FAST FOOD SWEATSHOPS: FRANCHISORS AS EMPLOYERS UNDER THE FAIR LABOR STANDARDS ACT

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The truly powerful feed ideology to the masses like fast food . . . while they dine on the most rarified delicacy of all: impunity. –Naomi Kline[1]

I. INTRODUCTION

On November 29, 2012, hundreds of fast food workers walked off their jobs in New York City with a unified demand that their hourly wages be increased to $15.[2] The movement quickly spread nationally as workers stood up to the corporations that make billions in profit off of their cheap labor.[3] The fast food workers put their plight on the national radar—the public soon got a glimpse of the conditions in a Taco Bell kitchen and the poverty wages paid to workers at KFC. While the movement persists, however, fast food workers continue to be abused while the large corporations that employ them remain impervious to challenges under the Fair Labor Standards Act ("FLSA").

But why do fast food worker advocates struggle to hold behemoth corporations liable for violations of federal employment law? This note will answer that question, while comparing fast food workers to agricultural and garment sweatshop workers, who have had more success in lawsuits against their corporate employers. My intention is to demonstrate that the subcontracting structure that proliferates though the garment and agricultural industries is roughly equivalent, for the purposes of finding that a business owner[4] is an employer, to the franchising scheme that currently

1 Naomi Klein, *Baker Does Bono,* NAOMIKLEIN.ORG (Dec. 20, 2003), http://www.naomiklein.org/articles/2003/12/baker-does-bono.

2 *See About Us*, FIGHT FOR $15, http://fightfor15.org/november10/about-us/ [https://perma.cc/3FQT-FDHD].

3 *See* IRENE TRUNG ET AL., NAT'L EMP. LAW PROJECT, THE GROWING MOVEMENT FOR $15 (2015), http://www.nelp.org/publication/growing-movement-15/ [https://perma.cc/JNN8-ULWX].

4 This note uses the term "business owner" to refer to the business entity at the top of the corporate ladder. Throughout this note, "business owner" is used to refer to garment manufacturers, farm owners, and fast food franchisors. While the middlemen who perform work at lower levels of the corporate chain are oftentimes owners of independent businesses, these middlemen will not be referred to as "business owners" to avoid confusion.

dominates the fast food industry. To do so, I will examine the predominant employment structures of all three industries, with the majority of my focus on the fast food industry, in order to identify the relationship between the low-wage workers at the bottom of the structure and the business owners on top. I will also analyze FLSA joint employment jurisprudence within the three industries to articulate a litigation strategy for advocates representing fast food workers who want to sue their corporate employers. Ultimately, to be successful in this fight, the American public must see fast food kitchens for what they are—modern American sweatshops.[5]

Business owners within the agricultural and garment industries evolved their structures in the nineteenth and twentieth centuries to minimize risk and evade liability.[6] One prominent component of this sophisticated evolution involved the use of a middleman, often an independent contractor, who stood between the business owner at the top of the corporate ladder and the low-wage workers at the bottom.[7] This use of intermediaries in the workplace was commonly referred to in the nineteenth century as the "sweating system," while the workplaces in this system were called "sweating shops."[8] The middleman, or contractor, was referred to as the "sweater," while the low-wage workers were colloquially known as the "sweated" or "oppressed."[9] Well-intentioned efforts by worker advocates to attack this system of subcontracting conflicted with the notorious constitutional right to contract that came from *Lochner*.[10]

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5 The phrase "modern American sweatshop" was coined in Bruce Goldstein et al.'s article, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, which discusses workplaces that utilize an intermediary to supervise work between business owners and low-wage workers. *See generally* Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

6 *See id.* at 987-88.

7 "It also meant that manufacturers sought to insulate themselves from the legal consequences of contractor abuse. Contracting was therefore done not just to implement an economic division of labor, but also to enforce a legal division of accountability." Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 15-16 (2009).

8 *See* BRUCE GOLDSTEIN & CATHERINE K. RUCKELSHAUS, LESSONS FOR REFORMING 21ST CENTURY LABOR SUBCONTRACTING: HOW 19TH CENTURY REFORMERS ATTACKED "THE SWEATING SYSTEM" 1, http://nelp.org/content/uploads/2015/03/Lessons-For-Reforming-21st-Century-Labor-Subcontracting-How-19th-Century.pdf [https://perma.cc/8DHD-LGRN]

9 *Id.* at 2.

10 *See id.* at 4; Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a state labor law that prohibited bakery employees from working extremely onerous hours was in violation of Lochner's freedom of contract, a right entitled to him under the

The FLSA was passed at the height of the New Deal, and in addition to articulating a federal minimum wage and overtime protections, the FLSA defined "employ" in a supremely expansive way.[11] Subsequent FLSA jurisprudence utilized this expansive definition to remedy existing problems with the subcontracting system in workplaces where low-wage workers were "sweated" in the name of profit motives.[12] From this grew "joint employment" doctrine, which recognizes that workers are often employed by several employers[13] in a single operation.[14] As a litigation tool, joint employment doctrine allows workers to assert several employers as defendants in a single complaint, effectively increasing chances of recovery and allowing workers to collect damages from diverse business entities that may be better suited to comply with a judgment for monetary damages.[15]

Over the years, the joint employment doctrine has been utilized to attack business owners who use subcontractors to indirectly abuse their workers. Worker advocates in many industries have recently had relative success utilizing this doctrine.[16] As franchising, a

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Due Process Clause of the 14th Amendment), *overruled by* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952) *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

11 "'Employ' includes to suffer or permit to work." Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014) (enacted in 1938).

12 *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947). In *Rutherford,* the Supreme Court considered a group skilled "boners" who worked at a slaughterhouse. The Court found that because the workers performed jobs that were integral to the success of the slaughterhouse and were controlled by the operational systems of the slaughterhouse, they were covered as employees under the Fair Labor Standards Act. *Id.* at 729-30.

13 "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." Fair Labor Standards Act, 29 U.S.C. § 203(d) (2014) (enacted in 1938).

14 "A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer." 29 C.F.R. § 791.2(a) (2000).

15 "By imposing full liability for unpaid or underpaid wages on all employers, the joint employer rule helps ensure that workers will be paid their lawful wages." Richard J. Burch, *A Practitioner's Guide to Joint Employer Liability Under the FLSA,* 2 HOUS. BUS. & TAX L.J. 393, 405 (2002).

16 *See, e.g.*, Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003) (discussing use of joint employment doctrine within the New York garment industry and specifically finding that functional control can be sufficient for determining that an entity is an employer under the FLSA); Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973) (considering the use of joint employment doctrine by harvest workers to hold a farming company jointly liable with the crew leader contractors they utilized); NLRB v. Gass, 377 F.2d 438, 442 (1st Cir. 1967) (using joint employment

particular form of subcontracting considered below, has grown in popularity, courts have balked when faced with the question of whether a franchisor can be an employer under the FLSA.[17] Recent trends, both within FLSA and the National Labor Relations Act ("NLRA") jurisprudence, suggest that courts might soon be willing to reconsider whether franchisors can be employers of workers at franchised locations.[18] This note will trace and amplify those developments, while drawing from successful litigation in the garment and agricultural industries to form a litigation strategy for fast food workers suing their corporate employers.

II. FLSA's Broad Employment Definition

Though many have contributed to the scholarship on FLSA's broad definition of "employ," this note would be remiss if it accepted the current jurisprudence defining "employ" without first elaborating on the congressional intent behind it.

The FLSA defines "employ" as including "to suffer or permit to work."[19] The Supreme Court has twice traced this language back to early efforts to eliminate child labor.[20] Those no-nonsense laws were specifically engineered to end child labor and impose liability on any entity that was aware of child labor, yet allowed it to persist.[21] The broad language was utilized to avoid confusion—Congress wanted to cut through obfuscating levels of the corporate ladder.[22]

Congress's inclusion of this language in the FLSA was no coincidence. This pro-labor New Deal legislation was meant to aid

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doctrine to find both a poultry company and a contracted trucking company were joint employers of the employee truck drivers); *see also* Katarina E. Wiegele, *Franchisors and the Specter of Joint Employment Liability for Franchisee Misconduct*, Bloomberg BNA (Sep. 19, 2014), http://www.bna.com/franchisors-specter-joint-n17179895132/ [https://perma.cc/C4SW-S5VH].

17 *See, e.g.*, Orozco v. Plackis, 757 F.3d 445, 452 (5th Cir. 2014); Chen v. Domino's Pizza, Inc., No. 09-107, 2009 U.S. Dist. LEXIS 96362, at *14 (D.N.J. Oct. 16, 2009).

18 *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186, *4 (Aug. 27, 2015) (redefining the joint employment standard under the National Labor Relations Act); *see also* Cano v. DPNY, Inc., 287 F.R.D. 251, 260 (S.D.N.Y. 2012) (granting Plaintiff's motion to file an amended complaint to add corporate defendants Domino's Pizza Inc., Domino's Pizza LLC, and Domino's Pizza Franchising LLC to FLSA complaint); Cordova v. SCCF, Inc., No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, *16 (S.D.N.Y. July 16, 2014) (denying a franchisor's motion to dismiss).

19 Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014) (enacted in 1938).

20 *See generally* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947); *see* Goldstein et al., *supra* note 5, at 1115-16.

21 *See* Goldstein et al., *supra* note 5, at 1030-37.

22 *Id.* at 1032.

abused workers in their pursuit of workplace justice.[23] Subsequent case law, however, impacted by corporate interests, obscured the FLSA's broad reach, as trends that emphasized notions of physical control as necessarily indicative of an employment relationship dominated the jurisprudence.[24] The proper standard, imputed from congressional intent, contemplates for workplaces where the business owner does not directly control the workers or the workplace, but rather where the employer knows about and can prevent work from being performed.[25]

Worker advocates are now somewhat constricted by a several decade long judicial misapplication of the FLSA's definition of "employ." Litigators using this definition, however, must understand this history so that arguments under the FLSA's broad employment roots make their way into legal briefs. Had fast food franchising been a business practice when the FLSA was written, Congress clearly would have considered these corporations as employers of workers at franchised locations.

III. Functional Similarity of Middlemen in the Garment, Agricultural, and Fast Food Industries

This section of the note will examine the prevailing business structure of the garment and agricultural industries to (1) identify parallels between these structures and the franchising system and (2) isolate themes in litigation that will be helpful for worker advocates to utilize against fast food franchisor corporations.

