STRATEGIC ENFORCEMENT] ("Franchising is also an attractive ownership form given the [fast food] industry's geographically dispersed, labor-intensive, and service-based nature. In such an industry, an enterprise's profitability is closely tied to the productivity and service delivery of its workforce. Assuring workforce productivity, in turn, requires effective management, including careful monitoring of the workplace. A large company with geographically dispersed outlets can therefore use franchising—rather than relying on company-owned and managed outlets—to better align the incentives of the franchisee, whose earnings are linked to the outlet's profitability."); WEIL, THE FISSURED WORKPLACE, *supra* note 4, at 122-29 (discussing how franchises can maintain a strong brand and minimize labor costs while expanding across wide geographic areas).

12 *See* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1509 (1990) ("Because the franchise contract usually is determined by the franchisor via a standard form agreement, . . . most of the express contractual obligations fall upon the franchisee."); David J. Kaufmann, *An Overview of the Business and Law of Franchising* 2 (Aspatore, 2013 WL 3773409, 2013) ("[T]he entire expense of developing, opening, and operating a franchised unit—buying or leasing the real estate, erecting and equipping the business premises, hiring and paying all personnel, paying for all inventory, and being financially liable for all aspects of that unit—is typically borne solely by the franchisee.").

13 In 2014, 104 of the top five hundred franchising firms in the United States were in the fast food sector, the largest number of any sector. *See* Tracy Stapp Herold, *The Fastest-Growing Sectors in the Franchise Industry*, ENTREPRENEUR (Dec. 17, 2014), https://www.entrepreneur.com/article/240720 [https://perma.cc/HR5Y-C6JY] ("The biggest sector by far, quick-service restaurants comprise more than 20 percent of the Franchise 500®.").

14 *See* Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193, 213-14 (2013) (reviewing empirical research and concluding that typical franchisees lack business experience and fail to read or understand the terms of franchise agreements); Kimberly A. Morrison, *An Empirical Test of a Model of Franchisee Job Satisfaction*, 34 J. SMALL BUS. MGMT. 27, 30 (1996) (noting that "only 20 percent of the sample had actually been business owners before becoming franchisees"); Elizabeth Garone, *The New Face of Franchisees*, WALL ST. J. (Aug. 19, 2013), http://www.wsj.com/articles/SB10001424127887324021104578553580349491440 [https://perma.cc/LEX4-Z8KR] (showing that 81% of franchisees own only one unit).

franchisors' duties to franchisees undefined.[15] Franchisees must pay an initial fee, often in the hundreds of thousands of dollars, and purchase all store equipment and materials.[16] Fast food franchisors also expressly incorporate their operational standards in the franchise agreement and reserve the right to terminate the agreements of franchisees who they determine have not met these standards.[17] In contrast to the franchisees' extensive obligations, franchisors in franchise agreements offer only vague commitments to provide operational advice and guidance at the franchisors' discretion.[18]

Franchisors can thereby centralize operations with standards that routinize every part of the work required to operate a franchise store, subject to unilateral change by the franchisor.[19] Franchisors can track and monitor these performance metrics through required franchisee computer equipment.[20] Detailed operational requirements also permit franchisors to deskill and routinize management functions by setting detailed hiring and firing standards that delegate little supervisory discretion and by conducting employee trainings remotely through their required computer systems.[21]

However, unlike directly employed managers, franchisees have an interest in ignoring operational standards that impose costs on franchise stores because

15 *See, e.g.*, Aff. Supp. V. Pet., *supra* note 3, ¶ 20 (noting that the Domino's "Franchise Agreement requires franchisees 'to fully comply with all specifications, standards and operating procedures and rules from time to time prescribed for the operation of a Domino's Pizza Store'"); *see also id.* ¶ 22 (summarizing other features of the Domino's Franchise Agreement); Hadfield, *supra* note 7, at 945 ("By 1977, the obligations of McDonald's franchisees were even more detailed. This contract ostensibly limited the parties' intent to ensuring the franchisee's compliance with those obligations, rather than to creating a set of mutual commitments. . . . In contrast, the contract left the franchisor's duties relatively undefined, a difficult-to-quantify duty to 'advise and consult.'").

16 *See* Hadfield, *supra* note 7, at 934-35 (demonstrating that fast food franchisee fees may often exceed $100,000); *see also* Aff. Supp. V. Pet., *supra* note 3, ¶ 22(a) (specifying that one of the terms of the Domino's Franchise Agreement is setting the "fees franchisees must pay to Domino's").

17 Hadfield, *supra* note 7, at 970.

18 *Id.* at 945. According to the franchise agreement annexed in the NYAG *Domino's* suit, Domino's offers franchisees operating and marketing assistance, but only at its discretion and without assuming any responsibility for the franchisees' success. *See* Aff. Supp. V. Pet., *supra* note 3, at Ex. 18 (illustrating the imbalance of power between franchisors and franchisees).

19 *See* Hadfield, *supra* note 7, at 945 (explaining that by the 1970s, McDonald's had incorporated adherence to its entire Operations Manual as express terms of the contract). Domino's requires franchise stores to follow a nearly 800-page manual of rules. Aff. Supp. V. Pet., *supra* note 3, ¶ 23 n.6. One state appellate court called this manual "a veritable bible for overseeing a Domino's operation. . . . [That] literally leaves nothing to chance." Parker v. Domino's Pizza, Inc., 629 So. 2d 1026, 1029 (Fla. Dist. Ct. App. 1993).

