No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULINA GUILLEN and FATIMA GUILLEN,

Respondents.

On Writ Of Certiorari to Supreme Court of the State of Washington

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters granting consent of the parties to the filing of this brief have been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Many who are wrongfully injured in automobile accidents seek legal redress in state court civil actions governed by state law. Fashioning liability rules to best serve the interests of justice, and procedural rules to govern such proceedings fairly and efficiently, historically has been the responsibility of the States.

In ATLA's view, 23 U.S.C. § 409 is a direct regulation of and unlawful interference in the States' judicial procedures. The statute far exceeds the constitutional bounds of Congress's authority and violates the principles of federalism that are the foundation of our form of government.

SUMMARY OF THE ARGUMENT

1. 23 U.S.C. § 409 directs state courts to preclude discovery and exclude from evidence in state-law damage actions a variety of documents, underlying data collected for those documents, and testimony based on them. The speculation that Congress intended to foster greater candor by those submitting highway safety information has no support in the legislative history. Rather, the statute's provisions suggest that Congress intended to make it more difficult for plaintiffs to pursue actions for death and injury due to negligent highway design and maintenance.

Congress, however, has no authority to declare or to supervise state tort law or the procedural rules governing such state-law actions.

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monetary contribution to the preparation or submission of this brief.

The Supremacy Clause requires state courts to entertain federal causes of action and enforce the federal rights of individuals. It does not authorize Congress to override state law with its own substantive or procedural rules of decision in cases based solely on state law. Similarly, the doctrine of federal preemption applies only where those subject to both federal and state sovereign authorities are faced with conflicting regulation. It does not permit Congress to regulate the way state governments regulate their citizens.

2. Section 409 is not a valid exercise of congressional power under the Spending Clause. Unlike other provisions in the highway safety statute, § 409 contains no express language to indicate to the States that compliance is a condition to receiving federal highway funds. Moreover, the threatened loss of all federal highway funding would make such conditional spending impermissibly coercive.

3. Nor is § 409 a valid exercise of power under the Commerce Clause. The statute does not regulate interstate commerce or the use of the channels of interstate commerce. It does not regulate economic or commercial activity having a substantial relation to interstate commerce. Instead, it purports to regulate state courts in the exercise of their judicial powers. To allow Congress such authority would create a completely centralized government.

4. Nor is § 409 supportable under the Necessary and Proper Clause. Sec. 409, added to the highway safety statute 17 years after its inception, cannot be deemed essential to this federally-assisted state program. States enjoy complete immunity except to the extent they consent to being sued. For Congress to offer States some protection against liability is to offer nothing.

Congress could directly punish those who provide false or misleading information in state applications for highway funds. However, interference with the judicial functions of state courts cannot be viewed as a proper means of obtaining accurate safety information.

5. Section 409 violates the Tenth Amendment. Congress has no authority to declare the substantive or procedural law applied by state courts in actions not based on a federal right or cause of action. Where the Founders deemed it appropriate for Congress to prescribe rules of evidence for state courts, they did so explicitly in the Full Faith and Credit Clause. In all other actions based on state law, this power is reserved to the States.

In addition, many state constitutions vest the authority to promulgate procedural rules in the judicial branch and render conflicting statutory rules invalid. Sec. 409 purports to empower state legislative or executive branches, by seeking federal funds, to evade separation of powers limits imposed by their own constitutions, violating basic precepts of federalism.

ARGUMENT

I. THE SUPREMACY CLAUSE DOES NOT AUTHORIZE CONGRESS TO PRESCRIBE THE SUBSTANTIVE OR PROCEDURAL RULES TO BE APPLIED BY STATE COURTS IN ACTIONS BASED SOLELY ON STATE LAW.

