GUIDO CALABRESI, *Circuit Judge*, dissenting:

Simon Mujo and Indrit Muharremi worked for Jani-King as cleaners. They paid tens of thousands of dollars to Jani-King in initial fees to obtain work: Mr. Mujo paid $44,175, and Mr. Muharremi paid $16,250. By the terms of the labor contracts they signed, which are styled as franchise agreements, the size of the initial fee determines how much work the cleaner will receive. Once work began, Jani-King deducted much of their monthly income for a variety of post-work fees, including "finder's fees," insurance payments, supply costs, and "charge-backs." According to their Amended Complaint, for example, Mr. Muharremi earned $4,508.72 for the month of September 2016. After royalty fees, accounting fees, technology fees, a "finder's fee," an advertising fee, a lease fee, franchise supply costs, and over $1,000 in "charge-backs," his gross income for the month was reduced to $1,746.80. In July of 2015, Mr. Mujo's earnings of $ 1,403.83 similarly were reduced to a gross income of $310.45. Jani-King argues that these are all permissible fees pursuant to a legitimate franchise agreement.

Appellants compare the system to indentured servitude. They pay so much money up front, and have so much of their wages deducted for fees, that they are obliged to keep working simply to earn back the money they paid to get

the jobs in the first place. They claim that they are employees whom Jani-King intentionally misclassified as independent contractors in order to evade Connecticut labor laws. Specifically, they argue that the initial fees violate Connecticut's anti-kickback statute, Conn. Gen. Stat. § 31-73(b), and that the post-work fees violate the state's minimum wage law, Conn. Gen. Stat. § 31-71e.

We cannot resolve this dispute without knowing whether appellants in fact properly qualify as independent contractors, franchisees, employees, or as a "dual status" combination of employees and franchisees at the same time. In other words, we first need to know how Connecticut classifies workers in the employment statutes under which appellants bring their claims. But when we read the relevant pages of the Connecticut General Statutes and the Connecticut Reports, no answers appear. The Connecticut Supreme Court has not addressed these questions, and cases in the lower Connecticut courts give virtually no indication as to whether workers can be both franchisees and employees at the same time. Moreover, and as important, Connecticut cases are silent as to how the state franchise law should be harmonized with more general state employment regulations. And without this knowledge we cannot know the appropriate result in this case regardless of whether appellants are employees,

franchisees, or both. For these reasons, I believe that in this case certification to the Connecticut Supreme Court is absolutely necessary.

The majority today holds that appellant workers are both employees and franchisees. It further holds that, as franchisees, they can be made to make payment such as franchise and finder's fees without violating Connecticut labor laws. But such holdings rest on unwarranted readings of Connecticut law. As a federal court we are empowered to evaluate questions of state law, provided that we do so with fidelity to states' interpretations of their own laws. Where state law is unclear, however, our normal course must be to ask the state courts for guidance on the matter. That conversation is the essence of judicial federalism. In this case, appellants asked the district court to seek such guidance, which it declined to do. Our court has now made the same mistake. I would certify the relevant determinative Connecticut law questions to the Connecticut Supreme Court, and respectfully dissent from our failure to do so.

I.

The court's mistake can be seen first by considering appellants' unjust enrichment claim. Connecticut's anti-kickback statute states in relevant part:

> No employer . . . shall, directly or indirectly, demand, request, receive or exact any refund of wages, fee, sum of money or

> contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that such refund of wages, fee, sum of money, contribution or deduction is necessary to secure employment or continue in employment. No such person shall require, request or demand that any person agree to make payment of any refund of wages, fee, contribution or deduction from wages in order to obtain employment or continue in employment.

Conn. Gen. Stat § 31-73(b).

In other words, the statute "prohibits an employer from demanding any sum of money from an individual as a requirement of employment or as a requirement for continued employment." *Lockwood v. Pro. Wheelchair Transp., Inc.*, 654 A.2d 1252, 1257 (Conn. App. Ct. 1995). At the motion to dismiss stage, the district court noted that "[p]laintiffs conceivably could prove that the parties' underlying agreement was an employment agreement that conditioned initial or continued employment on payment of a down payment or any number of other fees and is therefore void as a matter of law." SA 21. During discovery, appellants produced the relevant contracts and pointed to several provisions which would violate the anti-kickback statute, provided that appellants could properly be understood to be employees. They showed that they paid large up-front fees in order to receive work assignments from Jani-King in the first place.

The size of the initial fee was linked to the amount of work Jani-King assigned. [1] They were also required to pay "finder's fees" for additional clients referred by Jani-King according to a pay schedule that Jani-King could change at any time. As Jani-King described in its brief, these fees were paid in exchange for "additional account referrals."