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23 *Id.* at 1100. ("The background and legislative history of the statutory definitions afford particularly persuasive evidence that Congress did not mean to exclude workers from the scope of this Act because they might be regarded as independent contractors for some purposes under common law concepts. In the original Black-Connery bill, which was not to be applicable to employers employing less than a prescribed number of employees, it was provided that the administrative board should have power to define and determine who were employees of a particular employer, and there was an explicit direction that the definition should be designed 'to prevent the circumvention of the Act or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.' A broad definition of 'employee,' including 'any individual suffered or permitted to work by an employer,' subsequently took the place of this provision.").

24 *See Rutherford*, 331 U.S. at 728-29 (citing Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947)) ("The definition of 'employ' is broad. . . . 'This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'"); *cf.* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984) (articulating a test for joint employment that was probative of whether the putative employer exerted physical control over workers).

25 *See* Goldstein et al., *supra* note 5, at 1136-37.

Garment and agricultural business owners typically utilize intermediary subcontractors to shield themselves from liability.[26] To build this shield, business owners find contractors who are willing to complete the work needed at the lowest price possible.[27] Fierce price competition between a large supply of contractors ensures that the business owner will get a favorable deal, while subcontractors are forced to take deals so unfavorable, the only way to make a profit is to sweat their workers.[28] The contractors are the direct source of physical abuse, while the business owner pleads ignorance because of an arm's-length relationship with the low-wage workers. The genius of the subcontracting system is that it allows business owners to make huge profits by manipulating contracts and indirectly exploiting workers, while evading FLSA liability.

Jurisprudence under the FLSA has deviated from Congress's initial intent and now utilizes what courts refer to as the "economic realities" test to determine whether an entity is an employer under the Act.[29] Under this test, an employment relationship is said to be determined based on the economic realities of the workplace.[30]

Two competing lines of cases emerged that articulate differing standards for assessing the economic realities of workplaces.[31] The first line has been criticized by advocates for favoring against a joint employer finding, because it is only probative of employment where the putative employer exerts direct physical control over

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26 *See* Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 300 (2003).

27 *Id.* at 301.

28 "Within this pyramid system, power flows downward. Retailers have substantial bargaining power to determine the wholesale price to the manufacturer, which, in turn controls the price paid to contract shops. Because contractors compete for bids and face the threat of foreign competition they are under intense pressure to cut costs, which they must achieve by reducing wages. The pressure on contractors to reduce labor costs often translates into illegal labor abuses committed against the workforce. In the worst cases, contract shops become sweatshops, characterized by extreme exploitation, including the absence of a living wage or benefits, poor working conditions, such as health and safety hazards, and arbitrary discipline." Cummings, *supra* note 7, at 9-10; LINDA G. MORRA, U.S. GEN. ACCOUNTING OFFICE, B-257458, GARMENT INDUSTRY: EFFORTS TO ADDRESS PREVALENCE AND CONDITIONS OF SWEATSHOPS 3 (1994) (finding that the garment industry is dominated by less than 1,000 manufacturers who parcel out production to about 20,000 contractors and subcontractors).

29 The "economic realities" language comes from *NLRB v. Hearst Publications,* but was cited in *Rutherford Food Corp. v. McComb,* which has become the bedrock of the joint employment doctrine. *Rutherford,* 331 U.S. at 727 (citing NLRB v. Hearst Publ'ns, Inc., 311 U.S. 111 (1944)).

30 Lung, *supra* note 26, at 316.

31 *Id.* at 317.

workers and the workplace.[32] Under this standard, the relevant factors that many courts have utilized to determine whether economic realities favor finding an employment relationship include whether the alleged employer:

1. "[H]ad the power to hire and fire the employees[;]
2. [S]upervised and controlled employee work schedules or conditions of employment[;]
3. [D]etermined the rate and method of payment[;] and
4. [M]aintained employment records."[33]

This approach is more appropriate in industries where there is overlapping ownership and management and only nominal distinction between separate entities.[34] The second, more recent line of cases takes a more holistic look at the economic realities of the employment relationship and deemphasizes physical control over workers as necessarily indicative of employment.[35] This standard was articulated for subcontracting industries because the rigid traditional standard does not fully grasp the economic realities of those industries.[36] While the more holistic standard comes closer to congressional intent in defining "employ," both standards fail to fully contemplate the full, expansive intent of Congress.[37]

A. *Economic Realities of the Garment Industry*

Garment factories in the United States resemble many of the shops that proliferate other countries and are just as notorious for their poor working conditions.[38] Much of this is hidden from the American public because of complex networks of supply chains that bring products from the factory to a retail store.[39] While research suggests that many Americans prefer ethically made clothing, it is almost impossible to find garments that are produced with

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32 *See* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984); Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

33 *Carter*, 735 F.2d at 12; *Bonnette*, 704 F.2d at 1470.

34 Andrew Elmore, *State Joint Employer Liability Laws and Pro Se Back Wage Claims in the Garment Industry: A Federalist Approach to A National Crisis*, 49 UCLA L. REV. 395, 404 (2001).

35 *See* Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989) (articulating five additional factors); Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003) (articulating six factors pertinent to determining an employment relationship in the garment industry).

36 *See Dole*, 875 F.2d at 805.

37 *See* Goldstein et al., *supra* note 5, at 1008-10.

38 Lung, *supra* note 26, at 294.

39 Jake Blumgart, *Sweatshops Still Make Your Clothes*, SALON (Mar. 21, 2013, 11:36 AM), http://www.salon.com/2013/03/21/sweatshops_still_make_your_clothes/ [https://perma.cc/W2AU-3CAR].

integrity.[40] Even corporations that pride themselves on their "sweat-free" labels are difficult to monitor because of the multiple layers of contractors and subcontractors that obfuscate the supply chain.[41]

The garment industry is particularly notorious for its use of an intermediary system to avoid employment liability.[42] Under the common scheme, firms, oftentimes called "jobbers" are tasked with the production of clothing.[43] These jobbers then source much of the actual production to a complex network of subcontractors.[44] Subcontractors serve as the vehicle and means for providing low cost labor.[45] Many of these subcontractors come to contracting as former shop workers and usually lack the managerial experience requisite to run a profitable business.[46] The jobbers oftentimes have long-term relationships with different subcontractors and they control all aspects of design, sales, quality, delivery, purchasing, co-ordination, and dissemination of the work.[47] Securing contracts with jobbers can be incredibly valuable, since a high level of price competition between subcontractors is characteristic of the industry.[48] This competition creates a "race to the bottom"[49] by contractors that incentivizes substandard working conditions and low-wages.[50]

Two concepts that have emerged as successful in determining the economic realities of the joint employment relationship within the garment industry are "functional control"[51] and "economic

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40 *Id.*

41 *Id.*

42 Goldstein et al., *supra* note 5, at 997.

43 *Id.*

44 *Id.* at 997-98.

45 *Id.* at 998.

46 *Id.*

47 *Id.* at 999.

48 Cummings, *supra* note 7, at 15; MORRA, *supra* note 28, at 3 (finding that the garment industry is dominated by less than 1,000 manufacturers who parcel out production to about 20,000 contractors and subcontractors).

49 "Race to the bottom" refers to the competition between subcontracting entities that often results in bidding on a contract at decreasing dollar values. To decrease their bids, subcontractors often cut wages and reel back workplace safety protections. With such great competition, the subcontractor who is willing to offer the lowest wages and most dangerous workplaces generally wins. *See generally* Steven Willborn, *Labor Law and the Race to the Bottom*, 65 MERCER L. REV. 369 (2014).

50 *See* Cummings, *supra* note 7, at 9-10.

51 *See* Irizarry v. Catsimatidis, 722 F.3d 99, 116 (2d Cir. 2013) ("[T]here is . . . no question that Catsimatidis had functional control over the enterprise as a whole. . . . This involvement meant that Catsimatidis possessed, and exercised, 'operational control' over the plaintiff's' employment in much more than a 'but-for' sense").

dependency."

1. Functional/Operational Control

Lopez v. Silverman is a critical case in joint employer jurisprudence, where the Southern District of New York focused primarily on who wields the real power and control of the garment industry.[52] In *Lopez*, Renaissance, a jobber, contracted a number of phases of the assembly process to various subcontractors.[53] The plaintiffs worked as garment pressers for one of those subcontractors, each asserting unpaid wages or overtime of roughly $3000.[54] In their FLSA complaint the workers named both Renaissance and the subcontractors as defendants, asserting that although Renaissance did not have physical control over the plaintiffs' workplace, they exerted sufficient control over operations to be liable as employers under the FLSA.[55]

To find that Renaissance was indeed an employer under the FLSA, *Lopez* deviated from the traditional rigid test for physical control. The court instead tailored a test that had utility within a subcontracting structure.[56] This new standard is appropriate where economic realities dictate that an employment relationship exists, yet the putative employer does not exert sufficient direct control to qualify as an employer under the traditional test.[57] In advancing this adapted standard, the *Lopez* court expressly recognized and took into account the nature of the garment industry's complex usage of contractors to shield liability. Thus, the court emphasized the need for an analysis that examines if an entity exerts *functional control* over workers.[58] The court advanced the following seven factors to determine whether there was an employment relationship:

> (1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer's integrated process of production or overall business objective; (2) whether the putative joint employer's premises and equipment were used for the work; (3) the extent of the putative employees' work for the putative joint employer; (4) the permanence or duration of the working relationship between the workers and the putative joint employer; (5) the degree of control exer-

52 *See* Lopez v. Silverman, 14 F. Supp. 2d 405, 423 (S.D.N.Y. 1998); *see also* Lung, *supra* note 26, at 341.
53 *Lopez*, 14 F. Supp. 2d at 408.
54 *Id.* at 408-09.
55 *See id.* at 412-13.
56 *Id.* at 415.
57 *Id.* at 419-20.
58 *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003).

