No. 17-41282

In the United States Court of Appeals for the Fifth Circuit

ALEXANDRO PUGA AND NORMA PUGA,

Plaintiffs-Appellees,

v.

RCX SOLUTIONS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Texas, Corpus Christi Division

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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American Association for Justice The American Association for Justice ("AAJ") is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns ten percent or more of this entity's stock.	Jeffrey R. White Kathleen Nastri (AAJ President)
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Respectfully submitted this 22nd day of June, 2018.

/s/ Jeffrey R. White
JEFFREY R. WHITE

Attorney of record for Amicus Curiae American Association for Justice

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ["AAJ"] is a national trial bar association whose members primarily represent plaintiffs in personal injury, employment rights, civil rights, and consumer rights cases. Many AAJ members represent those who have been injured in vehicle accidents involving leased motor carrier vehicles, as in this case.[1]

AAJ's concern is that Appellant RCX Solutions has called into question the validity of the longstanding statutory employer doctrine. That settled rule has played a vital role in holding motor carriers who are federally certificated to transport freight over interstate highways accountable for the negligence of the drivers they hire. AAJ believes that this rule of clear financial responsibility not only assures compensation for the victims of vehicle accidents and their families, but benefits all users of the nation's roadways by providing incentives for motor carriers who use large trucks to undertake the steps necessary for their safe operation.

SUMMARY OF ARGUMENT

1. Interstate trucking dominates the freight transport industry and is vital to the American economy. However, large trucks are involved in many of the fatal accidents on America's highways. For efficiency reasons, many carriers lease trucks

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

and hire drivers to transport their shipments. However, the Interstate Commerce Commission ["ICC"] reported to Congress that some motor carriers avoided safety regulations and evaded financial responsibility for vehicle accidents by structuring their arrangements so that the drivers they hired would be deemed independent contractors under state agency law.

2. In 1956, Congress tasked the ICC with issuing regulations that would require ICC-regulated motor carriers to have control of and responsibility for the safety of operations and equipment of leased vehicles as if they were owned by the carriers. The ICC responded by issuing a requirement that such leases expressly provide that the carrier-lessee have exclusive control over the leased equipment and assume complete responsibility for its operation for the duration of the lease.

Pursuant to the statute and the control regulation, this Court adopted the statutory employee doctrine that holds the lessee motor carrier vicariously liable for the negligence of the driver of the leased vehicle, regardless of whether the driver would be deemed an independent contractor under state agency law. The statutory employee doctrine does not preempt or supersede state law regarding vicarious liability; it precludes the abusive manipulation of state law using lease agreements or other arrangements with truck owners. The doctrine does not impose vicarious liability on a motor carrier for the conduct of drivers over whom the carrier has no control. It finds the right of control explicitly stated in the lease, as required by the

ICC regulation. In this manner, the statutory employment doctrine carries out the intent of Congress by providing the same incentive to insure the safe operation of leased vehicles as the ICC requires for the carriers' own vehicles.

This Court has consistently reaffirmed its adherence to the statutory employee doctrine, as have the district courts of this circuit and every sister federal circuit that has considered the issue.

3. The 1992 amendment to the Federal Motor Carrier Safety Regulations ["FMCSR"] did not undermine the validity of the statutory employee doctrine. At the outset, this Court's discussion relating to a 1986 amendment has no relevance to the statutory employee issue.

The 1992 amendment added a paragraph to the section containing the control regulation stating that nothing in the control regulation is intended to affect whether the driver is an independent contractor or employee of the carrier. The plain language of the amendment does not invalidate the statutory employee doctrine. If that were the intent, the ICC would have removed or modified the control regulation which is the basis of the doctrine. Instead, the amendment reaffirms the control regulation in its first sentence. In addition, the amendment does not defer to state law to distinguish between an employee or and independent contractor. Both the statute and the FMCSR contain their own broad federal definition of "employee" which includes both employees and independent contractors. Finally, to interpret the

amendment as removing the statutory employee doctrine in favor of deferring to state vicarious liability law would contradict Congress's own purpose in authorizing the control regulation, which was to correct the abusive manipulation of state vicarious liability law in lease agreements.