Was this arrangement an unlawful kickback in violation of Conn. Gen. Stat. § 31-73(b)? The question cannot be resolved without knowing whether appellants are properly understood as employees or franchisees, or some combination of the two. And if they are some hybrid of both statuses, which is controlling under Connecticut law? As Judge Menashi stated at oral argument, Oral Argument at 35:00, it is perfectly legal, and indeed routine, for independent contractors who enter franchise agreements to pay for the right to operate that franchise. By contrast, employers are prohibited from charging employees for a job under Conn. Gen. Stat. § 31-73(b). The district court wrote that appellants "provided no basis for distinguishing their claims for relief from legitimate fees within the franchise agreement." SA 38. But whether they have done so or not depends on whether they can be both employees and franchisees, and the

[1] This arrangement, where size of fee was correlated to amount of work, suggests that the money was paid in exchange for getting work, not for a standard set of franchise benefits.

consequences of such "dual status." And these questions, as previously stated, are unresolved by Connecticut law.

Both the district court and the majority seek to avoid the problem by using Connecticut's so-called "ABC test" to categorize appellants for purposes of the anti-kickback statute. And Connecticut law does indeed apply this test in other contexts. The ABC test is set forth in Connecticut's Unemployment Compensation Act, Conn. Gen. Stat. § 31-222(a)(1)(B)(ii), to determine whether workers are properly classified as employees or independent contractors for the purposes of that act, and, by its terms, for that act only. In 1995, the Connecticut Supreme Court held that the ABC test was also applicable to claims brought under the Connecticut Minimum Wage Act. *Tianti ex rel. Gluck v. William Raveis Real Estate, Inc.*, 651 A.2d 1286, 1290 (Conn. 1995). The Court acknowledged this express application of this test to minimum wage law again in *Standard Oil of Conn., Inc. v. Adm'r, Unemployment Comp. Act.*, 134 A.3d 581, 594 (Conn. 2016) (describing *Tianti*'s holding as: "[T]he ABC test was applicable in determining the existence of an employment relationship between the salespersons and the defendant" for the purposes of § 31-72).

But the courts of Connecticut have never held that the ABC test applies to define who is covered by the anti-kickback statute. And notwithstanding its holdings for minimum wage law, Connecticut law does not tell us whether appellants are employees, franchisees, or both, for purposes of that statute.

Very recently, the U.S. Court of Appeals for the First Circuit certified precisely this question—whether the ABC test should make this leap to the franchise context—to the Massachusetts Supreme Judicial Court in a case called *Patel v. 7-Eleven, Inc.*, No. 20-1999, 2021 WL 3486175 (1st Cir. Aug. 9, 2021). There, our sibling circuit humbly acknowledged its own ignorance, an ignorance we share, as to whether the ABC test applies to the relationship between a franchisor and a franchisee. *Id.* at *2.[2] Just like that case, the "outcome of this appeal hinges on a question of [Connecticut] law, upon which the [Connecticut] courts have not spoken." *Id.* at *1. This degree of uncertainty alone should be enough to certify.

Having applied the ABC test to issues that are not clearly governed by that test, and, under that test, having found that appellants are employees, the district court held that appellants could be both employees and franchisees. It then

[2] Because Massachusetts does not have its own franchise law, instead relying on federal law, that case concerns harmonizing Massachusetts labor law with the FTC's franchise regulations, rather than state franchise laws.

found their claims to be invalid because appellants—being franchisees—were governed exclusively by the Franchise Act, Conn. Gen. Stat. § 42-133e(b). Thus, the district court presumed appellants' franchisee status predominated over their employee status. But no such presumption is warranted. Even if the court were correct in its guess that under Connecticut law workers can be both franchisees and employees, the district court could not know what Connecticut labor law standards apply to such "dual" workers.

II.

The answer to that question determines how we view both the pre-work payments and post-work deductions at issue in this case. If the workers are simply franchisees, then both are likely acceptable. The pre-work payments may be standard fees paid by franchisees to a franchisor for the privilege of operating a legitimate franchise. And the post-work deductions may be allowable pursuant to a valid contract. If, instead, the workers are employees then any such payments were made in exchange for employment and are prohibited by the Connecticut anti-kickback statute. *See* Conn. Gen. Stat. § 31-71e. And, similarly, post-work deductions may well be illegal reductions from earned wages. *See* Conn. Gen. Stat. § 31-73(b).