> cised by the putative joint employer over the workers; (6) whether responsibility under the contract with the putative joint employer passed without material changes from one group of potential joint employees to another; and (7) whether the workers had a business organization that could or did shift as a unit from one putative joint employer to another.[59]

More recently, in *Zheng*, the Second Circuit emphatically rejected the traditional four factor economic realities test, chastising its "unduly narrow" focus on formal control of the physical performance of another's work.[60] The Second Circuit adopted *Lopez*'s reasoning, holding that the traditional four-factor test is sufficient for a finding of joint employment, but not necessary to establish a joint employment relationship in all industries.[61] It found grounding for a slightly modified *Lopez* standard from the Supreme Court, in the landmark *Rutherford* case.[62] Using this standard, the court found that Liberty, a garment manufacturer, was the employer of workers that operated several layers beneath Liberty in the subcontracting scheme.[63]

The concept of functional control is central to joint employment litigation within the garment industry because it considers the dynamics of the prevalent subcontracting structure.[64] The *Lopez* and *Zheng* courts expressly recognized that subcontracting indus-

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59 *Id.* at 68 (internal citations omitted).

60 *Id.* at 69. The Court cites the *Restatement of Agency* § 220(1)(1933), which references the master-servant relationship. "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." While this expresses the common law, master-servant view of the employment relationship, it does not account for the broad definition of "employ" found in the FLSA. The Court rejects the rigid traditional approach as one that "cannot be reconciled with the 'suffer or permit' language in the statute, which necessarily reaches beyond traditional agency law." *Id.*

61 *See id.* at 71.

62 *See id.* at 70. *Rutherford* considered conditions that were closer to the factual circumstances of *Zheng* and *Lopez* than *Carter*. It found that an employer can be joint employer under FLSA even when it is apparent that that employer did not exercise direct control over the employees.

63 The factors that the court considered are: "(1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants." *Id.* at 72.

64 Lung, *supra* note 26, at 343; Lopez v. Silverman, 14 F. Supp. 2d 405, 414 (S.D.N.Y. 1998); *Zheng*, 355 F.3d at 68.

tries, namely the garment and agricultural industries, are dominated by "relationship-defining owners" who control the terms of their contract with the middleman subcontractors.[65] The highly regulated assembly-line-style production emblematic of the garment industry is prescribed not by the subcontractor shop owners, but rather by the business owners—the engineers of the unfair unilateral contracts.[66]

2. Economic Dependency

Various courts have exalted that the "touchstone" of the economic realities test is economic dependency,[67] which is not a specific test, but rather a theme articulated by courts that diverge from reliance on physical control as the central component of a joint employment finding.[68] Courts that tout the concept of economic dependency tend to skew their analyses of the economic realities test towards a determination of whether the workers are dependent upon a putative employer.[69]

Courts have found that low-wage garment workers are economically dependent on their putative employers when contracts with shop owners are one-sided with little room for maneuverability or negotiation of terms.[70] Within *Sureway Cleaners*'s analysis of economic dependency, the court considered the specific terms of the contracts that Sureway Cleaners initiated with its subcontractor "agents." The terms of the contracts were unilateral in nature, while subcontractors could not assign their rights under the contract without Sureway Cleaners's express consent.[71] A similar imposition of unilateral contracts was considered in *Lopez*, where the

65 *Lopez*, 14 F. Supp. 2d at 418 ("Simply put, the dynamic between unskilled workers performing a discrete aspect of production, middle-man contractors, and dominant, relationship-defining owners is highly similar whether those owners are farmer-growers or manufacturer-jobbers."); *see also Zheng*, 355 F.3d at 68.

66 Cummings, *supra* note 7, at 15.

67 Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (deemphasizing control over workers, while focusing on dependence of the orchestra members upon ballroom operators); Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981) (holding that Sureway, a laundry service company, was a joint employer although the service used "agents" or independent contractors to operate individual laundromats); *see generally* Castillo v. Givens, 704 F.2d 181, 190 (5th Cir. 1983).

68 Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987); *see generally Bartels*, 332 U.S. at 130; United States v. Silk, 331 U.S. 704, 713 (1947); *Sureway Cleaners*, 656 F.2d at 1370; Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1054 (5th Cir. 1987).

69 *Sureway Cleaners*, 656 F.2d at 1372-73; *Lopez*, 14 F. Supp. 2d at 414.

70 *See Lopez*, 14 F. Supp. 2d at 417.

71 *Sureway Cleaners*, 656 F.2d at 1371.

business owner was independently responsible for determining piece rates per garment.[72] This kind of control, while not physical, is characteristic of the garment industry, where the business owner exerts dominance in all levels of employment.

Notions of functional control and economic dependency, while commonplace in a joint employment analysis within the garment industry, have largely evaded courts' analyses of employment relationships in the fast food industry. Worker advocates must weave these concepts into their litigation strategies when attempting to hold fast food corporations liable for violations of the FLSA.

B. *Economic Realities of the Agricultural Industry*

The agricultural industry in the United States is one that we indirectly interact with on a daily basis, yet the workers who pick our food are often invisible to consumers.[73] Like the garment industry, the typical agricultural business scheme involves a network of contractors and subcontractors, distancing the workers who harvest fields from business owner farmers.[74] These farmers hire "farm labor contractors," who provide daily seasonal workers to pick the crop.[75] The same "race to the bottom"[76] that suppresses wages by fierce competition for contracts that is seen in the garment industry, is also characteristic of the agricultural industry.

Farm labor contractors, the middlemen of the agricultural industry, supervise the day-to-day work of the harvesters.[77] Many of them come from deep poverty, some rising as former migrant laborers themselves, and lack the independent resources to meet a weekly payroll.[78] They operate independently to recruit, supervise, and pay harvesting workers.[79] Because a language barrier often exists between the workers and the business owner farmers, the farm labor contractor is typically the only supervisory personnel in com-

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72 *Lopez*, 14 F. Supp. 2d at 409.

73 *See* Lenni B. Benson, *The Invisible Worker*, 27 N.C.J. INT'L L. & COM. REG. 483, 490 (2002); *see also* Jeff Severns Guntzel, *Vital and Invisible: Minnesota's Migrant Workers and Their Children*, MINNPOST (Oct. 5, 2011), https://www.minnpost.com/rural-minnesota/2011/10/vital-and-invisible-minnesotas-migrant-workers-and-their-children [https://perma.cc/268A-SNN2].

74 *See generally* Aimable v. Long & Scott Farms, 20 F.3d 434, 437 (11th Cir. 1994) (outlining the contractual relationships that are typical within the industry).

75 *Id.*

76 *See* Willborn, *supra* note 49, at 369.

77 *See generally Aimable*, 20 F.3d at 441.

78 Goldstein et al., *supra* note 5, at 992-93.

79 *Id.* at 993.

munication with the workers.[80] Unless the harvest is going poorly, the farm labor contractor also generally controls work schedules, determines which fields to harvest, and generally asserts physical control over employee working conditions.[81]

Agricultural workers are protected by an additional statute, the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), which was specifically put into place to redress the "historical pattern of abuse and exploitation of migrant and seasonal farmworkers."[82] Under this statute, litigators have been very successful in holding business owners liable for workplace abuses of harvesters, which makes it extremely useful for our purposes.[83]

Although the AWPA defines "employ" in the same way that the FLSA does,[84] the AWPA expressly stipulates factors, often called "regulatory factors," that should be used when examining the agricultural work relationship.[85] The AWPA regulations expressly state that the enumerated regulatory factors are not exhaustive to a joint employment analysis.[86] When courts determine whether a farmer is a joint employer for purposes of the FLSA and the AWPA, they usually do so using both the regulatory factors and various other factors, referred to as non-regulatory factors, which were articulated by federal courts.[87] Analysis of the regulatory factors, much like the traditional economic realities test, tends to illicit whether the putative employer maintained physical control over the har-

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80 *Id.*

81 *Id.*

82 *Id.* at 1007 (citing H.R. Rep. No. 97-885, at 3 (1982)).

83 *See, e.g.*, Torres-Lopez v. May, 111 F.3d 633, 645 (9th Cir. 1997).

84 "Employ" includes to "suffer or permit to work." Agricultural Workers Protection Act, 29 CFR § 500.20(h)(5); *see* Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014).

85 The regulatory factors are: "(i) The nature and degree of the putative employer's control as to the manner in which the work is performed; (ii) The putative employee's opportunity for profit or loss depending upon his/her managerial skill; (iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers; (iv) Whether the services rendered by the putative employee require special skill; (v) The degree of permanency and duration of the working relationship; and (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business." 29 C.F.R. § 500.20(h)(4)(i)-(vi).

86 *Id.* The regulations cite to several cases to determine economic realities: Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987), *cert. denied*, 488 U.S. 898 (1988); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1329 (5th Cir. 1985); Castillo v. Givens, 704 F.2d 181, 192 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1983); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 756 (9th Cir. 1979).

87 *See Torres-Lopez*, 111 F.3d at 646; *Aimable*, 20 F.3d at 439.

vester workers,[88] while the non-regulatory factors provide for a more holistic determination of the economic reality of the employment relationship.[89] It is through both sets of factors that courts are able to determine the true economic realities of the agricultural employment relationship.[90]

Courts have varied in their application of specific non-regulatory factors under the AWPA. The plaintiffs in *Aimable v. Long & Scott Farms* argued for the inclusion of six regulatory factors to aid the court's calculus concerning the true economic realities of the employment relationship.[91] Although the court did not ultimately adopt these factors in their entirety, its reasoning was criticized by the Ninth Circuit for devaluing the importance of the non-regulatory factors.[92] The Ninth Circuit, in *Torres-Lopez*, offered eight non-regulatory factors which the court grounded in *Rutherford*, the landmark Supreme Court case, and *Real*, a Ninth Circuit case.[93] An analysis of these eight factors, in addition to the regulatory factors, led the Ninth Circuit to find that the harvesting workers were economically dependent upon farmer business owners, thus an employment relationship had been established.[94]

An analysis of relevant joint employment cases within the agricultural industry yields many different non-regulatory factors con-

88 *See Aimable*, 20 F.3d at 439 (explaining that the defendant growers argued for the regulatory factors to conclude that there was no joint employment).

89 Antenor v. D & S Farm, 88 F.3d 925, 934 (11th Cir. 1996). Many of the regulatory factors were based on common law master-servant employment relationships and do not take into consideration the expansive "suffer or permit to work" standard of the FLSA. The FLSA standard was articulated to assign responsibility to businesses who do not directly supervise the activities of putative employees. *Id.*

90 *See Torres-Lopez*, 111 F.3d at 636; *Aimable*, 20 F.3d at 439; *Antenor*, 88 F.3d at 934.