It is clear, instead, that the ICC adopted the 1992 amendment to correct a misinterpretation of the control regulation by some courts, including this Court, that a driver who is deemed a statutory employee of the motor carrier lessee for purposes of vicarious liability to an injured member of the public is also an "employee" for purposes of state workers' compensation coverage. The ICC's statements in 1992 regarding the amendment announce that its purpose was to give notice to the courts and workers' compensation tribunals that the control regulation does not affect the relationship between the carrier and driver. The statutory employee doctrine deals with the relationship between the carrier and an injured member of the public, for whose benefit the FMCSR was promulgated.

The 1992 amendment led this Court to alter its position on whether the regulation affects workers' compensation determinations. Other courts have followed suit, describing the contrary view as a misinterpretation of the regulation. None of these decisions addressed the statutory employee doctrine.

In fact, none of the cases cited by RCX Solutions hold that the 1992 amendment invalidated the statutory employee doctrine. Those decisions hold,

instead, that the amendment corrects a misinterpretation that the control regulation created an irrebuttable presumption that a driver was operating within the course of employment during the lease, even if the delivery had been completed and the driver was returning empty or embarked on transporting another shipment.

Neither the statutory and regulatory background to the statutory employee doctrine, nor the clear meaning of the regulatory amendments, nor the case law applying the doctrine support the notion that the doctrine is no longer valid under current law. This Court should reject RCX's invitation to overturn this Court's considered and settled statutory employee doctrine.

ARGUMENT

I. THE STATUTORY EMPLOYEE DOCTRINE CARRIES OUT CONGRESS'S PURPOSE IN ENACTING THE MOTOR CARRIER SAFETY ACT BY PROTECTING THE PUBLIC FROM ABUSES SURROUNDING MOTOR CARRIER-OWNER LEASE AGREEMENTS.

A. Motor Carrier-Owner Lease Agreements Play an Important Role in the Vital Interstate Trucking Industry.

There is no doubt that the interstate freight trucking industry is "the lifeblood of the U.S. economy." American Trucking Associations, Reports, Trends & Statistics ["ATA Reports"], *available at* http://www.trucking.org/News_and_Information_Reports.aspx. Following the construction of the interstate highway system in the 1950s, interstate trucking has dominated the freight industry. Wikipedia, "Trucking industry in the United States," *available at* https://en.

wikipedia.org/wiki/Trucking_industry_in_the_United_States. The honored adage is no exaggeration: "If you bought it, a truck brought it." *Id*.

But this human activity also exacts a grievous human toll. One in ten fatal motor vehicle crashes involves a large truck, which can be either a single-unit vehicle or a combination tractor-trailer. Insurance Institute for Highway Safety, Large Trucks, Fatality Facts (December 2017), *available at* http://www.iihs.org/iihs/topics/t/large-trucks/fatalityfacts/large-trucks. Poorly maintained equipment and driver fatigue are major factors in those fatal crashes. *Id*. Moreover, because of massive size and weight of tractor-trailer units, drivers of surrounding vehicles are most at risk. "Ninety-seven percent of vehicle occupants killed in two-vehicle crashes involving a passenger vehicle and a large truck in 2016 were occupants of the passenger vehicles." *Id*.

Lease agreements play an important role in freight transportation. To obtain ICC authorization to engage in interstate transport, a motor carrier "must demonstrate financial ability, insurance coverage, and compliance with safety requirements, both as to equipment and competence of drivers." *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913, 918-19 (D. Utah 1993). However, as Supreme Court Justice Blackmun explained, "Demand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and

idleness, are necessary and continuing objectives." *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 35 (1975). For that reason, motor carriers frequently enter into leases or similar arrangements with truck owners for use of the truck to transport the carrier's trailer on a specific trip using an operator who is, or who is employed by, the truck owner. *See American Trucking Ass'ns v. United States*, 344 U.S. 298, 303 (1953). In this way, "the motor carrier is relieved of the burden of holding, maintaining, and upgrading equipment [and] does not have to keep a large staff of employees on the books." R. Clay Porter & Elenore Cotter Klingler, *The Mythology of Logo Liability: An Analysis of Competing Paradigms of Lease Liability for Motor Carriers*, 33 Transp. L.J. 1, 4 (2006). This Court has recognized that the extensive legislative and administrative work behind the federal motor carrier lease regulations "reflects the importance attached by the Congress and ICC to the economic necessity for such short term leases . . ." *Simmons v. King*, 478 F.2d 857, 865–66 (5th Cir. 1973). Nevertheless, Congress and the Commission found it necessary to correct abuses that had grown up around this practice. *Id*. at 866-67.

B. Congress Authorized the ICC to Issue Regulations Requiring Motor Carriers to Assume Responsibility for the Safe Operation of Trucks Leased from Truck Owners.