The majority attempts to circumvent the problem by claiming that the questions before us have already been answered. It does so in its discussion of the minimum wage claim by mischaracterizing the holding of the Appellate Court of Connecticut in *Jason Roberts, Inc. v. Adm'r*, 15 A.3d 1145 (Conn. App. Ct. 2011), and by overreading the decision of the Supreme Court of Connecticut in *Mytych v. May Dep't Stores Co.*, 793 A.2d 1068 (Conn. 2002).

In *Jason Roberts*, a worker claimed to be a misclassified employee of a cement company, and he sought unemployment benefits under Conn. Gen. Stat. § 31-222. The putative employer pointed to a franchise agreement between the parties and argued that the agreement rendered § 31-222 inapplicable. *Jason Roberts*, 15 A.3d at 1149. The Appellate Court of Connecticut disagreed. It wrote, the employer "neither cites, nor does our research reveal, any legal support for this argument. . . . The act makes no express exemption for franchises, nor can we imply an exemption[.]" *Id*. at 1149–50. Thus, the case stands for the proposition that the existence of a franchise agreement does not per se render employment law inapplicable.

In the majority's hands, *Jason Roberts* transforms into a virtually opposite holding. It becomes an affirmation that "an individual can be an employee under

the ABC test . . . even if that same individual is also a franchisee." Maj. at 10. The majority then goes on to assert, without citation, that "[i]f an individual qualifies as both a franchisee and an employee, she would be entitled to the protections of both the Connecticut Franchise Act and the employment-related provisions of Connecticut law." *Id.* The majority then concludes—again without citation—that the freedom of contract implied in the Franchise Act trumps the limitations on that freedom mapped by Connecticut's employment laws. But in fact, *Jason Roberts* says nothing about whether a worker can be both a franchisee and an employee under the minimum wage act or the anti-kickback statute. And, more important, it nowhere suggests how to harmonize these laws if a worker can be both.

Indeed, if anything, *Jason Roberts* directly supports appellants' position. Although the court "appreciate[d] that franchises are business arrangements that can differ in many ways from a traditional employment relationship," it was bound to "construe and apply the [unemployment] statute as [it found] it." *Jason Roberts*, 15 A.3d at 1150 (internal quotations omitted). Put simply, the case suggests that once a worker qualifies as an employee, Connecticut employment law applies, regardless of whether they signed a contract marked "Franchise

Agreement." Thus, properly understood, *Jason Roberts* at least leaves us no closer to resolving our key questions.

The majority next turns to *Mytych v. May Dep't Stores Co.*, 793 A.2d 1068 (Conn. 2002) for support. *Mytych* states the uncontroversial proposition that "the employer-employee agreement, as opposed to a statutory formula, control[s] the manner in which wages are calculated." *Mytych*, 793 A.2d at 1072. Asserting, correctly, that "there is a strong public policy in Connecticut favoring freedom of contract," the majority holds that it must therefore adopt the definition of wages in the franchise agreements, even if Mr. Mujo, Mr. Muharremi, and the class of workers they represent entered into the agreements "unwisely." Maj. at 12 (quoting *Geysen v. Securitas Sec. Servs. USA, Inc.*, 142 A.3d 227, 234 (Conn. 2016)).

But by this analysis, the majority assumes the answer to the question before it. Employees may be free to determine how their wages are calculated. Yet there is no reason to assume the same is necessarily true as to "franchise agreements" made by workers who are misclassified as franchisees or as some hybrid mixture of franchisees and employees. The proper inquiry as to these workers is not whether the disputed fees are wages, but whether the Franchise Agreements violate public policy in the specific ways that Connecticut courts

define public policy. Thus, while "it is well established that parties are free to contract for whatever terms on which they may agree . . . it is equally well established that contracts that violate public policy are unenforceable." *Geysen*, 142 A.3d at 233.

And a franchise contract provision might well violate public policy if it "acts to negate the wage statutes," or "negate[s] laws enacted for the common good," or is "designed to evade statutory requirements." *Id.* at 234. The Amended Complaint includes detailed allegations that the Franchise Agreements fall into precisely the situations contemplated by *Geysen*. It states that the Agreements misrepresent appellants as franchisees rather than employees, violating public policy by acting to "negate the wage statutes."

Thus, the majority compounds the district court's errors. First, it repeats that court's misreading of *Jason Roberts* as holding that a worker can be both a franchisee and an employee in Connecticut. Maj. at 17. Next, it decides that a Connecticut "employee-franchisee" is free to enter any "compensation agreement that defines her compensation," however unwise. *Id.* at 18. But each of these steps requires the majority to spin Connecticut law out of whole cloth. And there is no Connecticut authority explaining a) how to define a worker as an

employee or franchisee for purposes of the anti-kickback statute, b) whether a worker can be an employee and franchisee at the same time, or c) how employee and franchise law would apply to such a "dual" worker.