20 According to the NYAG's *Domino's* suit, the moment a franchise store employee logs an order in the system, Domino's begins a timer that measures each step of the process against its own benchmarks. Aff. Supp. V. Pet., *supra* note 3, ¶¶ 183-87.

21 Domino's allegedly requires franchisees to reject applicants and fire employees who do not meet Domino's criminal background and motor-vehicle standards, and it trains franchise store managers to defeat unionization campaigns and to use its payroll software to lower labor expenses. *Id.* ¶¶ 137-46, 165-66.

franchisees may only recoup their investments in the franchise if the business is profitable.[22] Fast food franchisors address this incentive by monitoring franchisees extensively for compliance with operational standards and by terminating the franchise agreements of those who do not comply with these standards.[23] The franchisor's unilateral right to terminate a franchise agreement is a catastrophic threat to franchisees, particularly those who are undercapitalized or who have no significant work experience outside the franchise.

B. *The Perverse Incentives of Franchisee Dependency*

Commentators have criticized franchise law for permitting franchisors to opportunistically require exhaustive contractual specifications and impose draconian remedies for noncompliance without a corresponding obligation by franchisors to exercise reasonableness and good faith.[24] In the words of the former United States Department of Labor (DOL) Wage and Hour Division Administrator David Weil, franchisor opportunism can also "create incentives for franchisees to violate laws."[25] Franchisors condition the franchise agreement on all manner of operations *except* wage rates.[26] Since franchisors aggressively police nearly all other cost variables, suppressing employee wages is one of the few ways that franchisees can boost store profit by cutting costs.

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22 *See* Hadfield, *supra* note 7, at 950 ("A franchisee wants to maximize her profits from the operation of the outlet; she does not wish to undertake any efforts or expenditures that will not compensate the undertaking."); MinWoong Ji & David Weil, *The Impact of Franchising on Labor Standards Compliance*, 68 INDUS. & LAB. REL. REV. 977, 979-82 (2015) (arguing that "franchisees are more likely not to comply with labor standards regulations than comparable restaurants owned by franchisors" because they are less likely to be caught, as they own fewer establishments, and that they "will always receive a lower profit per unit than a comparable company-owned establishment" because of owing the franchise fee, and they have less stake in the brand and "face lower incentives to pay an efficiency wage and greater incentive to directly supervise workers who may be of lower productivity").

23 *See* Peter C. Lagarias, *Franchising in California: Uniformity in California Franchise Agreements*, 21 FRANCHISE L.J. 136, 138 (2002) (noting that franchise agreements include termination clauses that permit termination for failing to meet the franchisor's standards, violating the franchise agreement or violating any law, statute, or violation); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 198-216 (2004) (describing complaints by franchisees of onerous inspection requirements and unjustified franchise terminations). According to testimony by a Domino's representative and Domino's business records, it reserves the right to terminate the franchise agreement of any franchisee who does "anything that would reflect poorly" on the brand. Aff. Supp. V. Pet., *supra* note 3, ¶ 23. It has terminated approximately fifty franchise agreements in New York State over a four-year period. *Id.* ¶ 176.

24 *See* Hadfield, *supra* note 7, at 950-55 (describing the "opportunism" problem created by incomplete terms in the franchise contract); Steinberg & Lescatre, *supra* note 23, at 178-81 (reviewing the interplay of antitrust law and franchises and concluding that, "[u]nconstrained by principles of antitrust or agency, franchisors are free to take opportunistic advantage of franchisees . . . .").

25 WEIL, THE FISSURED WORKPLACE, *supra* note 4, at 9.

26 *See* Lagarias, *supra* note 23, at 137-38 (discussing various franchise obligations and provisions included in typical franchise agreements without mentioning wage rate requirements).

Studies have shown that franchising is correlated with wage-and-hour law violations in fast food stores. David Weil, comparing DOL investigations of fast food franchisee– and franchisor-owned stores, found that "[t]he probability of noncompliance is about 24% higher among franchisee-owned outlets than among otherwise similar company-owned outlets."[27] This finding is consistent with the allegation in the NYAG's *Domino's* suit that most franchisees in New York State report wage rates to Domino's that violate wage-and-hour laws. [28]

The franchisor's incentive to impose operational requirements without a corresponding obligation to act in the franchisees' benefit can cause these violations. Domino's, for example, allegedly provides franchisees with a "Payroll Report" that automatically calculates owed wages to use for payroll.[29] But, according to the NYAG's Domino's suit, this Payroll Report systematically underreports wages owed to franchise store employees.[30] It is allegedly "impossible" for a franchisee to know that the Payroll Report underreports owed wages because it only provides gross owed wages without showing the underlying calculations.[31] Domino's has allegedly been aware of flaws in the Payroll Report since 2007 but did not fix the flaws or inform the franchisees about them.[32]

It is difficult to imagine a franchisor allowing its own store managers to use a flawed payroll system that underreported owed wages. That Domino's allegedly allowed its franchisees to do so for nearly a decade demonstrates the need for greater franchisor accountability.

27 WEIL, THE FISSURED WORKPLACE, *supra* note 4, at 131-32; *see also* MinWoong Ji & David Weil, *Does Ownership Structure Influence Regulatory Behavior? The Impact of Franchising on Labor Standards Compliance* 3 (Bos. Univ. Sch. of Mgmt., Working Paper No. 2010-21, 2009) (noting that investigations have found on average $4,265 more back wages owed at franchise stores than at comparable company-owned outlets on average).