Beginning in 1948, the ICC embarked on extensive hearings into interstate trucking practices and equipment lease agreements in particular. *See Christian v.*

United States, 152 F. Supp. 561, 563-64 (D. Md. 1957) (detailing the administrative proceedings). One problem the Commission found, as this Court has noted, was that "[m]otor carriers had attempted to immunize themselves from the negligence of the drivers who operated their vehicles by making them all nominally 'independent contractors.'" *White v. Excalibur Ins. Co.*, 599 F.2d 50, 52 (5th Cir. 1979).

Under state law agency principles, a motor carrier who leased a truck for transport was not liable for negligent operation of the vehicle if the carrier had hired the driver as an independent contractor. *See, e.g.*, *Costello v. Smith*, 179 F.2d 715 (2d Cir. 1950). Taking advantage of this feature of state law, "interstate motor carriers attempted to immunize themselves from liability for negligent drivers by leasing trucks and classifying the drivers as independent contractors." *Sharpless v. Sim*, 209 S.W.3d 825, 829 (Tex.App.—Dallas 2006); *see also Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 38 (Tex.App.—Fort Worth 2002, no pet.) (same).

The need to preclude such blatant manipulation of state law was clear. As one district judge declared:

> [P]ublic policy requires that the holder of a franchise or certificate from the Interstate Commerce Commission for the operation of freight vehicles in interstate commerce upon the public highways be held responsible for the operation of such vehicles under said franchise or certificate, by independent contractors . . . Otherwise, the public might be entirely deprived of the safeguards to the public required by the Interstate Commerce Commission, by means of certificate holders evading their responsibility by the employment of irresponsible persons as independent contractors.

Hodges v. Johnson, 52 F. Supp. 488, 490-91 (W.D. Va. 1943).

In addition, the absence of written lease provisions clearly stating the carrier's controlling authority made "fixing of the lessee's responsibility for accidents highly difficult." *American Trucking Ass'ns*, 344 U.S. at 305. *See also Transamerican Freight Lines*, 423 U.S. at 37 (Evidence of evasion of safety requirements along with "difficulties in the fixing of the lessee's responsibility" for accidents prompted congressional concern).

Congress responded in 1956 by amending Interstate Common Carrier Act and authorizing the ICC to require motor carriers who lease trucks to "be fully responsible for the operation thereof . . . *as if they were the owners of such vehicles*." 49 U.S.C. § 304(e) (1956) (emphasis added).[2]

In response to this congressional mandate, the ICC promulgated a requirement that leases of trucks by motor carriers for interstate shipments

> [P]rovide that the authorized carrier lessee *shall have exclusive possession, control, and use of the equipment* for the duration of the lease. The lease shall further provide that the authorized carrier lessee

[2] The current form of this statute is codified at 49 U.S.C. § 14102(a)(4), and now authorizes the Secretary of Transportation to require leases to provide that the motor carrier,

> (4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

> shall assume complete responsibility for the operation of the equipment for the duration of the lease.

49 C.F.R. § 376.12(c)(1) (formerly 49 C.F.R.§ 1057.12(c)(1)) (emphasis added).

RCX Solutions is plainly wrong that "[n]othing in either § 14102 or the accompanying regulations creates a liability scheme or imposes automatic vicarious liability on a party in RCX's position." RCX Br. 31. Both the statute and the ICC's "control regulation" were designed to "correct abuses that had arisen" in connection with lease agreements and similar arrangements by which motor carriers sought to avoid safety regulations and evade liability for driver negligence. *Simmons*, 478 F.2d at 866-67; *see also Transamerican Freight Lines*, 423 U.S. at 36-37.

II. THIS COURT HAS ADOPTED AND CONSISTENTLY ADHERED TO THE STATUTORY EMPLOYEE DOCTRINE TO CARRY OUT THE REGULATORY PURPOSE OF PROTECTING THE PUBLIC BY HOLDING MOTOR CARRIERS ACCOUNTABLE FOR THE DRIVERS THEY HIRE.

A. The Statutory Employee Doctrine Does Not Preempt State Vicarious Liability Law, But Corrects Abuses of that Law.

Based on the statute and the control regulation, this Court and every other federal circuit court that has faced the question has adopted the statutory employee doctrine. That doctrine imposes on ICC-regulated motor carriers the financial accountability that Congress and the agency intended. Nevertheless, RCX misleadingly describes this doctrine as imposing automatic liability on motor carriers and impermissibly preempting state vicarious liability law. RCX Br. 30-31.