91 The factors articulated by the plaintiffs in *Aimable* include: (1) investment in equipment and facilities; (2) the opportunity for profit and loss; (3) permanency and exclusivity of employment; (4) the degree of skill required to perform a job; (5) ownership of facilities where work occurred; and (6) performance of a specialty job integral to the business. *Aimable*, 20 F.3d at 439.

92 *See Torres-Lopez*, 111 F.3d at 641.

93 These factors include: (1) whether the work was a specialty job on the production line, (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes, (3) whether the premises and equipment of the employer are used for the work, (4) whether the employees had a business organization that could or did shift as a unit from one worksite to another, (5) whether the work was piecework and not work that required initiative, judgment or foresight, (6) whether the employee had an opportunity for profit or loss depending upon managerial skill, (7) whether there was permanence in the working relationship, and (8) whether the service rendered is an integral part of the employer's business. *Id.* at 640. *See generally* Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979).

94 *See Torres-Lopez*, 111 F.3d at 644.

sidered by various courts. A synthesis of these cases reveals the following factors as indicative of economic dependence in this industry: (1) ownership of facilities where work occurred;[95] (2) performance of a line-job integral to the business;[96] and (3) investment in equipment and facilities.[97] These factors capture the unique nature of the employment relationship within the agricultural industry.[98]

These themes of economic dependency that come from the non-regulatory factors must be used by worker advocates attempting to prove that fast food corporations are employers under the FLSA. The factors expressly consider the business owner's reliance on the workers as integral to the model, which, as the next section explores, is a theme prevalent in the fast food franchising system.

C. The Franchising Relationship and Joint Employment Within the Fast Food Industry

Much unlike the sweated workers in the garment and agricultural industries, low-wage workers are the personification of the fast food industry to the consuming population. They greet customers at the drive-through window, salt french fries, and swipe customers' credit cards at the cash register. While other subcontracting relationships keep workers at arm-length distance from the consumer, the exploitation of fast food workers is in our face, yet the legal framework has not evolved to allow fast food workers to sue their corporate employers for wage and hour violations.

Historically, franchisors have not been held liable for FLSA violations at franchised locations.[99] Fast food giants have effectively exploited a system that allows them to control various aspects of the workplace, while evading employment liability.[100] Though litigation against franchisors is scarce in most circuits, courts that have analyzed the franchisor relationship have done so under the traditional economic realities test for physical control. Thus, worker ad-

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95 *See Aimable*, 20 F.3d at 444; *Antenor*, 88 F.3d at 934; *Rutherford*, 331 U.S. at 730; Hodgson v. Griffin & Brand of McAllen, Inc., 471 F.2d 235, 238 (5th Cir. 1973); *Torres-Lopez*, 111 F.3d at 640.

96 *See Rutherford*, 331 U.S. at 730; *Torres-Lopez*, 111 F.3d at 640; *Aimable*, 20 F.3d at 444; *Antenor*, 88 F.3d at 934; *Griffin & Brand*, 471 F.2d at 237.

97 *See Antenor*, 88 F.3d at 934; *Rutherford*, 331 U.S. at 730; Rickets v. Vann, 32 F.3d 71, 74 (4th Cir. 1994).

98 *See Antenor*, 88 F.3d at 934; *Aimable*, 20 F.3d at 444; *Torres-Lopez*, 111 F.3d at 640.

99 *See generally* Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014) ("Orozco II"); Chen v. Domino's Pizza, Inc., No.09-107 (JAP), 2009 U.S. Dist. LEXIS 96362 (D.N.J. Oct. 16, 2009).

100 *Id.*

vocates have not been successful.[101] Fast food franchisors, however, often exert control over working conditions that parallels or eclipses the control that has led courts to find joint employment in the garment and agricultural industries.

1. The Franchising System Within the Fast Food Industry

To determine whether there is anything inherent within a franchising contract that would prohibit a finding that a franchisor is an employer of workers at franchised locations, this note will analyze the structure of the predominant franchising system in the American economy. This section will consider how a typical franchise works and take a detailed look at the McDonald's franchising system to determine the true economic realities of fast food employment relationship.

i. *How Does Franchising Work?*

Franchising is a new, yet rapidly growing innovation in American business systems.[102] Today, franchising relationships dominate many industries, including fast food restaurants.[103] McDonald's, rated the number one franchise system by Franchise Times,[104] "alone[,] daily[,] serves nearly 50 million customers at over 36,000 restaurants in the United States and more than 100 countries, which employ 1.9 million people."[105] When taken as a whole, the American workforce employed at franchised locations is massive.[106]

One definition of "franchise" is a "license from the owner of a trademark or trade name permitting another to sell a product or

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101 Cano v. DPNY, Inc., 287 F.R.D. 251, 259 (S.D.N.Y. 2012).

102 In the early 1980s, the U.S. Dept. of Commerce estimated collective gross revenues of franchises at $350 billon. According to the U.S. Census Bureau, franchising companies and their franchisees now account for around $1.3 trillion in U.S. retail sales. David Kaufmann et al., *A Franchisor is not the Employer of its Franchisees or their Employees*, 34 FRANCHISE L.J. 439, 452 (2015).

103 *Id.* ("Today, franchising not only entirely dominates certain industries—such as guest lodging, real estate brokerage, quick-service restaurants, vehicle repair, tax preparation, lawn care, pest control, and convenience stores—but has propelled itself to the forefront of not only the American economy but, increasingly, the global economy as well.").

104 *Franchise Times Top 200+*, FRANCHISE TIMES, http://www.franchisetimes.com/Top-200/ [https://perma.cc/2DSZ-CMZL]

105 Kaufmann et al., *supra* note 102, at 452 (citing McDonald's, *Getting to Know Us*, ABOUT MCDONALD'S, http://www.aboutmcdonalds.com/mcd/our_company.html [https://perma.cc/7JJN-VJ65]).

106 *See Census Bureau's First Release of Comprehensive Franchise Data Shows Franchises Make Up More Than 10 Percent of Employer Businesses*, U.S. CENSUS BUR. (Sept. 14, 2010), https://www.census.gov/newsroom/releases/archives/economic_census/cb10-141.html [https://perma.cc/F3ZF-GPFK].

service under that name or mark."[107] One of the major franchising lobbies, the International Franchise Association ("IFA"), highlights three main components to a franchising relationship: "(1) the licensing of a protected trademark, (2) no negotiability on the part of the franchisee, and (3) ongoing interaction between the franchisor and the franchisee."[108]

Franchising is a simple concept—franchisees are granted the right to market goods and services of the franchisor business owner in return for a fee and an agreement to operate within that franchisor's standards and practices.[109] Franchisees buy into the brand, which is already known and trusted by a consumer base.[110] Thus, they do not need to establish reputation—reputation is purchased from the franchisor. Business owners are relieved of certain responsibilities, including: finding locations; leasing or purchasing units; building and equipping units; hiring staff; purchasing inventory; securing licenses and permits; and operating the unit.[111] These can all be passed off to franchisees, saving the business owner significant cost.

American fast food restaurants operate under an arrangement referred to as "business format franchising."[112] This type of franchising system positions the franchisor business owner as a support system to trademarked franchisees.[113] The model envisions the franchising relationship as a "team effort," dependent on the ongoing partnership between the franchisor and the franchisee.[114] Partnership is exemplified by a common saying within the business model: "Franchising means working for yourself, but not by yourself."[115] Thus, franchisors and franchisees can be seen as entwined

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107 1-2 GLADYS GLICKMAN, FRANCHISING § 2.02 (2015).

108 Telecomm's. v. Comm'r of Internal Revenue, 95 T.C. 495, 511 (1990).

109 Kaufmann et al., *supra* note 102, at 452.

110 *See generally id.*; Eddy Goldberg, *Weighing the Pros and Cons of Franchising vs. Traditional Business*, FRANCHISING.COM, http://www.franchising.com/howtofranchiseguide/weighing_the_pros_and_cons.html [https://perma.cc/7FXY-DT36] ("If you're Joe's Pizza, you're on your own when it comes to marketing and advertising. If you're a Pizza Hut franchisee, you have the power of the brand's multi-million-dollar national and regional marketing and advertising behind you.").

111 Kaufmann et al., *supra* note 102, at 453.

112 David A. Beyer, *Considerations in the Development of a Franchise System*, 1996 FL BAR FRANCHISE LAW AND PRACTICE 10.

113 *See* Alisa Pinarbasi, *Stop Hamburglaring Our Wages: The Right of Franchise Employees to Union Representation*, 47 U. PAC. L. REV. 139, 151-52 (2015).

114 Eddy Goldberg, *The Basics of Franchising*, FRANCHISING.COM, http://www.franchising.com/howtofranchiseguide/what_is_franchising_the_basics.html [https://perma.cc/LW5N-3AV9].

115 *Id.*

in a symbiotic relationship, mutually dependent upon each other for survival and success.

Fees paid to franchisor business owners vary widely, though the cost of opening and operating a fast food franchise is significant.[116] Franchisors typically require a franchise fee, hefty royalty payments, and other miscellaneous payments, all in addition to overhead expenses that the franchisee incurs to staff and stock the restaurant.[117] The overall investment required to open a fast food franchise restaurant typically ranges from $250,000 to close to $2 million.[118]

ii. *Case Study: The McDonald's Franchising System*

Since the McDonald's Corporation ("McDonald's" or "McDonald's Corporate") sets the pace of the fast food market,[119] this section will examine the McDonald's franchising system to determine the economic realities of the fast food franchising relationship.[120] For this analysis, I draw from McDonald's own advertising materials and several recent FLSA complaints filed in district courts that assert McDonald's Corporate as an employer.

McDonald's attracts potential franchisees by flamboyantly establishing its clout within the industry.[121] The corporation's advertising materials suggest that people want to become franchise owners because: (1) franchisees want to be their own boss; (2) the product is well-established and high quality; (3) franchisee's re-

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116 Eddy Goldberg, *The Costs Involved in Opening a Franchise*, FRANCHISING.COM, http://www.franchising.com/howtofranchiseguide/the_cost_of_opening_a_franchise.html [https://perma.cc/96P8-NHLQ].

117 *Id.*

118 *See id.* ("Fast food restaurants cost from about $250,000 to $1 million and up. . . . A Burger King will cost about $2.2 million for a typical restaurant. . . ."); *see also McDonald's Franchise*, FRANCHISE HELP, https://www.franchisehelp.com/franchises/mcdonalds/ [https://perma.cc/T6PQ-FLET] ("To open a McDonald's franchise, however, requires a total investment of $1.06 million-$1.9 million. . . .").