28 Aff. Supp. V. Pet., *supra* note 3, ¶ 34.

29 *Id.* ¶¶ 91-118. Domino's alleges that it has recently restricted access to the Payroll Report for franchisees in New York State. Memorandum in Opposition to Verified Petition at 13, People v. Domino's Pizza, Inc., No. 450627/2016 (N.Y. Sup. Ct. Dec. 9, 2016).

30 Aff. Supp. V. Pet., *supra* note 3, ¶¶ 91-118. According to the NYAG's *Domino's* suit, the Payroll Report contains flaws that cause it to report owed wages that violate federal and state wage-and-hour law in (1) underreporting owed overtime for those employees who work in more than one franchise store; (2) underreporting the overtime wages owed to delivery employees whose franchisees claim a "tip credit" by multiplying 1.5 times the reduced, tipped rate, instead of the minimum wage; and (3) failing to track nontipped work when the franchisee claims a tip credit. *Id.* ¶¶ 99-111.

31 *Id*. ¶ 197.

32 *Id*. ¶¶ 98-114.

II. Defeating Franchisor Accountability by Characterizing Supervisory Control as Quality Control

Where labor contractors and their employees in low-wage industries economically depend upon a lead firm for work, the lead firm can be held liable as a joint employer.[33] But historically, courts have been reluctant to find that franchisors jointly employ franchise employees. This is anomalous because the economic dependence of the franchisee's employees is not functionally different from employees of any other labor contractor. A review of joint-employer claims against fast food franchisors reveals that this anomaly stems from the incorrect assumption that a franchise agreement is arms-length. This assumption permits franchisors to sweep supervisory control into franchise agreements by characterizing supervision as "operational" or "quality" control to defeat franchisor joint-employer claims.

Dependency defines the outer boundary of franchisor responsibility for franchise store employees; it separates independent contractor relationships from employee status under wage-and-hour laws and true arms-length transactions from ones of trust, in which a heightened duty is owed.[34] But despite the dependency woven into the franchise relationship, courts considering franchise law and joint-employer claims historically have greeted claims of franchisor supervisory control with skepticism.[35]

Franchise law does not impose a special duty on franchisors outside of requiring good faith in franchise terminations,[36] which cannot override the express provisions of a franchise agreement.[37] Most courts find that this duty is met so long as the franchisor discloses all known, material terms in the franchise agreement and exercises good faith in its exercise of franchise termination provisions.[38] In effect, absent fraud or bad faith in franchise termination, the

33 *See infra* note 45 and accompanying text.

34 *See* Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641, 668-71 (noting that a franchisee's dependency upon the franchisor can establish a fiduciary duty); Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 334 (2014) (explaining how, in deciding whether an employee–employer relationship exists, many courts ask "whether the worker or contractor is 'economically dependent' on the alleged employer").

35 *See infra* notes 53–55 and accompanying text.

36 *See* Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1292 (9th Cir. 1987) ("The California Franchise Relations Act has not imposed additional fiduciary duties on the franchisor."); Murphy v. White Hen Pantry Co., 691 F.2d 350, 354-56 (7th Cir. 1982) (noting that the franchisor owed no fiduciary duty to the franchisee outside of termination); *cf.* Arnott v. Am. Oil Co., 609 F.2d 873, 881-84 (8th Cir. 1979) (reasoning that "[i]nherent in a franchise relationship is a fiduciary duty," but describing that duty as merely requiring good faith and fair dealing).

37 Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 929 (1994).

38 *See, e.g.*, Atl. Richfield Co. v. Razumic, 390 A.2d 736, 741-43 (Pa. 1978) (holding that franchisors may not terminate franchise agreements arbitrarily but otherwise owe no special duty to franchisees).

franchise relationship is governed by the franchise agreement, in which franchisors can disclaim all responsibility for franchisee employees.[39]

Wage-and-hour laws are a different story, or they should be. The Fair Labor Standards Act (FLSA),[40] like New York Labor Law and many other state wage-and-hour laws, broadly defines the employment relationship as one in which a person or entity "suffer[s]" or "permit[s]" an individual to work,[41] and an employee may have multiple employers who are jointly responsible for wage-and-hour-law compliance.[42] The "striking breadth"[43] of this definition is meant to protect vulnerable workers by extending liability to the lead firms on which the employees economically depend.[44] Under wage-and-hour laws, courts assign liability to joint employers where the "economic reality" shows that the employee is dependent on the putative joint employer.[45]

Courts have applied this doctrine in a variety of industries to assign liability to lead firms as joint employers despite a lack of direct supervision. For example, the Ninth Circuit applied the doctrine to the agriculture industry in *Torres-Lopez v. May*,[46] and the Second Circuit did the same to the garment industry in *Zheng v. Liberty Apparel Co*.[47] In addition to the extent of direct control, such as on-site supervision and assigning wage rates, these courts have reviewed evidence of joint employment across two additional dimensions: (1) *indirect supervision* over the employee, such as supervisory

39 Domino's, for example, opposes the NYAG's claims of franchisee dependence by reference to the franchise agreement, which characterizes franchisees as "independent contractor[s]" who can, subject to compliance with the terms of the franchise agreement, "operate their stores as they see fit" and are solely responsible for compliance with the law. Memorandum in Opposition to Verified Petition, *supra* note 29, at 5-6.