The salient feature of the statutory employee doctrine is that it does not preempt or supersede state vicarious liability law. Rather, it precludes motor carriers from gaming state law to evade accountability. State common law of agency universally recognizes that an employee is "a person employed to perform services in the affairs of another and who . . . is subject to the other's control *or right to control*." Restatement (Second) of Agency § 220(1) (1958) (emphasis added). On the basis of that control, the principal "is subject to liability for the torts of [an employee] committed while acting in the scope of their employment." *Id*. at § 219(1). Absent such control, the person is an independent contractor for whose negligence the employer is not vicariously liable. *Id*. at §202(2). *See*, *e.g.*, *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 542 (Tex. 2002) ("[T]he absence of that right of control . . . commonly distinguishes between an employee and an independent contractor and negates vicarious liability for the actions of the latter.").

The statutory employee doctrine does not impose liability for the negligence of drivers over whom the carrier has no control. The ICC's control regulation simply requires that carriers make the right to control their leased drivers and equipment an explicit part of the lease. It thus provides the "relationship between the parties giving rise to the right of control" that RCX asserts is essential to vicarious liability. *See* RCX Br. 27 (citing *Oncor Elec. Delivery Co., LLC v. Murillo,* 449 S.W.3d 583, 592-93 (Tex.App.—Houston [1st Dist.] 2014, pet. denied)). The statutory employer

doctrine imposes vicarious liability based on that right of control, regardless of whether the driver is denominated an "independent contractor" in the lease agreement.

In this manner, the statutory employment doctrine achieves the goal set by Congress. It provides the incentive for a motor carrier to take the steps to ensure the safe operation of its leased vehicles and drivers as it would its own vehicles. Essentially, the regulation and the statutory employee doctrine "make the carrier police its lessors as it is policed by the ICC." *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. at 919 (quoting *Rediehs Exp., Inc. v. Maple*, 491 N.E.2d 1006, 1012 (Ind. Ct. App. 1986)).

B. This Court Has Consistently Adhered to the Statutory Employment Doctrine.

This Court adopted the statutory employee doctrine in *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973). Because, under a lease in compliance with the control regulation, the carrier "assumed exclusive possession, control, and use of the vehicle and responsibility to the public," the driver became the carrier's "statutory employee, and as such [the carrier] was vicariously liable as a matter of law for the negligence of [the driver]." *Id*. at 867.

This Court has reaffirmed this doctrine on multiple occasions. *See, e.g.*, *Ooida Risk Retention Grp., Inc. v. Williams*, 579 F.3d 469, 474-75 (5th Cir. 2009);

Consumers Cty. Mut. Ins. Co. v. P.W. & Sons Trucking, Inc., 307 F.3d 362, 366 (5th Cir. 2002); *Jackson v. O'Shields*, 101 F.3d 1083, 1086 (5th Cir. 1996); *Price v. Westmoreland*, 727 F.2d 494, 497 (5th Cir. 1984); *White v. Excalibur Ins. Co*., 599 F.2d 50, 52-53 (5th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979).

The district courts in this circuit have applied the rule without question. *See, e.g.*, *Sentry Select Ins. Co. v. Drought Transp., LLC*, No. 15-CV-890 (RCL), 2017 WL 5382168, at *2-3 (W.D. Tex. May 3, 2017); *Mendoza v. Hicks*, No. CV 15-1455, 2016 WL 915297, at *2 (E.D. La. Mar. 10, 2016); *Hutchinson v. Shuman*, No. 4:07CV37-SA-EMB, 2008 WL 11342643, at *1-4 (N.D. Miss. June 24, 2008).

C. Other Federal Circuits Have Adopted the Statutory Employee Doctrine.

Every federal court of appeals to consider the matter has adopted the statutory employment doctrine. *See Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473, 476–77 (3d Cir. 1961); *Proctor v. Colonial Refrigerated Transp., Inc.*, 494 F.2d 89, 92 (4th Cir. 1974) (The statute and regulations "cast[] upon [the lessee] full responsibility for the negligence of [the driver] of the leased equipment."); *Johnson v. S.O.S. Transport, Inc.*, 926 F.2d 516, 523 (6th Cir. 1991) (similar); *Grinnell Mut. Reinsurance Co. v. Empire Fire & Marine Ins. Co.*, 722 F.2d 1400, 1404 (8th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); *Planet Ins. Co. v. Transport Indem. Co.*, 823 F.2d 285, 288 (9th Cir. 1987); *Rodriguez v. Ager*, 705 F.2d 1229, 1233–36 (10th Cir. 1983); *cf. Graham v. Malone Freight Lines, Inc.*, 314 F.3d 7, 13 (1st Cir. 1999)

(Citing with apparent approval the statutory employee doctrine as set out by this Court in *Jackson v. O'Shields*, 101 F.3d 1083 (5th Cir. 1996)).