119 Franchise Times Magazine ranks McDonald's number one among the top franchises, with global sales of just under $90 billion annually. Notably, six of the top ten franchises are fast food corporations. *Franchise Times Top 200+*, FRANCHISE TIMES, http://www.franchisetimes.com/Top-200/ [https://perma.cc/AA3A-BAZN].

120 By examining the franchising relationship of the McDonald's Corporation, the author does not intend to demonstrate bias against McDonald's. McDonald's was chosen for this case study because it generates the most profit of fast food franchisors. *Id.*

121 "There are now more than 30,000 McDonald's restaurants in over 119 countries and territories, serving nearly 50 million people each day. In 2006, McDonald's global sales were over $57 billion, making it by far the largest food service company in the world." *From Small Beginnings*, CAREERS AT MCDONALD'S 1 (2008), http://www.retail-square.com/sites/default/files/mcd_franchising.pdf [https://perma.cc/DJC8-XE6W].

ceive excellent training in business management, leadership skills, team building, and handling customer inquiries; (4) continuous support is provided by McDonald's; (5) franchisees benefit from national marketing carried out and paid for by McDonald's Corporate; and (6) franchisees receive access to McDonald's Corporate's business forecast information.[122]

In exchange, McDonald's receives a slew of fees from their franchisees. McDonald's begins by charging their franchisees an initial franchising fee of $45,000 to get through the door.[123] These fees are a common element to the franchising relationship and are roughly equivalent for all fast food restaurants.[124] Franchisees are also indebted through royalty fees to McDonald's of about 5% of gross sales,[125] advertising fees of approximately 5% more of gross sales,[126] and oftentimes rental fees of about an additional 15% of gross sales.[127] Though McDonald's does not have the same net worth requirement as do many fast food franchises,[128] an estimated investment of $1.1–$1.9 million dollars, with $500,000 of liquid capital, is required to bring the business into full operation.[129]

In addition to the various fees that McDonald's charges their franchisees, a multitude of other terms in the contract either ensure significant corporate oversight of operations or restrict the

122 *Franchising at McDonald's,* McDONALD'S 2-4 (2008), http://www2.mcdonalds.co.uk/static/pdf/aboutus/education/mcd_franchising.pdf [https://perma.cc/K97U-4N37].

123 *McDonald's Franchise*, *supra* note 118.

124 The franchise fees for some of the leading fast food franchises are as follows: Taco Bell: $45,000; Wendy's: $40,000; KFC: $45,000; McDonald's: $45,000; Pizza Hut: $25,000. Hayley Peterson, *Here's How Much It Costs To Open Different Fast Food Franchises In The US*, BUSINESS INSIDER (Nov. 4, 2014, 1:39 P.M.), http://www.businessinsider.com/cost-of-fast-food-franchise-2014-11 [https://perma.cc/DD2A-XYMS].

125 Jana Kasperkevic, *McDonald's franchise owners: what they really think about the fight for $15*, GUARDIAN, (Apr. 14, 2015), http://www.theguardian.com/business/2015/apr/14/mcdonalds-franchise-owners-minimum-wage-restaurants [https://perma.cc/44KT-EUDV]. Royalty fees for some of the leading fast food franchises are as follows: Taco Bell: 5.5% of gross sales; Wendy's: 4% of gross sales; KFC: 4% of gross sales; McDonald's: 4% of gross sales; Pizza Hut: 6% of gross sales. Peterson, *supra* note 124.

126 Kasperkevic, *supra* note 125.

127 *Id.*

128 Net worth requirements refer to minimum net worth requirements and liquid asset requirements that franchisors can impose. Some of the net worth requirements for leading fast food franchise are as follows: Taco Bell: $1.5 million minimum net worth, $750,000 minimum liquid assets; Wendy's: $5 million minimum net worth, $2 million minimum liquid assets; KFC: $1.5 million minimum net worth, $750,000 minimum liquid assets; Pizza Hut: $700,000 minimum net worth, $350,000 minimum liquid assets. Peterson, *supra* note 124.

129 *McDonald's Franchise*, *supra* note 118.

rights of the franchisee.[130] A recent FLSA complaint details some of the terms of the franchising agreement.[131] Relevant contract terms include:

> (1) a 20-year term; (2) McDonald's Corporate's sole right, at its discretion, to renew or extend the Franchise Agreement at the end of the term; (3) no right of the franchisee to terminate the Agreement; (4) the right of McDonald's Corporate to terminate the Agreement for cause, including, among others, the failure to maintain the restaurant in a good, clean, wholesome manner and in compliance with McDonald's System standards, violation of franchise restrictions, knowing sale of foods other than those approved by McDonald's System or those that fail to conform to McDonald's System standards, denial of access to McDonald's, or any conduct that damages the McDonald's System's reputation; (5) McDonald's Corporate's right of first refusal to acquire the franchisee's business by matching any offer; and, (6) prohibitions on the franchisee's involvement in competing or similar business during the term of the franchise, and further prohibitions on involvement in competing business within 10 miles for 18 months after the termination or expiration of the franchise.[132]

According to public filings, McDonald's also selects the site where each one of its franchises will be located and owns the land and buildings used by franchisees.[133] To outfit and equip their restaurants, franchisees must purchase equipment from McDonald's Corporate or McDonald's Corporate approved vendors.[134]

McDonald's Corporate manages and regulates daily operations by requiring franchisees to use a variety of software applications.[135] These applications compile inventory, labor, and payroll information.[136] They produce profit projections, of which McDon-

130 *See generally McDonald's Franchising Agreement*, SCRIBD, http://www.scribd.com/doc/233487415/McDonalds-Franchise-Agreement#scribd [https://perma.cc/8756-Q9WW].

131 Complaint ¶ 62, Pullen v. McDonald's Corp., No. 5:14CV11081, 2014 WL 978792 (E.D. Mich. Mar. 13, 2014) [hereinafter Pullen Complaint]; Complaint ¶ 62, Wilson v. McDonald's Corp., No. 2:14CV11082, 2014 WL 978785 (E.D. Mich. Mar. 13, 2014) [hereinafter Wilson Complaint].

132 Pullen Complaint, *supra* note 131, ¶ 62; Wilson Complaint, *supra* note 131, at ¶ 62.

133 Pullen Complaint, *supra* note 131, ¶¶ 64-65; Wilson Complaint, *supra* note 131, ¶¶ 64-65.

134 Pullen Complaint, *supra* note 131, ¶ 68; Wilson Complaint, *supra* note 131, ¶ 68.

135 McDonald's Corporation requires franchisees to use Point of Sale ("POS"), In Store Processor ("ISP") and Regional Restaurant Data Diagnostics ("R2D2"). Pullen Complaint, *supra* note 131, ¶ 74; Wilson Complaint, *supra* note 131, ¶ 74.

136 Pullen Complaint, *supra* note 131, ¶ 76; Wilson Complaint, *supra* note 131, ¶ 76.

ald's Corporate has unfettered independent access and closely monitors.[137] The systems also configure daily activity reports to send to McDonald's Corporate, which detail employee hours, sales made, and customer counts, among other things.[138] With these reports and other information compiled through both formal audits and surprise inspections, McDonald's determines whether cause exists to terminate the franchise agreement or makes certain recommendations on how franchisees can improve profits.[139] Failure to comply with these regulations puts franchisees at a significant risk of losing their businesses.[140]

This pressure is felt by franchisees. "People look at McDonald's like it's a cash-generating behemoth, but the restaurants are expensive to maintain," reported one McDonald's franchisee.[141] Franchisees claim that McDonald's Corporate charges too much to operate franchised restaurants, including rent, remodeling fees, training fees, and software.[142] "[McDonald's is] doing everything they can to shift costs to operators . . . It is not as profitable a business as it used to be," claims another franchisee.[143] Decisions about whether to renew contracts with franchisees are done on a case-by-case basis, with failures to remodel, failure to comply with McDonald Corporate's rigorous standards, or failure to pay the required fees as grounds for McDonald's Corporate to not renew or terminate the agreement.[144]

One of the few components to operating a franchise that McDonald's Corporate does not officially monitor is employee wages at franchisee-managed stores.[145] However, since a large portion of gross sales goes immediately to McDonald's Corporate as part of

137 *See* Pullen Complaint, *supra* note 131, ¶¶ 77-81; *see also* Wilson Complaint, *supra* note 131, ¶¶ 77-81. The integrated applications produce a "labor cost percentage," which is calculated by adding up labor costs and dividing by gross sales revenue. Pullen Complaint, *supra* note 131, ¶ 78; Wilson Complaint, *supra* note 131, ¶ 78.

138 Pullen Complaint *supra* note 131, ¶ 81; Wilson Complaint, *supra* note 131, ¶ 81.

139 Pullen Complaint, *supra* note 131, ¶ 87; Wilson Complaint, *supra* note 131, ¶ 87.

140 *See* Pullen Complaint, *supra* note 131, ¶ 87; *see* Wilson Complaint, *supra* note 131, ¶ 87.

141 Julie Jargon, *Discontent Simmers Among McDonald's Franchisees*, WALL ST. J. (June 2, 2015, 4:35 PM), http://www.wsj.com/articles/discontent-simmers-among-mcdonalds-franchisees-1433272884 [https://perma.cc/PMA7-BMED].

142 Leslie Patton, *McDonald's Franchisees Rebel as Chain Raises Store Fees*, BLOOMBERG BUS. (Aug. 6, 2013, 4:16 PM), http://www.bloomberg.com/news/articles/2013-08-06/mcdonald-s-franchisees-go-rogue-with-meetings [https://perma.cc/L5R2-UJFS].

143 *Id.*

144 *See* Kasperkevic, *supra* note 125.