40 29 U.S.C. § 201 (2012).

41 *Id.* § 203(g). Many state laws, including New York Labor Law, define the employment relationship in a similarly broad manner. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14(a) ("*Employee* means any individual employed, suffered or permitted to work by an employer, except as provided below.").

42 29 U.S.C. § 203(d); 29 C.F.R. § 791.2(a) (2016).

43 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

44 *See* Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 405, 408 (7th Cir. 2007) (holding that migrant workers of a subcontractor—who were "furnished only dilapidated and overcrowded housing" and were "not fully compensate[d]"—were also employees, under the FLSA, of the seed company that had contracted with the subcontractor); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1043-48, 1094-99 (1999) (tracing the origins of the "suffer" and "permit" language to early twentieth century laws meant to protect a particularly vulnerable class—child laborers).

45 *See, e.g.*, Rutherford Food Corp. v. McComb, 331 U.S. 722, 729-30 (1947) (finding that a slaughterhouse jointly employed de-boners—despite labeling them as independent contractors—because of its occasional supervision of the de-boners, evidence that the de-boners depended on the slaughterhouse for their schedules and income, and their performance of routine line-jobs that the slaughterhouse integrated into its production process).

46 111 F.3d 633, 645 (9th Cir. 1997).

47 355 F.3d 61, 79 (2d Cir. 2003).

control embedded in operational standards; and (2) *nonsupervisory dependence*, or evidence of economic dependence separate from supervision, such as the extent to which an employee performs routine, unskilled work that is integrated into the production process. For instance, the Ninth Circuit in *Torres-Lopez* found that a grower jointly employed pickers because it controlled the harvest schedule and total workers needed, owned the premises and equipment, permitted the contract to pass from one labor contractor to the next with no material changes, the workers had no business organization that shifted from one unit to another, and the work—picking cucumbers—was integral to the production process.[48] Similarly, the Second Circuit in *Zheng* vacated a trial court's determination that a garment manufacturer did not jointly employ its labor contractor's employees because it failed to consider evidence of indirect supervision and nonsupervisory dependency.[49] Following this and similar precedent, lower courts have considered indirect supervision and nonsupervisory dependence in joint-employer claims under wage-and-hour law in a variety of industries.[50] In one recent and illustrative FLSA case, the Central District of California denied Wal-Mart's partial motion for summary judgment in *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, finding genuine issues of material fact as to whether Wal-Mart jointly employed the employee of a warehouse operator where there was little evidence of direct control.[51] Specifically, the court found that Wal-Mart indirectly supervised the warehouse operator through "operating metrics," including specific productivity goals for each hour of work, suggestions about how to improve the efficiency of the work, and detailed audits that, if they revealed deficiencies, required the warehouse operator to provide a written action plan along with corrective action.[52]

In contrast to this line of subcontractor cases, courts considering FLSA claims against franchisors often reject indirect supervision and nonsupervisory dependence as grounds for a joint-employer determination. In *Singh v. 7-Eleven, Inc.*, for example, another California federal court held that employees of a franchise convenience store were not jointly employed by the franchisor.[53] The Fifth Circuit in *Orozco v. Plackis* discounted indirect supervision by

48 111 F.3d at 640-41.

49 355 F.3d at 70-72.

50 *See, e.g.*, Greenawalt v. AT&T Mobility LLC, 642 F. App'x 36, 38-40 (2d Cir. 2016) (vacating judgment that dismissed a joint-employer claim by security guards); Velez v. New Haven Bus Serv., Inc., No. 3:13-19, 2015 WL 75361, at *6 (D. Conn. Jan. 6, 2015) (denying defendant Yale University summary judgment on a claim that it jointly employs bus drivers); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 196 (S.D.N.Y. 2003) (granting summary judgment to delivery workers, finding that a pharmacy jointly employed them).

51 No. 2:11-8557, 2014 WL 183956, at *3 (C.D. Cal. Jan. 14, 2014).

52 *Id.* at *3-4.

53 No. 05-4534, 2007 WL 715488, at *3-6 (N.D. Cal. Mar. 8, 2007).

holding in favor of a fast food franchisor in a joint-employer FLSA claim.[54] In *Reese v. Coastal Restoration and Cleaning Services, Inc.*, a Mississippi federal court dismissed evidence of indirect supervision and rejected a franchisor joint-employer claim in the janitorial industry.[55]

In each of these cases, the courts rejected evidence of indirect supervision similar to evidence found sufficient to establish a joint-employer relationship in *Carrillo*. The courts in *Orozco*, *Reese*, and *Singh* minimized the required selection, supervision, and training standards similar to those found probative of indirect supervision in *Carrillo*.[56] Whereas the court in *Carrillo* found that Wal-Mart's "suggestions" to improve the warehouse operation evidenced nonsupervisory dependence because of the expectation that the operator would follow the recommendations,[57] *Orozco* merely found irrelevant, "non-binding" advice.[58]

What accounts for this difference? Employment scholars have offered different theories to explain the inconsistent outcomes reached by courts considering employment status controversies. Marc Linder criticizes the judiciary's failure to consider FLSA's remedial statutory purpose, which leads courts to apply various factors formalistically instead of searching the record to discern the economic reality of the work relationship.[59] Katherine Stone locates this resistance to change in the nature of work itself, finding that the traditional factors showing economic dependence in industrialized work settings do not translate well into a post-industrial work relationship.[60]

To be sure, statutory purposelessness and confusion about how to apply a doctrine developed in the 1940s to post-industrial work relations helps to

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54 757 F.3d 445, 449-52 (5th Cir. 2014).