In fact, even the district court decisions cited by Appellant do not reject the statutory employee doctrine. *See* Part III(C), below. There appears no sound reason for this Court to reject the settled rule holding motor carriers liable for the negligence of the drivers they hire to operate their leased vehicles.

III. THE 1992 AMENDMENTS TO THE INTERSTATE COMMERCE ACT REGULATIONS DID NOT UNDERMINE THE STATUTORY EMPLOYEE DOCTRINE.

A. The 1986 Amendment to the ICC "Placard" Regulation Has No Relevance to the Validity of the Statutory Employee Doctrine.

RCX does not dispute that the statutory employee doctrine has been governing law with respect to accountability of motor carriers for injury caused by the negligence of their drivers. Nevertheless, RCX insists that the doctrine is invalid "under current law." RCX Br. 28. RCX argues that it is entitled to judgment in this case because the ICC itself overturned the statutory employment doctrine 26 years ago. In Appellant's view, the doctrine is "an outdated legal theory imposing federal preemption on state vicarious liability law" and that, as a result of the 1992 amendments to the Federal Motor Carrier Safety Regulations, "[t]here is no such doctrine." RCX Br. 13.

Appellant is unclear what specific change the 1992 amendment affected that would entitle it to judgment in this case. RCX asserts that the amendment

> was added in 1992 in response to concerns from the motor carrier industry that courts had misinterpreted the disclosure regulations set forth in § 14102 to preempt state vicarious liability law. *See, e.g.*, *Jackson v. O' Shields*, 101 F.3d 1083, 1087 (5th Cir. 1996).

RCX Br. 30.

This Court in *Jackson*, however, was speaking solely about a 1986 amendment to the ICC requirement that carriers remove their placards after the lease contract is terminated. 101 F.3d at 1086-87.

That 1986 amendment addressed a split in authority regarding whether the lessee-carrier is vicariously liable for a driver's negligence even when the driver is not engaged in making the contracted delivery. As one state court explained, the majority of jurisdictions held that the control regulation

> creates an irrebuttable presumption . . . that the driver and motor vehicle were in the service of the lessee-if, when an accident occurs, the lease is in effect and the lessee's I.C.C. placards are adorning the leased motor vehicle.

Cincinnati Ins. Co. v. Haack, 708 N.E.2d 214, 222 (Ohio Ct. App. 1997) (collecting cases, including *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973)).

Under the majority view, the carrier would be liable even if the accident occurred while the driver was returning empty after making the delivery ("bobtailing") or was "on an undertaking of his or her own while using the carrier-

lessee's I.C.C. authority." *Id*. The rationale for this bright-line rule was "to ensure that 'innocent victims' are compensated quickly and not entangled in lengthy court battles between the lessee, the lessor-owner, the driver, and those parties' insurance carriers." *Id*.

By contrast,

> [T]he minority of jurisdictions hold that a written lease in combination with the display of the lessee's I.C.C. placard creates only a rebuttable presumption of the lessee's liability for the leased driver and truck which may be rebutted . . . by showing that the truck was not actually being used in the lessee's service at the time of the accident.

Id. *See, e.g., Wilcox v. Transamerica Freight Lines*, 371 F.2d 403 (6th Cir. 1967).

The ICC amended its regulation in 1986 by deleting the requirement that the carrier remove its placards or other insignia from the leased equipment at the end of the lease. Instead, the regulation now requires that the lease "specify which party is responsible for removing identification devices from the equipment upon the termination of the lease." 49 C.F.R. § 376.12(e). This Court in *Jackson* stated that the purpose of the amendment was to make clear that the ICC rules were not intended "to assign liability based on the existence of placards." *Jackson*, at 1087.

The placard rule was not the basis of the statutory employee doctrine. It merely governed the termination of the statutory employment. As this Court concluded, "[i]n the aftermath of the [1986] amendments, the continued vitality of

decisions in other circuits holding that a lease cannot be effectively terminated until a carrier removes its placard and obtains a receipt is at best questionable." *Id*.