We the People have delegated to Congress broad, but not boundless, powers to govern us. The Founders did not entrust the liberties of Americans to a centralized government, however beneficent. The "genius of their idea" was to "split the atom of sovereignty" between national and state authorities,

"each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). As the Court has recently observed, "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government," but retained their "inviolable sovereignty." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). Hence, ours is "an indestructible union, composed of indestructible states," *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

Dual sovereignty is a defining feature of our Nation's constitutional blueprint, and its preservation is essential, "to ensure protection of our fundamental liberties." *United States v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). Chief Justice John Marshall described this Court's responsibility in no uncertain terms:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

Accordingly, this Court has been vigilant in limiting congressional action to its proper constitutional scope. In *New York v. United States*, 505 U.S. 144, 161 (1992), the Court held that Congress may not "commandeer" state legislatures to serve its own

regulatory ends. Similarly, the Court in *Printz v. United States*, 521 U.S. 898 (1997), precluded Congress from commandeering state executive branch agencies. This case presents the opportunity for the Court to complete the trilogy by delimiting the extent to which Congress can commandeer the judicial branch of state governments to further its own policy views.

A. It is Not the Role of Congress to Regulate or Supervise State Tort Law.

At issue in this case is 23 U.S.C § 409, which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Sec. 409 is not a statute of general applicability. It is a direct command to state courts ruling on discovery and admissibility of evidence in state-law damage actions. The statute covers a wide variety of materials beyond those required by the federal government to be submitted in a State's application for federal highway

funds.[2] Sec. 409 is frequently invoked, as in this case, to bar the use of accident reports prepared by state or local law enforcement personnel, as well as traffic counts, surveys and diagrams of the accident location. It has been applied to citizen complaints of hazards to highway agencies and to letters from public officials calling attention to dangerous conditions. *See, e.g., Long v. State, Dep't of Transp. & Dev.,* 743 So. 2d 743, 747 (La. Ct. App. 1999).

The statutory bar is not directed at confidential communications, but encompasses publicly available documents as well as the underlying data collected to prepare such documents. It has been applied to exclude expert testimony based on covered materials, *e.g., Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993), and even newspaper articles based on information contained in covered materials. *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

In 1987, when Congress added § 409 to the Highway Safety Act of 1973, it gave little indication of its purpose. *See Kitts v. Norfolk & W. Ry. Co.*, 152 F.R.D. 78, 82 n.14 (S.D.W. Va. 1993) ("The one respect in which all the cases interpreting section 409 are in agreement is that the section, seemingly, has no legislative history.") In the absence of a clear statement of legislative intent, Courts have suggested that Congress enacted section

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[2] This case does not involve the discovery or admissibility of documents within the control of federal agencies, which may be governed by various statutes mandating nondisclosure, *see* 2 Jack B. Weinstein & Margaret M. Berger, WEINSTEIN'S EVIDENCE ¶ 501[05] (1994). Such statutes may create a "required reports" privilege protecting information that must be submitted to a government agency. *See Association for Women in Science v. Califano*, 566 F.2d 339 (D.C. Cir. 1977).

409 for "at least two purposes: (1) to facilitate candor in the preparation of documents by protecting them from use in litigation . . . and (2) to prevent the record keeping required by federal law from providing 'an additional, virtually no-work, tool for direct use in private litigation.'" *Mackie v. Grant Trunk Western R. Co.*, 544 N.W. 709, 711 (Mich. App. 1996) (citations omitted). *See also Coniker v. New York*, 181 Misc. 2d 801, 804, 695 N.Y.S.2d 492, 495 (Ct. Cl. 1999) (similar).

That Congress was concerned with a lack of candor in state applications for federal highway funds was the speculation of a single intermediate state court. *Duncan v. Union Pacific. R. Co.*, 790 P.2d 595, 597 (Utah Ct. App. 1990), aff'd on other grounds, 842 P.2d 832 (Utah 1992).[3] Neither Petitioner nor the United States has brought forward any additional direct evidence that a concern about candor was in fact Congress's motivation.