55 No 1:10-36, 2010 WL 5184841, at *3-5 (S.D. Miss. Dec. 15, 2010).

56 *See Orozco*, 757 F.3d at 451-52 (concluding that a franchisor did not supervise or control its franchisee's work schedule and conditions, despite evidence that the franchisor trained employees, and further concluding that a provision in the franchise agreement requiring the franchisee to meet the franchisor's standards did not suffice to establish indirect control); *Reese*, 2010 WL 5184841, at *4 (concluding that a franchisor did not exercise authority in hiring and firing employees, despite the franchisor's background-check requirement, and that the franchisor did not exercise supervision and control of the work schedule and conditions, despite a provision in the franchise license agreement requiring "vehicles, equipment, supplies, cleaning products, uniforms, computer hardware and software" to meet the franchisor's standards); *Singh*, 2007 WL 715488, at *3 (concluding that the franchisor was not a joint employer, despite evidence that "employees were subject to the terms and conditions of the training, on-going training, and satisfaction of 7-Eleven service standards," the franchisor imposed various operational standards on the store, and the franchisor provided payroll services).

57 *Carillo*, 2014 WL 183956, at *8.

58 *Orozco*, 757 F.3d at 449; *see also* Ochoa v. McDonald's Corp., 133 F. Supp. 3d 1228, 1238 (N.D. Cal. 2015) (discounting McDonald's staffing "advice" to store managers outside the franchisee's presence).

59 Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 207-08 (1999).

60 Katherine V.W. Stone, *Rethinking Labour Law: Employment Protections for Boundaryless Workers*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW 155, 162-75 (Guy Davidov & Brian Langille eds., 2006).

account for the malleability of the FLSA joint-employer test. Some courts have narrowly construed the joint-employer doctrine for jobs that cannot be easily analogized to the mass production work of the industrial era,[61] while other courts, including the court in *Carrillo*, have grounded their broad application of the joint-employer doctrine in the industrial nature of the work.[62] But the failure to consider statutory purpose does not explain why the joint-employer doctrine is consistently applied more narrowly in the franchising context. Jobs performed by fast food workers are as analogous to industrial work as those jobs performed by agricultural, garment, and warehousing workers. In these latter cases, courts have broadly applied the economic realities test. Not so in the franchising context.

The courts' consideration of indirect supervision in *Torres-Lopez*, *Zheng*, and *Carrillo* but not in franchising cases like *Orozco*, *Reese*, and *Singh* appears grounded primarily in the mistaken assumption that the franchise relationship is an arms-length transaction. This assumption pervades franchising cases, extending well beyond wage-and-hour law. "Franchising is different," reasoned the California Supreme Court in *Patterson v. Domino's Pizza, LLC*,[63] a state sexual harassment case, because "[t]he franchisee is often an entrepreneurial individual who is willing to invest his time and money, and to assume the risk of loss, in order to own and profit from his own business."[64] The franchise agreement, accordingly, reflects an arms-length relationship that seeks to establish uniform quality standards "for the benefit of both parties."[65] As explained in Part I, this assumption is incorrect: franchisees are generally not independent entrepreneurs but rather dependent contractors. As a result, the franchise agreement is often an incomplete contract that primarily benefits the franchisor. And this incorrect assumption can lead courts to dismiss the

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61 *See, e.g.*, *In re* Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 471 (3d Cir. 2012) (applying only direct control factors to a joint-employer claim by a car rental company's sales managers).

62 In *Carrillo*, for example, the court reasoned that "the manual labor performed by plaintiffs . . . is sufficiently analogous to the [agricultural] labor in *Torres-Lopez* such that the combined application of the [indirect supervision and nonsupervisory dependency] factors is appropriate." 2014 WL 183956, at *11; *see also* Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 408 (7th Cir. 2007) (finding agricultural workers to be jointly employed by a seed company and a labor contractor because "[e]verything the Court said" about work performed by deboners in *Rutherford* is true about plaintiffs' work); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 193-95 (S.D.N.Y. 2003) (finding that a pharmacy jointly employed delivery workers because their work was sufficiently analogous to work performed by deboners in *Rutherford*, as well as agricultural and garment workers in other cases).

63 333 P.3d 723 (Cal. 2014).

64 *Id.* at 732, 734. The state law claim in *Patterson* differs from most wage-and-hour laws in requiring a showing of day-to-day supervision to sustain a joint-employer finding. *Id.* at 740.