Neither the 1986 amendment nor the *Jackson* court's discussion of that provision bears any relevance to the issue before this Court. There is no dispute that the truck in this case displayed the RCX identifying placard. *See* RCX Br. 14-15. Nor is there any dispute that Brown was operating the truck in furtherance of RCX Solutions' interests at the time of the accident. Nor did *Jackson* even mention the 1992 amendment. Appellant apparently concedes that its discussion of this case has no bearing on its statutory employee argument. RCX Br. 33 n.2.

B. Neither the Text of the 1992 Amendment nor the ICC's Explanatory Statements Indicate that the Statutory Employee Doctrine Is No Longer Valid.

1. *The text of the 1992 amendment does not reject the statutory employee doctrine.*

RCX next directs this Court's attention to a regulatory modification the ICC put in place in 1992. As noted, Congress tasked the ICC to correct the abuses in lease agreements that sought to manipulate state vicarious liability law by characterizing the drivers "nominally" as independent contractors. *White v. Excalibur Ins. Co*., 599 F.2d at 52; 49 U.S.C. § 304(e) (1956), revised and reenacted as 49 U.S.C. § 14102(a)(4). The ICC responded by adopting 49 C.F.R. § 376.12(c)(1), which requires the lease to provide that the "carrier-lessee shall have exclusive possession,

control, and use of the equipment for the duration of the lease." This Court adopted the statutory employee doctrine based on that "control" regulation. See *Simmons*, 478 F.2d at 857.

On July 24, 1992, the ICC added to § 376.12(c) the following provision:

> (4) Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

49 C.F.R. § 376.12(c)(4), originally codified at 49 C.F.R. § 1057.12(c)(4).

RCX is incorrect that the plain language of this amendment invalidates the statutory employee rule. *See* RCX Br. 31. If that were the case, the ICC would have drastically revised or eliminated § 376.12(c)(1), the "control" regulation which serves as the basis for the statutory employee doctrine. In fact, the amendment reaffirms § (c)(1) in its first sentence.

Second, RCX errs in interpreting the phrase "independent contractor or an employee" in the text of paragraph (c)(4) as a directive to defer to state law of vicarious liability on this point. *See* RCX Br. 30-31. In fact, both the statute and the federal regulations promulgated thereunder provide a federal statutory definition of "employee" that expressly includes both "employees" and "independent contractors," irrespective of state law.

In Definitions related to Commercial Motor Vehicle Safety, Congress expressly provided:

> "[E]mployee" means an operator of a commercial motor vehicle (*including an independent contractor* when operating a commercial motor vehicle) . . . who directly affects commercial motor vehicle safety in the course of employment.

49 U.S.C. § 31132(2)(A) (emphasis added).

The regulations similarly define "employee" broadly as including "a driver of a commercial motor vehicle (*including an independent contractor* while in the course of operating a commercial motor vehicle)." 49 C.F.R. § 390.5 (emphasis added). *See, e.g., Sharpless*, 209 S.W.3d at 829; *Amerigas Propane, LP v. Landstar Ranger, Inc*., 109 Cal. Rptr. 3d 686, 698 (Cal. App. 2010). Thus the statutory employee doctrine, which imposes vicarious liability for the negligence of drivers, regardless of whether they are classified as "independent contractors," is supported by the plain text of the basic definitions in both the statute and the regulations.

Finally, RCX contends that its reading is correct because "every textual indication is that Congress did not intend to override state law in this regard." RCX Br. 31. To the contrary, RCX's extreme interpretation contradicts the Congress's very purpose in directing the ICC to promulgate regulations to correct the manipulation of state vicarious liability law through the use of evasive lease agreements. *See Simmons,* 478 F.2d at 866-67. To hold otherwise would lend

approval to precisely the abuse of state vicarious liability law that prompted Congress to authorize the control regulation in the first place. As this Court emphasized, defining an employee to include workers who might be deemed independent contractors under state law "is central to this federal regulatory scheme." *Consumers Cty. Mut. Ins. Co. v. P.W. & Sons Trucking, Inc.*, 307 F.3d 362, 366 (5th Cir. 2002).

> By eliminating the common law employee/independent contractor distinction, the definition serves to discourage motor carriers from using the independent contractor relationship to avoid liability exposure at the expense of the public.