The second purpose imputed to Congress by some courts is to prevent covered materials from becoming a "virtually no-work, tool for direct use in private litigation." *Mackie, supra*; *Light v. State*, 149 Misc. 2d 75, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990). Congress's concern, in other words, was that some States make it too easy for plaintiffs to recover for wrongful injury or death due to negligent highway design.

Support for this view is found in the statute itself. Sec. 409 targets only damage actions. In addition, Congress provided no protection to those who actually submit information or prepare reports, surveys or lists.

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[3] The Utah court's sole cited authority is the conference report, which merely paraphrases the provision. 790 P.2d at 597 n.2, citing H. Conf. Rep. No. 100-27, 104th Cong. 1st Sess. 172-173.

Instead, the benefits of the statute are bestowed on defendants – governmental and private parties – who may have had little or nothing to do with compiling or preparing those materials.

ATLA submits that it is beyond the authority of Congress to supervise state tort law or to require state courts to replace state law with what Congress views as a better rule in damage actions. As this Court stated:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

B. The Supremacy Clause Does Not Support a Congressional Demand that State Courts Exclude Certain Evidence in State Law Damage Actions.

Despite this Court's clear demarcation of the limits on Congress's authority in *Erie,* Petitioners argue that Congress may demand that state courts apply "federal prescriptions," Brief for Petitioner at 19, relying on *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), and this Court's decisions upholding federal preemption of state tort actions. *Id.* at 20 & 23.

This Court made clear in *Testa v. Katt*, 330 U.S. 386 (1947), that the Supremacy Clause requires state judges to entertain federal causes of action that are within their jurisdiction. As Justice O'Connor has pointed out, *Testa* and similar cases "all involve congressional regulation of individuals, not congressional requirements that States regulate." *New York v. United States,* 505 U.S. at 178. The duty of state courts to enforce the federal rights of individuals flows

from the command of the Supremacy Clause that the "supreme Law of the Land" be enforceable in every State. *Id.*

It is one thing for Congress to bestow on individuals a federal right or cause of action which state courts must recognize. It is quite another for Congress to dictate directly to state courts how they must decide cases. A state court is not "to be treated as a Federal court deriving its authority not from the State creating it, but from the United States." *Howlett v. Rose*, 496 U.S. 356, 370 n.17 (1990). *F.E.R.C.* is not to the contrary. As the majority there stated, "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," 456 U.S. at 761-62; *Printz*, 521 U.S. at 929.

Hence, even in civil actions to enforce a federal right, Congress may not prescribe the procedural rules state courts must apply. *Howlett v. Rose, supra* at 369-72. *See also Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 56-57 (1912) (state courts must take cognizance of federal causes of action created by the Federal Employers Liability Act, where there was no "attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure."). *Cf., Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (Because trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" and "part and parcel of the remedy afforded railroad workers" by the FELA, a state rule under which the trial judge determined the validity of a release could not be deemed a mere rule of procedure.).

Consequently, even where Congress has established a federal right of action, the general rule, "bottomed deeply in belief in the importance of state

control of state judicial procedure, is that federal law takes the state courts as it finds them." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). *See also Johnson v. Fankell*, 520 U.S. 911, 919 (1997).

In this case, there is no federal right at stake. Congress lacks any authority to dictate to state courts either the substantive or procedural rules in actions governed by state law.

C. The Doctrine of Federal Preemption Does Not Apply to Congressional Regulation of State Courts, Rather than Private Conduct.

For similar reasons, § 409 cannot be supported on the basis of the doctrine of federal preemption.

Preemption is the Framers' solution to a problem created by replacing regulation of the states under the Articles of Confederation with direct regulation of persons, which is the basis of the Constitution. When an individual is subject to both federal and state regulations, the Supremacy Clause mandates that state law must yield, where that is the clearly expressed intent of Congress, where a state regulation actually conflicts with federal law, or where Congress intended federal regulation to occupy the field. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Hence, the preemption doctrine applies only to the regulation of activities of private persons and businesses subject to dual sovereigns actors – not to the regulation of the States themselves or of state courts. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). As this Court has explained:

> No matter how powerful the federal interest involved, the Constitution simply does not give

> Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York v. United States, 505 U.S. at 178.