65 *Id.* at 738. Domino's relies on the reasoning in *Patterson* to argue that "the implementation and enforcement of [quality control] standards does not make a franchisor a joint employer." Memorandum in Opposition to Verified Petition, *supra* note 29, at 17.

supervisory authority reserved to the franchisor in the franchise agreement as a form of quality control.[66]

Julia Tomassetti makes a related critique of the test for determining employment or independent contractor status, distinguishing between control over the means of the work and control over the end result.[67] For Tomassetti, the flaw in this test is that, unlike in a standard contract, performance is never complete in an employment agreement.[68] As a result, all terms can point toward either control over the means or ends. Contractual nonrenewal rights, for example, can either constitute evidence of a right to discipline—which shows an employment relationship—or the completion of a contract term—which shows an independent contractor agreement. In conflating the means of production with its end, courts fail to find a distinction with a difference.[69]

The courts in *Singh*, *Reese*, and *Orozco* evoked a similarly empty distinction between supervisory and quality controls in the franchise agreement. Each of these courts discounted evidence of supervisory control that served the franchisor's interest in operational, or quality, control.[70] These cases, then,

66 *See Patterson*, 333 P.3d at 739 (dismissing evidence other than direct control because "[a]ny other guiding principle would disrupt the franchise relationship"); *see also, e.g.*, Ochoa v. McDonald's Corp., 133 F. Supp. 3d 1228, 1235-39 (N.D. Cal. 2015) (disregarding "the welter of" facts showing McDonald's "strength as a franchisor"—including its power to unilaterally sanction the franchisee and terminate the franchise agreement, give "recommendations" about "crew scheduling and staffing," utilize extensive monitoring, require training, and use scheduling and payroll programs—as evidence of an employment relationship); Vann v. Massage Envy Franchising LLC, 13-2221, 2015 WL 74139, at *8 (S.D. Cal. Jan. 6, 2015) (discounting evidence of franchisor control over franchise store services and customer interactions as "policies to assist in brand uniformity"); Reese v. Coastal Restoration & Cleaning Servs., Inc., No 1:10-36, 2010 WL 5184841, at *5 (S.D. Miss. Dec. 15, 2010) (noting that a contractual provision in the franchise agreement "is simply one of the quality control standards" imposed by the franchisor and that it "does not show that [the franchisor] has power to control hiring/firing of [franchisee] employees"). Although the Second Circuit in *Zheng* distinguished between supervisory and quality control, it held that purported quality control that affects employee schedules is a form of supervisory control. *See* 355 F.3d 61, 75 (2d Cir. 2003) ("[I]n cases in which the purported joint employees worked exclusively or predominantly for the purported joint employer. . . . [T]he joint employer may *de facto* become responsible, among other things, for the amount workers are paid and for their schedules, which are traditional indicia of employment.").

67 Tomassetti, *supra* note 34, at 336-39, 357-62. As demonstrated by a recent Ninth Circuit case, this test is intended to distinguish bona fide independent contractor relationships, which only impose requirements on the end product or service, from those permitting control over the manner in which the work is performed. *See* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989-90, 993 (9th Cir. 2014) (holding that FedEx employed drivers that it labeled independent contractors because it not only controlled the "results" of customer deliveries but also the means, including driver appearance standards and schedules).

68 Tomassetti, *supra* note 34, at 355-56.

69 *Id.* at 356-57.

70 *See Reese*, 2010 WL 5184841, at *4 (finding that a background check "is simply one of the quality control standards [the franchisor] requires as a condition to granting a franchise for the use of its system, trade name, service marks, trademarks, *etc*."); Singh v. 7-Eleven, Inc., No. 05-04534, 2007 WL 715488,

appear to turn on whether this dependence serves the interest of franchisors rather than the degree of dependence by the franchisees' employees on the franchisors. This is circular reasoning. Franchisors have an interest in *all* manners of franchisee dependence on the franchisor, including dependence achieved through indirect supervision of franchise store employees. By sweeping supervisory control into the franchise agreement under the guise of an arms-length agreement, franchisors have succeeded in persuading courts that dependence suggesting joint employment is somehow a mutually exclusive category from dependence in controlling operations.[71]

At its logical endpoint, this reasoning serves as a threshold test for whether to consider indirect supervision and franchisee dependence at all. In *Juarez*, one California trial court made this often-unstated test explicit, holding that the state's presumption of employment in its means–ends test "does not apply in the franchise context" and instead requiring the franchisee to "show that the franchisor exercised control beyond that necessary to protect and maintain its interest in its trademark, trade name, and goodwill to establish a prima facie case of an employer–employee relationship."[72]

As the Third Circuit recently held in rejecting the reasoning in *Juarez*, this franchising supervisory control–quality control distinction has no basis in law.[73] Moreover, as the Second Circuit in *Zheng* observed, it creates incentives for joint employers to hide behind formal trappings of independence to disguise a joint-employment relationship.[74] This incentive is particularly perverse in fast food franchise stores, where franchisee dependence on the franchisor can cause wage-and-hour-law violations.

at *5 (N.D. Cal. Mar. 8, 2007) (determining that supervisory controls meeting the franchisor's "goal of attaining conformity to certain operational standards and details" did not create an employer–employee relationship); *see also* Orozco v. Plackis, 757 F.3d 445, 452 (5th Cir. 2014) (reading the franchise agreement to grant the franchisor "a certain degree of control over the [franchisee's] location," but holding such control insufficient to make the franchisor an employer of franchisee's staff).

71 Domino's, for example, relies on the supervisory control–quality control distinction to argue that "the [NY]AG's claim that [Domino's] is a 'joint employer' impermissibly attempts to transform the standards that [Domino's] (and every other franchisor) uses to protect its brand and ensure consistency and quality into indicia of an employment relationship." Memorandum in Opposition to Verified Petition, *supra* note 29, at 17.