145 *See generally id.*

the monthly fees, franchisees are left with little cushion when it comes to employee wages. One franchisee reported:

> We try and accommodate our workers, but there's [sic] several issues. The way McDonalds [sic] does it, they work to bring customers into the stores with their very low prices. So the difference for us between a dollar hamburger and a $3 hamburger is huge. So that was why I was telling McDonalds [sic] that you have to get away from these low value sandwiches years ago, and they said, 'just pay your employees less.'[146]

It is no coincidence that franchisees are encouraged to pay employees less and cut corners when it comes to complying with employment laws—employee wages become one of the only elements of operating a franchised fast food restaurant that franchise owners have the ability to adjust.[147] McDonald's workers are routinely stretched as far as possible on the job, frequently forced to work while off the clock,[148] or to work during designated break times without pay.[149] These violations of employment laws have led to innumerable judgments against McDonald's (for violations in company owned stores)[150] and their franchisees over the years.[151]

146 Lydia DePillis, *McDonald's Franchisee Says the Company Told Her "Just Pay Your Employees Less"*, WASH. POST (Aug. 4, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/08/04/first-person-kathryn-slater-carter-the-franchise-owner-taking-on-mcdonalds/ [https://perma.cc/B8E8-NJV6].

147 While McDonald's, in theory, gives franchisees the ability to set prices for specific products sold at franchise restaurants, in practice, franchisees get the "not a team player" branding that could put their franchise in jeopardy when it comes time for contract renewal. "One time our coffee price was a nickel over what the advertised sale price was and the head of the McDonald's region came in and he said: 'You are over. You can't do this.' That was the first time he told us to sell our business" one contractor reports. *See* Kasperkevic, *supra* note 125.

148 *See* Clare O'Connor, *McDonald's Reviews Wage Theft Claims as Workers in 30 Cities Protest for Overtime Pay*, FORBES (Mar. 18, 2014, 6:04 PM), http://www.forbes.com/sites/clareoconnor/2014/03/18/mcdonalds-reviews-wage-theft-claims-as-workers-in-30-cities-protest-for-overtime-pay/ [https://perma.cc/J95D-F2WL]. ("'Thousands of workers like me in McDonald's across the state are forced to work off the clock all the time before their shift by being told they can't punch in till it's "busy,"' said Franklin LaPaz, a 25-year-old who said he works between 30 and 40 hours weekly.").

149 *See* C.A. Pinkham, *McDonald's Managers Admit to Employee Wage Theft*, KITCHENETTE (Apr. 4, 2014, 12:57 PM), http://kitchenette.jezebel.com/mcdonalds-managers-admit-to-employee-wage-theft-1558344968 [https://perma.cc/6RU3-R6BS]. ("Other examples of theft include denying employees breaks—while docking them the time anyway—forcing employees to clock out but continue working and making employees work off the clock before and after their scheduled times.").

150 Emphasis is placed on the fact that McDonald's is held liable for employment violations at *company owned* stores. About 18% of McDonald's restaurants are owned and operated by McDonald's Corporate. *Company Profile*, MCDONALD'S, http://www.aboutmcdonalds.com/mcd/investors/company_profile.html [https://perma.cc/RJ9Z-HLM2].

151 Emily Jane Fox, *McDonald's Workers Sue for Wage Theft*, CNN MONEY (Mar. 14,

2. Joint Employment Jurisprudence when a Franchising Relationship Exists

The majority of franchisor liability cases considered under the economic realities test have relied exclusively on the traditional test for physical control.[152] Recent jurisprudence, however, suggests that worker advocates may be successful against fast food franchisors by utilizing litigation strategies that focus on functional control and economic dependence as key to the economic realities consideration.[153]

i. *Orozco and Reliance on Physical Control*

Although the jurisprudence is confined mostly to district courts,[154] *Orozco II* is the only available circuit court case that considered whether a fast food franchisor could be an employer under the FLSA.[155]

Orozco II's procedural posture illustrates a cautionary tale for advocates pursuing a more liberal application of franchisor liability under the FLSA.[156] In this case, Plaintiff Benjamin Orozco worked for a franchised Craig O's Pizza and Pasteria ("Craig O's"), where he experienced multiple violations of the FLSA.[157] After settling with the franchisees, Orozco added the franchisor to his complaint.[158] By denying the franchisor's motion for judgment as a

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2014, 11:56 AM), http://money.cnn.com/2014/03/13/news/companies/mcdonalds-wage-theft-class-action/ [https://perma.cc/NN62-A8UY] ("Since 1985, the Labor Department has found that McDonald's and its franchises have had to pay back wages more than 300 times for FLSA violations.").

152 *See* Orozco v. Plackis, 757 F.3d 445, 452 (5th Cir. 2014) ("Orozco II"); *see* Singh v. 7-Eleven, Inc., No. C-05-04534 RMW, 2007 U.S. Dist. LEXIS 16677, at *9 (N.D. Cal. Mar. 7, 2007).

153 *See* Cano v. DPNY, Inc., 287 F.R.D. 251, 262 (S.D.N.Y. 2012) (allowing Domino's Pizza Inc. to be amended to a FLSA complaint.), Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201, 208 (S.D.N.Y. 2014) (denying a motion to dismiss submitted by franchisor Bareburger Group LLC). *Cf.* Chen v. Domino's Pizza, Inc., No. 09-107, 2009 U.S. Dist. LEXIS 96362, at *15 (D.N.J. Oct. 16, 2009) (granting a motion to dismiss submitted by franchisor Domino's Pizza, Inc.).

154 *See, e.g.*, Reese v. Coastal Restoration & Cleaning Servs., No. 1:10cv36-RHW, 2010 U.S. Dist. LEXIS 132858, at *8 (S.D. Miss. Dec. 15, 2010) (finding no joint employment relationship between franchisor SEVPRO, a coastal restoration and cleaning franchisor, and an employee of the franchisee); *Singh*, 2007 U.S. Dist. LEXIS 16677, at *9 (finding no joint employment relationship between franchisor 7-Eleven and employees of a 7-Eleven franchise).

155 *See generally Orozco II*, 757 F.3d 445.

156 *Id.* at 447-48.

157 *Id.* at 447.

158 *Id.*

matter of law, *Orozco* became one of the first cases of its kind.[159] The case was appealed to the Fifth Circuit, where, to the dismay of worker advocates, the court initiated a textbook analysis for physical control.[160] Notably, in *Orozco II*, the Fifth Circuit did so without mentioning concepts of functional control or economic dependence.[161] The Fifth Circuit instead prioritized the franchise agreement, which stated, in relevant part:

> 'Franchisee shall at all times comply with all lawful and reasonable policies, regulations, and procedures promulgated or prescribed from time to time by Franchisor in connection with Franchisee's shop or business. . . . *Franchisee shall, irrespective of any delegation of responsibility, reserve and exercise ultimate authority and responsibility with respect to the management and operation of Franchisee's shop.*'[162]

Taking this document at face value, however, was a distinct error by Fifth Circuit. The court failed to consider the true power that the franchisor maintained over daily operations at the franchised restaurants.

This litigation was fiercely fought with Amici supporting both sides.[163] Notably, one of the Amici Curiae Briefs in this case, submitted by the Secretary of Labor, focuses heavily on themes of functional control.[164] "This Court considers several factors in assessing this economic reality . . . [four traditional factors]. . . . [But,] these factors are not to be looked at in isolation; rather, *the 'dominant theme' in applying them is to discern whether the alleged employer had sufficient 'operational control' to be held liable for FLSA violations.*"[165] The Secretary of Labor warned that corporate structures often insulate legally responsible entities from liability.[166] He also added that franchisors' interests vary significantly, but they often go beyond merely maintaining a brand name and system of marketing.[167] "Therefore, under the FLSA and its broad view of who is an employer, the question is whether, under the particular facts, a

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159 *See* Orozco v. Plackis, 952 F. Supp. 2d 819, 827 (W.D. Tex. 2013).

160 *See Orozco II*, 757 F.3d at 448.

161 *Id.*

162 *Id.* at 451-52 (emphasis added).

163 *See generally* Brief for United States Secretary of Labor as Amici Curiae Supporting Appellee, Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014) (No. 13-50632); Brief for Nat'l Restaurant Ass'n & the Tex. Restaurant Ass'n in Support of Appellant, Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014) (No. 13-50632).

164 *See generally* Brief for United States Secretary of Labor, *supra* note 163.

165 *Id.* (emphasis added).

166 *Id.* at 13.

167 *Id.* at 14-15.

franchisor's principal exerts sufficient *operational control* of the employment situation at a franchisee to warrant individual employer liability."[168]

The Fifth Circuit's error in *Orozco II* was not negligible. Although in theory, it did not foreclose the possibility that a franchisor could be found an employer under the FLSA,[169] it stuck to an outdated method of determining an employment relationship that does not adequately contemplate the economic realities of the predominant franchising relationship existent in fast food franchising. In doing so, the Fifth Circuit affirmed the age-old, yet highly regulated, arm's-length approach to controlling franchisees that leads to violations of the FLSA.

ii. *Cano's Consideration of Functional Control*

Successful litigation strategies concerning the economic realities of the employment relationship within the fast food industry highlight functional control.[170] *Lopez*, *Zheng*, and *Barfield* paved the way for fast food workers to bring FLSA actions against their corporate employers.[171] Recent trends in joint employment jurisprudence suggest that district courts are willing to consider the functional control that fast food franchisors exert over franchised employees.[172]

Cano v. DPNY represented the first real deviation (with the exception of *Orozco*) from the traditional economic realities analysis within joint employment franchising cases.[173] The plaintiffs in this case, organized workers at a franchised Domino's Pizza, alleged numerous FLSA complaints against both the franchisee and Dom-

168 *Id.* at 15 (emphasis added).

169 Orozco v. Plackis, 757 F.3d 445, 452 (5th Cir. 2014) ("Orozco II") ("We do not suggest that franchisors can never qualify as the FLSA employer for a franchisee's employees; rather, we hold that Orozco failed to produce legally sufficient evidence to satisfy the economic reality test and thus failed to prove that [Defendant] was his employer under the FLSA.").

170 *See* Cano v. DPNY, Inc., 287 F.R.D. 251, 258 (S.D.N.Y. 2012).

171 *See* Lopez v. Silverman, 14 F. Supp. 2d 405, 419-20 (S.D.N.Y. 1998); Zheng v. Liberty Apparel Co., 355 F.3d 61, 68 (2d Cir. 2003); Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 138 (2d Cir. 2008). Barfield, not discussed in the text of this note, was a Second Circuit case that followed Zheng's standard for functional control. The Second Circuit asserted "Zheng makes clear that the reason for looking beyond a defendant's formal control over the physical performance of a plaintiff's work is to give full content to the broad 'suffer or permit' language in the statute." *Barfield*, 537 F.3d at 138 (internal quotations omitted).