II. 23 U.S.C. § 409 IS NOT A VALID EXERCISE OF CONGRESSIONAL SPENDING POWER.

A. Sec. 409 Is Not A Condition On Receipt Of Federal Funds.

The Constitution empowers Congress to "provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Incident to this power, "Congress may attach conditions on the receipt of federal funds," including "compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole,* 483 U.S. 203, 206 (1987).

However, this Court has emphasized, if Congress wants to attach strings to its spending, it must announce its conditions clearly so that States can "exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 207. As the Court recently pointed out, conditional spending is in the nature of a contract; its validity depends upon placing the states on clear notice of its terms. *Barnes v. Gorman*, 122 S. Ct. 2097, 2100 (2002). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 2101, quoting *Pennhurst State School and Hospital v.*

Halderman, 451 U.S. 1, 17 (1981). Sec. 409, however, gives no indication that compliance is a condition to receiving highway funds.

It is not sufficient that § 409 is part of a larger spending program that the States are free to accept or reject. *Pennhurst*, for example, involved the Developmentally Disabled Assistance and Bill of Rights Act of 1975. The Act's explicit purpose, similar to that of the federal highway statute, was to assist the States through the use of federal grants to improve the care and treatment of those with mental disabilities.

The Court held that a provision in the statute setting forth a "Bill of Rights" of the mentally disabled did not require the States to recognize substantive individual rights to care as a condition of receiving federal funds. That section of the statute, this Court pointed out, contained no conditional language. By contrast, in other sections of the Act where Congress intended to impose conditions, it did so explicitly. *Id.* at 23.

Similarly, Congress used no conditional language in the text of § 409. Indeed, as the Association of American Railroads observes, the plain text of the statute indicates that it is not conditional at all. Rather, "§ 409 limits the use of this information in *all* courts, whether or not the forum State accepts federal highway funds." Brief of the Association of American Railroads at 14-15 (emphasis in original). Contrary to Petitioner's assertion, a State's citizens who view § 409 as contrary to their interests cannot simply decline the federal grant. Brief for Petitioner at 24. If the residents of Washington were to reject federal highway money today, their decision would not remove the bar to use of evidence that has been collected. Nor would it allow

use of future collections or compilations made for developing highway safety projects that might someday be eligible for federal funds.

As in *Pennhurst*, other sections of the same statute demonstrate that Congress knew how to attach conditions to the receipt of federal highway funds. For example, 23 U.S.C. § 158, the requirement that States establish a minimum drinking age of 21, which this Court upheld as a valid spending condition in *Dole*, spells out precisely what the states must do to fulfill the condition and describes the penalties for non-compliance. Other provisions are similarly detailed. *See* 23 U.S.C. § 131 (States that do not control outdoor advertising near interstate highways will lose 10% of federal highway funds); 23 U.S.C § 141 (States that do not adequately enforce state laws respecting maximum vehicle size and weights lose 10% of funds); 23 U.S.C. § 141(b) (States that permit heavy vehicles to be registered without proof of payment of federal taxes lose 25% of funds); 23 U.S.C. § 154 (States that do not enact open-container laws will be penalized by transfer of 1.5% to 3% of funds to alcohol-impaired driving programs); 23 U.S.C. § 159 (States that do not revoke or suspend licenses of those convicted of drug offenses will lose 5%, then 10% of funds); 23 U.S.C. § 161 (States that do not enact and enforce laws respecting driving by intoxicated minors lose 5%, then 10% of funds).

Sec. 409 contains no similar indication that funding is conditional on compliance, how compliance shall be determined, or the consequences of non-compliance. Even if Congress intended to make § 409 a condition for receipt of federal funds, the statute does not comply with this Court's repeated insistence that "Congress speak with a clear voice." *Davis v. Monroe*

County Bd. of Ed., 526 U.S. 629, 640 (1999), *quoting Pennhurst*, *supra* at 17.