72 Juarez v. Jani-King of Cal., Inc., No. 09-3495, 2012 WL 177564, at *4 (N.D. Cal. Jan. 23, 2012) (internal quotations omitted); *see also* Courtland v. GCEP-Surprise, LLC, CV-12-00349, 2013 WL 3894981, at *3 (July 29, 2013) (relying on *Patterson* to reject indirect supervision as evidence of a franchisor's joint employment of franchise store employees, holding that "[a] franchisor is not a joint employer unless it has significant control over the employment relationship").

73 *See* Williams v. Jani-King of Phila. Inc., No. 15-2049, 2016 WL 5111920, at *7 (3d Cir. Sept. 21, 2016) ("Pennsylvania law does not distinguish between controls put in place to protect a franchise's goodwill and intellectual property and controls for other purposes." (internal quotation marks omitted)).

74 *See* 355 F.3d 61, 72 (2d Cir. 2003) (discussing the factors pertinent to an FLSA analysis where alleged joint-employers are attempting "to evade the FLSA or other labor laws").

III. NEW YORK ATTORNEY GENERAL'S *DOMINO'S* LAWSUIT AND ITS IMPLICATIONS FOR FAST FOOD GOVERNANCE

The NYAG's *Domino's* suit introduces evidence of franchisee dependence on Domino's and the franchisor's aggressive monitoring of comprehensive operational standards to supervise its franchise store workforce indirectly. If this were the extent of its allegations, this case would risk the same judicial skepticism that greeted the plaintiffs in *Orozco*, *Singh*, and *Reese*. But the allegations in the NYAG's *Domino's* suit also describe direct interventions by Domino's in the hiring, supervision, discipline, and termination decisions in franchise stores, including that Domino's required franchisees to use software it knew systematically underreported owed wages.[75] If credited by a court, these allegations seem sufficient to establish a joint-employer relationship, as several lower courts have recently denied franchisor motions to dismiss joint-employer claims with similar allegations.[76]

Even if these allegations were insufficient, the NYAG additionally asserts that Domino's alleged failure to correct or disclose the flaws in its payroll program violate both fraud and franchise law statutes.[77] Importantly, a court could reject the claim that Domino's is a joint employer of franchise store employees and still find violations of state fraud and franchise law. This outcome would require Domino's to remedy these violations of wage-and-hour law.

75 Aff. Supp. V. Pet., *supra* note 3, ¶¶ 133-61, 180-207.

76 *See, e.g.*, Ocampo v. 455 Hospitality LLC, No. 14-9614, 2016 WL 4926204, at *7-9 (S.D.N.Y. Sept. 15, 2016) (denying a franchisor's motion to dismiss hotel employees' joint-employer wage-and-hour-law claim based on allegations that the franchisor monitored employee performance through on-site inspections, required employee time and wage recordkeeping, instructed franchisees on how to hire and train employees, and reserved right to audit franchisee records and terminate franchise agreement based on inspection results); Cordova v. SCCF, Inc., No. 13-5665, 2014 WL 3512838, at *5 (S.D.N.Y. July 16, 2014) (denying a franchisor-defendant's motion to dismiss where the franchisee-employee alleged, in part, that the franchisor required "certain record keeping systems, including systems for tracking hours and wages and for retaining payroll records and therefore, that [the franchisor] knew or should have known of, and had the authority to exercise control over, the accuracy of records concerning Plaintiffs' hours and wages and those of similarly situated employees"); Olvera v. Bareburger Group LLC, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014) (holding that franchise restaurant employees pleaded sufficient facts to survive a motion to dismiss where the complaint "asserts, *inter alia*, that the franchisor-defendants: (1) guided franchisees on 'how to hire and train employees'; (2) set and enforced requirements for the operation of franchises; (3) monitored employee performance . . . ."); Cano v. DPNY, Inc., 287 F.R.D. 251, 260 (S.D.N.Y. 2012) (holding that plaintiffs pleaded sufficient facts to survive a motion to dismiss where their complaint alleged, for example, that franchisor-defendants "created management and operation policies and practices that were implemented at the defendants' store . . . and monitor[ed] employee performance by means of required computer hardware and software").

77 Amended Memorandum of Law in Support of Verified Petition at 36-41, People v. Domino's Pizza, Inc., No. 450627/2016 (N.Y. Sup. Ct. Nov. 4, 2016).

Even if the NYAG prevails in its suit against Domino's, however, it is unclear whether it will establish a broad, durable baseline of franchisor accountability. Franchisors are likely to resist monitoring franchise store pay practices for fear of expanding their liability to other employment laws and tort claims.[78] Franchisors can seek to insulate themselves from legal liability by reconfiguring their relations with franchisees. For example, franchisors could require franchisees to operate more independently of the franchisor, yet increase the capital investment requirement to ensure their dependency on the franchise relationship. Or, franchisors could shift the risk of joint-employer liability to a third party by subcontracting out their franchising operation. Franchisors could also avoid fraud and franchise law liability by removing franchise store payroll functions and data from their required software.[79] These measures would not remove the perverse incentives for franchisees to violate wage-and-hour laws, or for franchisors to ignore these laws while still imposing comprehensive operational standards. Indeed, by removing franchisors further from franchise store pay practices, franchisees may be even less likely to comply with wage-and-hour law.

These next-generation problems are hardly insurmountable. But they may require going outside of wage-and-hour laws to establish a duty to monitor illegal payroll practices, notwithstanding joint-employer status.