172 *See Cano*, 287 F.R.D. at 258; Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014); Cordova v. SCCF, No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *16-*19 (S.D.N.Y. July 16, 2014).

173 *Cano*, 287 F.R.D. at 259.

ino's Pizza, Inc. ("Domino's" or "Domino's Corporate").[174] The Southern District of New York compared the circumstances of the franchising relationship with those alleged by plaintiffs in *Orozco*.[175] Under a theory of functional control,[176] it found that the plaintiffs pled enough to add Domino's Corporate to the complaint.[177] Plaintiffs argued that Domino's: (1) created system-wide management policies, (2) required prospective franchise owners to have managed a store that was owned by Domino's for at least one year, (3) monitored employee performance by means of required computer software, (4) implemented hiring policies for employees of individual franchisees, and (5) had the right to inspect the franchisee's stores to ensure compliance with their policies.[178] The court paid particular attention to a time-tracking system implemented by the defendants, which included a system for tracking hours and wages and retaining payroll records, which were then submitted to Domino's Corporate for review.[179] In light of the concept of functional control, the court concluded that the plaintiffs could amend their complaint to include Domino's Corporate.[180] *Cano* subsequently settled for just shy of $1.3 million for 61 delivery workers.[181]

174 *Id.* at 255.

175 The *Orozco* complaint alleged that the employer controlled the employment relationship by: (1) making regular announced and unannounced visits to the store to monitor the work of employees and discuss their performance; (2) regularly discussing feedback with franchisees and giving suggestions for improvement; (3) maintaining authority to hire managerial staff; (4) selecting and setting up timekeeping systems and training managerial staff on how to use them; (5) training employees at one location for work at another location with the same wages; and (6) sharing employees with multiple franchise stores. *Orozco v. Plackis*, No. A-11-CV-703 LY, 2012 U.S. Dist. LEXIS 91916, at 2-*3, *rev'd*, 757 F.3d 445, 452 (5th Circ. 2014) (applying the traditional four factor "economic reliance" test).

176 "Courts must look beyond an entity's formal right to control the physical performance of another's work, indeed, simply exercising *functional control* over workers may be sufficient to be an employer under the FLSA. Accordingly an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours or pay them. Nor does employer status require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one's employees. Control may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA." *Cano*, 287 F.R.D. at 258 (internal citations and quotations omitted) (emphasis added).

177 *Id.* at 260.

178 *Id.*

179 *Id.*

180 Notably, the Court in *Cano* pointed to the broad "suffer or permit" definition of employ in its analysis. *Id.* at 258.

181 Interestingly, in a statement to the media, Domino's Corporate said it was "not contributing to the settlement in any way." Valuations of Domino's actual contribu-

Other New York district court cases highlight a trend—it is possible to survive a defendant franchisor's motion to dismiss if the franchisor exercised functional control over the franchisee's employees.[182] *Olvera v. Bareburger* and *Cordova v. SCCF* rely heavily on *Zheng*'s articulation of functional control.[183] In denying the defendant franchisor's motion to dismiss, the *Cordova* court systematically worked through a *Zheng* analysis to find that the plaintiffs had sufficiently pled facts suggesting joint employment.[184] Although the reasoning in *Bareburger* is thin,[185] these cases, taken together, suggest that the Second Circuit might soon be in a position to determine whether a franchisor can qualify as an employer under the FLSA.

3. Trends in Labor Law

This note does not consider the NLRA in length, however, recent developments in labor law are particularly useful to illuminate trends of holding business owners liable for the actions of their franchisees. Although the NLRA and FLSA utilize different definitions of the term "employ,"[186] the political motivations for finding that a fast food franchisor is a joint employer under the NLRA and FLSA are roughly equivalent. Regardless of how "employ" is defined within the respective statutes, courts are beginning to identify that franchisors wield a large amount of power in the franchising relationship, controlling systems that influence the day-to-day of the workplace.

The NLRA's joint employment standard was significantly complicated in 1984 by *Laerco* and *TLI*, two cases that imposed new

tion, by way of waiving some of the franchisee's monthly fees, were about $140,000. Steven Greenhouse, *Domino's Delivery Workers Settle Suit for 1.3 Million*, N.Y. TIMES, Feb. 1, 2014, at A3, http://www.nytimes.com/2014/02/01/nyregion/dominos-franchise-settles-delivery-workers-lawsuit-for-1-28-million.html?_r=0.

182 *See* Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201, 206 (S.D.N.Y. 2014); Cordova v. SCCF., No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, at *16 (S.D.N.Y. July 16, 2014).

183 *See Bareburger*, 73 F. Supp. 3d at 205-08 (denying franchisor Bareburger Group LLC 's motion to dismiss under theories of functional control from *Zheng*, *Lopez*, and *Barfield*); *Cordova*, 2014 U.S. Dist. LEXIS 97388 at *16-*18 (denying franchisor SCCF's motion to dismiss under theories of functional control from *Zheng*, *Lopez*, and *Barfield*).

184 *See Cordova*, No. 2014 U.S. Dist. LEXIS 97388 at *16-*18.

185 *See Bareburger*, 73 F. Supp. 3d at 205-08.

186 The National Labor Relations Act follows the common-law agency test when determining if an employment relationship exists under the Act. BFI Newby Island Recyclery, 362 N.L.R.B. 186, at *16 (2015). *Cf.* Fair Labor Standards Act, 29 U.S.C. § 203(g) (2014) (defining "employ" to include to suffer or permit to work).

requirements that forced the National Labor Relations Board ("NLRB" or "Board") to look away from the *right* to control workers to the *actual* exercise of that control.[187] Cases that followed this unfounded precedent abandoned themes of passive control as probative of employer status.[188] Since the notorious 1984 decisions, the American workplace evolved to include more temporary and contract workers,[189] which corporations used to separate themselves from labor laws. The standard that they set, however, was inconsistent with common law principles, which contemplate more than just actual control, rather the *right to control* as probative of an employment relationship.

This precedent was untangled in August 2015 when the Board refined its joint employer standard to accommodate for changes in the modern workplace.[190] In *Browning-Ferris*, the Board found that two or more entities are joint employers where: "[1] they are both employers within the meaning of common law,[191] and [2] if they share or codetermine those matters governing the essential terms and conditions of employment."[192] The Board noted that, central to both of those inquires, is the "existence, extent, and object of the putative joint employer's control."[193] Most importantly, the Board parted ways with the traditional notion that entities must exercise direct control over employees to be considered employers

187 *See* BFI Newby Island Recyclery, 362 N.LR.B. 186, at *10; Laerco Transportation, 269 N.L.R.B. 324, 325 (1984); TLI, Inc., 271 N.L.R.B. 798, 798 (1984).

188 *See* BFI Newby Island Recyclery, 2015 N.L.R.B. LEXIS 672, *47. The Board uses *Airborne Express* to illustrate this point. This restrictive approach has resulted in findings that an entity is not a joint employer even where it indirectly exercised control that significantly affected employees' terms and conditions of employment. For example, the Board refused to find that a building management company that utilized employees supplied by a janitorial company was a joint employer notwithstanding evidence that the user dictated the number of workers to be employed, communicated specific work assignments and directives to the supplier's manager, and exercised ongoing oversight as to whether job tasks were performed properly. *Airborne Express*, 338 N.L.R.B. 597 (2002).

189 *See* BFI Newby Island Recyclery, 2015 N.L.R.B. LEXIS 672, *50.

190 *See* Office of Public Affairs, *Board Issues Decision in Browning-Ferris Industries*, NAT'L LABOR RELATIONS BD. (Aug. 27, 2015), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries [https://perma.cc/28MP-SBA3] (citing BFI Newby Island Recyclery, 2015 N.L.R.B. LEXIS 672).

191 Under the Restatement's common-law agency test, a "servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or *right to control*. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (emphasis added).

192 BFI Newby Island Recyclery, 2015 N.L.R.B. Lexis 672, *68-69.

193 *Id.* at *7.

within the NLRA.[194] This standard, the Board articulated, is more consistent with traditional interpretations of employer status that emphasized the "*right* to control the work of employees and their terms of employment as probative of joint-employer status."[195] Notably, the Board did not require that this right be formally exercised by the putative employer.[196]

In anticipation of *Browning-Ferris*, in July 2014, the General Counsel of the NLRB authorized numerous unfair labor practice complaints against McDonald's Corporate.[197] Corporations that utilize franchising, as well as the IFA, are fighting these complaints fiercely, calling them:

> direct assault[s] by unelected Washington bureaucrats at the National Labor Relations Board, with the Service Employees International Union and its allies in organized labor pulling the strings behind the scenes. . . . SEIU has made dismantling the proven and time-tested franchise business model a top priority, in order to increase its steadily declining membership.[198]

A finding of liability as a joint employer would mean that McDonald's would be forced to bargain with unions, likely leading to higher wages and improved benefits for workers at franchised locations.

IV. Joint Employment Analysis within the Fast Food Industry: A Standard Informed by the Garment and Agricultural Industries

This section will consider whether fast food franchisors are employers under the FLSA. Since the McDonald's franchising sys-

194 *See id.*
195 *Id.* at *39 (emphasis added).
196 *See id.*
197 Michael J. Lotito & Missy Parry, *Redefining "Employer": How the NLRB Plans to Treat Separate Companies as One*, WASH. LEGAL FOUND. 1 (Sept. 26, 2014), http://www.wlf.org/upload/legalstudies/legalbackgrounder/092614LB_Lotito2.pdf [https://perma.cc/8JWE-4NGK] ("Between November 2012 and July 29, 2014, 181 charges were filed against McDonald's franchisees and/or McDonald's USA. Of those charges, the NLRB authorized 43 complaints against both McDonald's franchisees and McDonald's USA."); Kaufmann et. al., *supra* note 102, at 440 ("The allegations of unlawful conduct advanced against McDonald's and its franchisees include discriminatory discipline; reductions in hours; discharges; and allegedly coercive conduct directed at employees in response to union activity, including allegedly overbroad restrictions on employees communicating with union representatives and other employees about unions.").
198 Lisa Jennings, *First round of McDonald's 'joint employer' hearings held*, NATION'S RESTAURANT NEWS (Apr. 1, 2015), http://nrn.com/hr-training/first-round-mcdonald-s-joint-employer-hearings-held [https://perma.cc/F573-N94D].

tem was considered at length above, this section will specifically analyze whether McDonald's Corporate is an employer of workers at franchised McDonald's restaurants.