III.

I am especially troubled because these are weighty questions of Connecticut law and policy, which Connecticut should have the opportunity to answer. Data on Connecticut are hard to come by, but what we do know suggests that worker misclassification has long been a serious problem in that state. In addition to violating employment rights of workers, misclassification costs state and local government crucial revenues from payroll, unemployment insurance, and workers' compensation. According to a 2011 report of the Connecticut Joint Enforcement Commission on Employee Misclassification, in a single year the state Labor Department issued 127 stop work orders for misclassifying workers and collected nearly $40,000 in civil penalties. Joint Enf't Comm'n on Emp. Misclassification, State of Conn., Annual Report 2 (2011), https://perma.cc/YU9Z-RC26. Additional investigation led to reclassifying 6,500 workers and the discovery of $50 million in unreported or underreported payroll. *Id.* at 3. That year, the state Department of Revenue Services conducted

its own misclassification investigation and assessed taxes, penalties, and interest totaling more than $600,000. *Id.* Earlier, an independent report found that 42% of audited employers in Connecticut had misclassified workers. Lalith de Silva, et al., Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration, Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs 58 (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

Despite the importance of this issue, the lack of Connecticut Supreme Court guidance, and the centrality of unanswered legal questions to the disposition of this case, the majority sees fit to tell Connecticut just how to blend together its franchise laws with its employment laws, applying the ABC test in a new context and creating a brand-new category of worker—the "employee-franchisee"—in the process. It treats appellants as employees for its analysis of their minimum wage claim, and as franchisees for the purposes of the anti-kickback statute claim. It then decides that because there are general statutes on these subjects, and because the Connecticut Supreme Court has affirmed the state's commitment to freedom of contract, appellants have no viable claims. But

in fact, all these are important Connecticut legal questions that are not properly ours to decide.

Many decisions on whether to certify are matters of judgment: How confident can we be that the highest court of the relevant state would say its law means what we say it does? If we decline to certify because we are overly confident in our capacity to guess, and the state subsequently decides a case the opposite way, we look foolish, and more importantly, we have been unfair to the parties. Moreover, in Connecticut, certification need not be an obstacle to speedy justice; in Connecticut, federal district courts are permitted to certify questions directly to the Connecticut Supreme Court, saving time and money.

Certification is fully consistent with the practice of the Supreme Court and our court. When state law is unclear, the Supreme Court has regularly used certification. And, on occasion, rather than certify directly itself, it has remanded to a lower court with instructions for that court to certify a question. *See McKesson v. Doe*, 141 S. Ct. 48, 51 (2020); *Bellotti v. Baird*, 428 U.S. 132, 151–52 (1976); *Lehman Bros. v. Shein*, 416 U.S. 386, 391–92 (1974); *Clay v. Sun Ins. Off. Ltd*, 363 U.S. 207, 212 (1960).

We have gone further. In two relatively recent cases, our court has successfully and usefully certified questions where state law was far clearer than in the case before us or than in the above-mentioned Supreme Court cases. *Glob. Reinsurance Corp. of Am. v. Century Indem. Co*, 843 F.3d 120, 122 (2d Cir. 2016), *certified question accepted*, 68 N.E.3d 98 (2017), and *certified question answered*, 91 N.E.3d 1186 (2017); *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 772 F.3d 740 (2d Cir. 2014), *certified question answered*, 118 A.3d 175 (Del. 2015). In both cases, we did so because there were indications that the state's highest courts might deviate from their prior holdings. Moreover, in an even more recent decision, *Glover v. Bausch & Lomb Inc.*, we certified because the outcome, as here, "ultimately turn[ed] on questions of state law for which no controlling decisions of the Supreme Court of Connecticut exist." No. 20-1156-CV, 2021 WL 3042364, at * 4 (2d Cir. July 20, 2021). And we did so even though—unlike the instant case—certification was not requested by any party. We did so *nostra sponte* because "[w]e have long recognized the appropriateness of according to state courts the opportunity to decide significant issues of state law through the certification process." *Id.* (quoting *Corsair Special Situations Fund, L.P. v. Pesiri*, 863 F.3d 176, 183 (2d Cir. 2017)).

In the absence of controlling decisions of the Supreme Court of Connecticut on the significant issue of worker classification and its consequences, we clearly should certify this case to the Connecticut Supreme Court. I would therefore vacate and remand to the district court with instructions to certify appropriate questions to the Connecticut Supreme Court. Because the majority fails to do this, I respectfully dissent.