CONCLUSION

The NYAG's *Domino's* suit marks an important milestone in protecting labor standards in the fast food industry. Its wage-and-hour-law claim may guide future courts' joint-employer analysis in the context of fast food franchisors. But the analysis offered in this Essay suggests that its most important impacts may lie elsewhere—in its demonstration of franchisee dependence and its use of fraud and franchise laws to hold franchisors accountable without the need to determine joint-employer status.

The suit's rich factual record shows that the judicial assumption that franchise agreements are arms-length is overdue for reconsideration. The

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78 Control over employment records is a factor in the traditional test to identify a master–servant relationship, *see* RESTATEMENT (SECOND) OF AGENCY § 220(g) (AM. LAW INST. 1958), and is used in a variety of employment laws, including the Americans with Disabilities Act (ADA) and Title VII. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (applying the common law agency test to statutes that do not define the employment relationship or "giv[e] specific guidance on the . . . meaning" of the term "employee"); *see also* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444-51 (2003) (following *Darden* by applying the common law agency test to the definition of "employee" in the ADA). Title VII uses the same definition of "employee" as the ADA. *See* 29 U.S.C. § 1002(6) (2012) (defining "employee" as "any individual employed by an employer").

79 Domino's alleges that it has already done this by restricting access to the Payroll Report for franchisees in New York State. Memorandum in Opposition to Verified Petition, *supra* note 29, at 13.

myth of the franchisee as an independent entrepreneur is demonstrably false, empowers a legal strategy of misdirection by franchisors, and has led courts to disregard franchisors' indirect supervision of franchisee employees. Further factual development in this and similar cases may lead courts to reject this assumption and with it, the conflation of supervisory control and quality control urged by franchisors in these suits.

Regardless of the near-future outcomes of wage-and-hour litigation against franchisors, however, franchisors are likely to respond by restructuring the franchise relationship in ways that will insulate them from liability without removing the perverse incentives for franchisees to violate the law.[80] This suggests the need to impose a duty on franchisors independent of joint-employer status.

The NYAG's *Domino's* suit offers franchise law as a plausible route to do this. Legislatures have previously used franchise law to address specific opportunistic behavior by franchisors.[81] Fast food franchisees' dependence on franchisors supports the imposition of a duty for fast food franchisors to exercise reasonable care to train franchisees about the requirements of wage-and-hour laws, monitor their payroll practices, and remedy violations of wage-and-hour laws in franchise stores as a condition of franchising.[82]

Establishing a baseline duty to prevent and redress wage-and-hour law violations through franchise law would address the present perverse incentives for franchisees to violate the law without requiring a joint-employer determination. This solution is available to the federal government and to all states that regulate franchisors. Since courts typically reject monitoring as evidence of supervisory control, if the law specifically requires such

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80 A similar franchisor response is likely in response to recent successful claims against McDonald's under an ostensible agency theory. In *Ochoa* and *Salazar*, while rejecting plaintiffs' joint-employer theory under wage-and-hour law, the courts nonetheless denied summary judgment on their claim that McDonald's was jointly liable under the ostensible agency theory under which plaintiffs believed that the franchisees were McDonald's true agents. Ochoa v. McDonald's Corp., 133 F. Supp. 3d 1228, 1239-40 (N.D. Cal. 2015); *see also* Salazar v. McDonald's Corp., No. 14-02096, 2016 WL 4394165, at *13 (N.D. Cal. Aug. 16, 2016) (denying motion for summary judgment on similar ostensible agency theory). McDonald's recently agreed to pay $3.75 million to resolve *Ochoa*, even as it continues to litigate *Salazar*. *See* Ochoa v. McDonald's Corp., No. 3:14-02098, 2016 BL 378649 (N.D. Cal. Nov. 14, 2016) (granting approval of the class settlement agreement); Robert Iafolla, *McDonald's Fights a Second Class Action Brought by Franchise Workers*, REUTERS LEGAL (Nov. 22, 2016), http://www.reuters.com/article/usa-employment-mcdonalds-idUSL1N1DN0GL [https://perma.cc/DC6L-WVBD]. McDonald's and other franchisors are likely to react to these and future ostensible agency theory claims by requiring franchisees to instruct store employees that they are not employees of the franchisor.

81 For example, Congress in 1978 passed the Petroleum Marketing Practices Act to limit the grounds on which motor fuel franchisors could terminate the franchise agreement and establish procedural protections for franchisees. 15 U.S.C. §§ 2802–2804 (2012).

82 This mirrors the injunctive remedy sought in the NYAG's *Domino's* suit. Amended Memorandum of Law in Support of Verified Petition, *supra* note 77, at 43.

monitoring, this approach is also unlikely to increase franchisor liability in unforeseen ways.[83]

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83 *See* Moreau v. Air Fr., 356 F.3d 942, 950-51 (9th Cir. 2004) (rejecting mandated safety trainings as evidence of joint employment where an airline was legally required to provide such trainings "to ensure compliance with applicable safety regulations"). Nor would joint liability necessarily increase costs for franchisors. As Chief Judge Easterbrook observed in *Reyes*, a business contracting with "fly-by-night" operators can reduce liability "either [by] deal[ing] only with other substantial businesses or hold[ing] back enough on the contract to ensure that workers have been paid in full." 495 F.3d 403, 409 (7th Cir. 2007). In response to a change in franchise law, requiring franchisors to remedy franchisee wage-and-hour law violations, franchisors could include holdbacks for labor performance—common in the construction industry—as a standard franchise agreement term. *Id.* at 409.