A. *Analysis Under the Proper "Suffer or Permit" FLSA Standard*

Under the proper definition of "employ" that Congress intended for the FLSA, the primary inquiry should be whether the fast food franchisor could have known about employment and prevented it.[199] The FLSA standard contemplates for passive employment where physical control is sufficient, but not a necessary finding of whether the franchisor "suffer[s] or permit[s]" individuals to work. Under this standard, fast food franchisors are very clearly employers of all workers that don the uniform that bears their brand. In a franchising relationship, the workers and franchisee are dependent upon the business owner, such that the franchisee cannot operate independently if the corporate franchisor disbands. Although workers are not physically controlled by the franchisor, their employment rests on the corporation's vitality. Thus, the fate of a McDonald's employee may be controlled on a day-to-day basis by her franchisee employers, but on a fundamental level, is dependent upon the operations of McDonald's Corporate.

Franchisors in this industry are conclusively employers under the broad interpretation of FLSA's definition of "employ." However, because courts have moved towards a more conservative understanding of what it means to employ a worker, advocates must craft the crux of their arguments within the economic realities test to determine whether franchisors can be liable for violations of the FLSA.

B. *Analysis Under the Economic Realities Test*

When assessing economic realities of employment relationships within specific industries, courts have articulated different standards tailored specifically to those industries.[200] While the traditional test for physical control is sufficient for a finding of joint employment in some circumstances,[201] it is not well-suited to determine the economic reality of the fast food industry, which

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199 Goldstein et al., *supra* note 5, at 1136-37.

200 *See* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 142 (2d Cir. 2008) ("In assessing the 'economic reality' of a particular employment situation, we have identified different sets of relevant factors based on the factual challenges posed by particular cases.").

201 *See generally* Int'l House v. N.L.R.B., 676 F.2d 906 (2d Cir. 1982).

utilizes franchisees as the middleman between the franchisor and employees at respective restaurants. For a more appropriate determination of economic realities in the fast food industry, courts must adopt concepts of functional control and economic dependency that have been emblematic of joint employment cases within the garment and agricultural industries.

1. Towards a Standard—How is the Fast Food Industry Similar to the Garment and Agricultural Industries?

Various aspects of the employment relationship in the garment and agricultural industries mirror those of the franchising relationship in the fast food industry. For brevity, this note will consider only a few of the similarities that are most applicable for the articulation of a standard that courts can use when analyzing whether fast food franchisors are employers of workers at franchised restaurants.

The most prominent parallel is the unilateral imposition of contract terms by the business owner of all three industries. Lack of negotiation on behalf of the middlemen in these industries necessarily suppresses wages paid to workers. In the garment and agricultural industries, middlemen are forced to take less than favorable deals because of the intense competition.[202] In the fast food industry, on the other hand, gross profit is eaten up by exorbitant monthly fees and start up costs that are paid to the business owner.[203] With very little left to pay workers, middlemen in all three of these industries can feel the pressure to cut corners to enhance their profit or even break even. Thus, business owners, although they do not sign the checks of workers or set pay rates, indirectly control workers' wages and working conditions.

Economic dependency, a key concept in finding an employment relationship in the agricultural and garment industries, is taken to new levels in the fast food industry. Ownership of land and investment in equipment often dictates the finding of a joint employment relationship in the agricultural industry.[204] Although land ownership varies across fast food franchisors, McDonald's Corporate maintains ownership of the land and buildings on which all McDonald's franchises operate.[205] McDonald's also requires

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202 *See* MORRA, *supra* note 28, at 3; *see also* Goldstein et al., *supra* note 5, at 997.
203 Peterson, *supra* note 124.
204 *See* Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994); Antenor v. D & S Farm, 88 F.3d 925, 932 (11th Cir. 1996); Torres-Lopez v. May, 111 F.3d 633, 640-41 (9th Cir. 1997).
205 Pullen Complaint, *supra* note 131, ¶ 65; Wilson Complaint, *supra* note 131, ¶ 65.

that franchisees purchase specified equipment either directly from McDonald's Corporate or through corporate-approved sources.[206] Further, employees at fast food restaurants perform line-jobs that are similar to those emblematic of the garment and agricultural industries for the maintenance of the fast food brand.[207] The McDonald's system is an integrated economic unit—the specialty jobs that employees perform at franchised locations are developed and operated by McDonald's Corporate.[208] These franchised restaurants are heavily regulated[209] and controlled to meet corporate standards and pass corporate review, which puts pressure on franchisees to ensure that employees are maximizing output.[210] This mutual economic dependence is the fast food business model—the system is engineered to give the franchisor control over the operations, which generates profit for the franchisor, while the franchisee shoulders all of the risk.

Somewhat unlike the agricultural and garment industries, where subcontractors can, in theory, operate independent from one specific business owner, franchise agreements in the fast food industry often prohibit franchisees from shifting their business units to another fast food franchisor.[211] By definition, franchisees are brand dependent[212]—if the franchisor terminates or fails to renew the franchise agreement, the franchised business must disband and employees lose their jobs. McDonald's also includes a non-compete provision within its franchise agreements, which ensures that a franchisee is not involved with a competing business within a certain mile radius for a period of at least 18 months.[213] While contractors in the agricultural and garment industries can often compete for different contracts and bring their employees with them, franchisees are afforded much less liberty. This takes

206 Pullen Complaint, *supra* note 131, ¶ 68; Wilson Complaint, *supra* note 131, ¶ 68.

207 "McDonald's Corporate's standard Franchise Agreement requires the McDonald's Franchisee to acknowledge 'that every component of the McDonald's System is important to McDonald's and to the operation of the Restaurant as a McDonald's restaurant, including a designated menu of food and beverage products; uniformity of food specifications, preparations methods, quality, and appearance; and uniformity of facilities and service.'" Pullen Complaint, *supra* note 131, ¶ 50.

208 *See id.* ¶ 16.

209 *See* Pullen Complaint, *supra* note 131, ¶ 67; Wilson Complaint, *supra* note 131, ¶ 67.

210 *See* Pullen Complaint, *supra* note 131, ¶¶ 21-22; Wilson Complaint, *supra* note 131, at 22.

211 *See* Pullen Complaint, *supra* note 131, ¶ 70.

212 *See* Goldberg, *supra* note 110.

213 *McDonald's Franchising Agreement*, *supra* note 130, at 6.

notions of economic dependency to a magnitude that is rarely even seen in the garment and agricultural industries.

2. Synthesizing a Standard that is Indicative of the Economic Realities of the Fast Food Industry.

An analysis of the economic realities within the fast food industry requires a standard that considers the dynamics of the franchising relationship. Thus, the standard must be able to effectively test for functional control of the employees and economic dependence of workers on the franchisor. Guided in part by joint employment jurisprudence within the garment and agricultural industries, the proposed factors for determining the economic realities of the employment relationship within the fast food industry are as follows:

1. Whether the fast food corporation owns the premises;[214]
2. The extent to which the fast food corporation owns or standardizes the equipment used by workers;[215]
3. The extent to which the workers perform a discrete line-job that is integral to the fast food corporation's overall process and success;[216]
4. The extent to which there is uniformity or standardization of the contract;[217]
5. The degree to which the employees in fast food restaurants are supervised by the business owner;[218]
6. The risk of profit and loss that franchisors take on within the franchising agreement;[219] and
7. Whether the workers were part of a "business organization" that could or did shift as a unit from one fast food franchisor to another.

None of these factors are meant to be dispositive determinations of

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214 *See* Antenor v. D & S Farm, 88 F.3d 925, 934 (11th Cir. 1996); GLICKMAN, *supra* note 107.
215 *See Antenor*, 88 F.3d. at 937.
216 *See id.*
217 *Id.*
218 *See id.* at 934.
219 Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371-72 (9th Cir. 1981) ("'Agents' [made] no capital investment and therefore [bore] no risk of a significant loss; most of the factors that determine profit (advertising, price setting, location, etc.) [were] controlled by Sureway. Although 'agents' [were] responsible for bad checks, theft losses, and the disposal of abandoned clothing, the district court found these to be burdens that Sureway chose to place on them. Thus, the lack of opportunity for loss of capital investment and the control by Sureway of the major factors determining profit indicate that in this respect also the 'agents' [were] economically dependent upon Sureway.") (internal citations omitted).

the employment relationship, rather, the factors, when taken together, are meant to determine control and economic dependency of the workers on the fast food corporation.

Advocates using this proposed analysis should note that the *Zheng* factors for determining functional control and economic dependency form the structural basis of this new standard.[220] Recent complaints alleging an employment relationship between franchisor and employees at franchises locations have survived motions to dismiss primarily with reference to *Zheng*'s augmented standard.[221] This proposed standard, with factors informed by jurisprudence in both the garment and agricultural industries, presents the best chance of success in both jurisdictions that are bound by *Zheng* and those that are not.

V. Conclusion

Fast food workers across the country are currently engaged in a fight to improve their wages and form unions.[222] To win this fight, workers will need to demonstrate to the American public that their exploitation mirrors the oppressive working conditions that predominate in sweatshops. As franchising has grown as an American business model, courts have been slow to penalize franchisors for the use and sometimes exploitation of an intermediary system that is a modern derivative of the "sweating system" that arose in the 19th Century. Worker advocates must challenge notions of corporate protectionism that have influenced a misapplication of the breadth of liability that Congress wished to impose when it defined "employ" within the FLSA.

Although joint employment jurisprudence in the fast food industry is still largely stuck in an analysis that tests exclusively for physical control, recent trends suggest a tide shift. With increased litigation against fast food franchisors using a standard that is indic-

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220 Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003) ("The factors [considered] are (1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants.").

221 *See* Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201, 206-07 (S.D.N.Y. 2014); Cordova v. SCCF, Inc., No. 13CIV5665-LTS-HP, 2014 U.S. Dist. LEXIS 97388, *16 (S.D.N.Y. July 16, 2014).

222 *See* Trung et al., *supra* note 3.

ative of the economic realities of the industry, advocates can expose the franchising relationship as a current form of the time-honored system of producing corporate profit on the backs of oppressed workers.