Id. See also Sharpless, 209 S.W.3d at 830 ("Regardless of the type of relationship between the carrier and the driver, however, the carrier is not excused from the regulations that treat the driver as a statutory employee for purposes of liability to the general public.").

2. *The ICC's statements regarding the 1992 amendment make clear that its intent was not to eliminate the statutory employee doctrine, but to eliminate its use in state workers compensation determinations.*

RCX relies on the ICC's statement accompanying the 1992 amendment as supporting the contention that the ICC intended its amendment to eliminate the statutory employee doctrine as an erroneous interpretation of the control regulation. RCX Br. 31.

To the contrary, the ICC's explanation indicates that the Commission was concerned with an issue between the carrier and driver that has nothing to do with vicarious liability for a driver's negligent harm to the public.

This Court held in *White v. Excalibur Insurance Co.* that a motor carrier who had leased a tractor for use in interstate commerce would be deemed the "employer" of the tractor's driver, not simply for purposes of vicarious liability for harm to the public, but also for purposes of Georgia workers' compensation law. 599 F.2d at 55. Accordingly, the sole remedy for death or injury to the driver would be a workers' compensation claim. *Id*. *Cf. Price v. Westmoreland*, 727 F.2d 494, 497 (5th Cir. 1984) (motor carrier was vicariously liable to injured truck passenger, who was not a coworker of the driver, but a member of the public protected by the Federal Motor Carrier Safety Regulations). The Eleventh Circuit agreed with *White*, holding that an injured driver was barred by Florida's workers compensation statute from suing the lessee-carrier. *Judy v. Tri–State Motor Transit Co.*, 844 F.2d 1496, 1506 (11th Cir. 1988).

Other courts, however, disagreed. *See, e.g., Johnson v. S.O.S. Transp., Inc*., 926 F.2d at 521–24 (disagreeing with *White* and allowing the estate of a driver to a wrongful death action against the lessee-carrier for negligence of the vehicle); *Proctor*, 494 F.2d at 90-93 (allowing tort action against carrier for injuries to driver's coworker who was riding as passenger at the time of the accident).

The ICC explained that the purpose of its 1992 amendment was to correct the view of *White* and other courts which the ICC saw as a misinterpretation of its control regulation.

> While most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect "employment" status, it has been shown here that some courts and State workers' compensation and employment agencies have relied on our current control regulation and have held the language to be prima facie evidence of an employer-employee relationship. These State agencies often find that the current regulation evidences the type of control that is indicative of an employer-employee relationship.

Petition to Amend Lease and Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 1992 WL 179665, at *2 (I.C.C. June 29, 1992). The Commission subsequently stated:

> The purpose of the amendment is to give notice to the courts and workers' compensation or other administrative tribunals who have ruled otherwise that, in requiring that a lease provide for the lessee's "exclusive possession, control, and use" of the equipment provided by the lessor, it is not the intention of the Commission's regulations to define or affect the relationship between a motor carrier lessee and an independent owner-operator lessor.

Petition to Amend Lease and Interchange of Vehicle Regulations, 57 FR 32905-01, 1992 WL 172420(F.R.) (July 24, 1992).

It is clear that the purpose of the 1992 amendment was not to inform courts that the universally adopted statutory employee doctrine was not supported by the control regulation, which Congress intended for protection of the public. Instead, the

ICC indicated that "most courts" correctly interpreted the regulation. However, the Commission found it necessary to make clear that the control regulation was not designed to affect coverage determinations under state workers compensation laws, which was not a subject of congressional concern in authorizing the regulations

Consequently, this Court altered its position set out in *White*. This Court found that holding that paragraph (c)(4), added by the 1992 amendment, makes clear that the control regulation and the statutory employee doctrine do not apply in the context of workers' compensation. *Simpson v. Empire Truck Lines*, 571 F.3d 475, 476-77 (5th Cir. 2009).

Other courts have similarly held that the 1992 amendment corrected a misinterpretation by some courts that the control regulation affected a driver's or co-worker's employee status under state workers' compensation statutes. In *Penn v. Virginia Intern. Terminals, Inc.*, 819 F. Supp. 514 (E.D. Va. 1993), the district court held that a truck driver who was injured while transporting cargo was not an employee of VIT for purposes of the Virginia Workers Compensation Act. To argue that the driver was a workers' compensation employee of the carrier based on the ICC control regulation "is a misinterpretation of the regulation, especially with the hindsight provided by the 1992 amendment to 49 C.F.R. § 1057.12(c)." *Id*. at 523. *See also Universal Am-Can, Ltd. v. Workers' Comp. Appeal Bd., (Minteer)*, 762 A.2d 328, 330–32 (Pa. 2000) (holding that an owner-operator who leased his truck

to a motor carrier and was injured when he fell from the truck was not entitled to workers' compensation payments as an employee of the carrier, stating that in view of "the unequivocal language contained in § 376.12(c)(4)" the control regulation does not determine employee status under state workers' compensation law.).

C. The Cases Cited by Appellant Do Not Hold That the Statutory Employee Doctrine is No Longer Valid.

RCX asserts that, following the 1992 amendment, "courts squarely presented with this issue have held that the 'statutory-employee' doctrine is no longer viable." RCX Br 32. Indeed, RCX invites this Court "to confirm that the statutory-employee doctrine is no longer viable, as numerous courts around the country have already recognized." RCX Br. 28.

In fact, no reported case has squarely so held. Certainly, none of the five decisions cited by RCX supports that assertion. The closest would appear to be a decision from the Western District of Oklahoma. *Jett v. Van Eerden Trucking Co., Inc.*, No. Civ-10-1073-HE, 2012 WL 37504 (W.D. Okla. 2012). In a suit for injuries sustained when a tractor-trailer rear-ended another vehicle, the court granted summary judgment for the motor carrier, holding that the statutory employer doctrine was not available because there was no written lease between the carrier and the truck owner. *Id*. at *3-4. The court's dicta that the 1992 amendment "makes clear that the ICC/Secretary has not adopted the sort of regulation that would be

necessary to plaintiffs' claim here," hardly qualifies as a clear rejection of the statutory employee doctrine. *Id*. at *4.

In *Lohr v. Zehner*, No. 2:12-cv-533–MHT, 2014 WL 2504574 (M.D. Ala. 2014), the accident occurred after the driver had completed his delivery for carrier-lessee Wilmac, and he was driving for a different shipper while still displaying Wilmac placards. The district court did not reject the statutory employee rule, but held that the carrier was not liable where the driver's negligence was not within the scope of his employment by Wilmac. *Id*. at *3.

Similarly, in both *Bays v. Summit Trucking, LLC*, 691 F. Supp. 2d 725 (W.D. Ky. 2010) and *UPS Ground Freight, Inc. v. Farran*, 990 F. Supp. 2d 848, 857 (S.D. Ohio 2014), where drivers became involved in accidents while "bobtailing" – driving empty after completing the lessee's delivery – the district courts applied the statutory employee rule. But both held that the 1992 amendment created a rebuttable presumption that the accident occurred in the course of employment. In both cases, the presumption was rebutted. *Bays*, 691 F. Supp.2d at 729; *Farran*, 990 F. Supp.2d at 860. Finally, in *Edwards v. McElliotts Trucking, LLC*, No. 3:16–1879, 2017 WL 3279168 (S.D. W. Va. 2017), where a coworker of driver was injured while assisting the driver in loading the leased truck, the court held that the carrier could be vicariously liable based on state law of agency, suggesting in dicta that the 1992

amendment created a rebuttable presumption that the driver was within the scope of employment. *Id*. at *7.

The insight to be gleaned from the decisions cited by RCX is not that the paragraph added in 1992 rendered the statutory employee doctrine invalid. It is instead that the chief impact of the 1992 amendment has been to correct an interpretation by some courts that the control regulation imposed an irrebuttable presumption that the driver was acting in the course of the statutory employment at all times during the duration of the lease. "Following the 1992 amendments," one district court observed, "courts interpreting § 376.12(c) generally agreed the regulations create only a rebuttable presumption of an agency relationship between the lessee-carrier and the driver." *Delaney v. Rapid Response, Inc*., 81 F. Supp. 3d 769, 776 (D.S.D. 2015) (citing cases, including both *Bays* and *UPS Ground Freight*.). The issue of whether Brown was driving the leased vehicle in furtherance of RCX Solutions' business is not at issue in this case.

In sum, there is no persuasive support in the statutory or regulatory background of the statutory employment doctrine nor in the case law applying that settled liability rule that should lead this Court to become the first to reject it.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the decision by the district court below.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

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Date: June 22, 2018

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CERTIFICATE OF SERVICE

I, Jeffrey White, counsel for amicus curiae and a member of the Bar of this Court, certify that on June 22, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

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