B. The Threat of Loss of All Highway Funds For Noncompliance With § 409 Is Impermissibly Coercive.

Even if § 409 is deemed an exercise of the Spending Power, the Court in *Dole* made clear there is a limit to the pressure Congress may exert on States to obtain their acceptance of spending conditions. "[I]n some circumstances," the Court stated, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole, supra* at 211, quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). *Dole* involved 23 U.S.C. § 158, under which a State that established a minimum drinking age below 21 would lose 5% of its allotment of federal highway funds. The Court concluded that the threatened loss of this "relatively small percentage" of funds did not amount to coercion. *Id.*

Petitioner and the Solicitor General suggest that a State seeking to retain its own rules in its own courts must decline to participate in the highway-aid program altogether. Brief for Petitioner at 26; Brief for the United States at 43. Clearly, a State's loss of 100% of its share of highway funds would be a severe blow to the state budget and would place the lives and safety of those who use its highways at risk. By any standard, this degree of pressure amounts to compulsion. As the Fourth Circuit had occasion recently to observe, if the federal government were to withhold the entirety of a State's Medicaid funds for failure to satisfy a statutory condition, "then serious Tenth Amendment questions

would be raised." *West Virginia v. U.S. Dept. of Health and Human Services*, 289 F.3d 281, 291 (4th Cir. 2002).

III. SECTION 409 IS NOT A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE.

A. Section 409 Does Not Regulate Interstate Commerce or the Use of Channels of Commerce, But Regulates State Courts.

Petitioner seek to bring § 409 within Congress's delegated power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3, because it "favorably effect[s] the instrumentalities of interstate commerce." Brief for Petitioner at 32. The Solicitor General characterizes § 409 as "designed to protect and regulate transportation" by ameliorating hazards, thus protecting both the channels and the instrumentalities of interstate commerce. Brief for the United States at 42.

Undeniably, "Congress may regulate the *use* of the channels of interstate commerce" as well as "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558 (1995); *United States v. Morrison*, 529 U.S. 598, 609 (2000) (emphasis added). However, the plain text of 23 U.S.C. § 409 does not regulate interstate commerce, nor its instrumentalities nor the use of its channels. This Court has defined the word "regulate" more narrowly than simply than "to have an effect on." A statute that "regulates" must explicitly address the object of regulation. For example, the "common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry,

but must be specifically directed toward that industry." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987).

Section 409, on its face, regulates state courts in their conduct of civil actions under state law. Even if state-law damage suits could be construed as a regulation of interstate commerce, the Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York v. United States*, 505 U.S. at 167.

B. Section 409 Does Not Regulate an Economic or Commercial Activity That Substantially Affects Interstate Commerce

Petitioner also relies on this Court's recognition that Congress may regulate activities having "a substantial relation to interstate commerce." Brief for Petitioner at 32.

That authority, however, extends only to the regulation of "*economic activity* [that] substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. at 560. (emphasis added) Indeed, limiting the Commerce Power to regulating economic activity "was central" to the Court's decision in *Lopez*. *United States v. Morrison*, 529 U.S. at 610. The Court added that, in every case "where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce," the "regulated activity was of an apparent commercial character." *Id.* at 611 & n.4.

Court rulings on the discoverability of evidence and its admissibility in civil actions clearly are not an economic or commercial activity.

Much of the work of state courts – ranging from the abatement of nuisances to zoning appeals – can be

seen to have an impact on interstate commerce. To allow Congress to prescribe the legal rules to be applied in such state-law actions would give Congress plenary authority over state courts as an attribute of the Commerce Power. Such an unprecedented expansion of authority "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Morrison,* 529 U.S. at 615; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

IV. SECTION 409 IS NOT AUTHORIZED BY THE NECESSARY AND PROPER CLAUSE.

A. The Statute is not a "Necessary" Exercise of Power.

Petitioner argues that § 409 should be upheld under U.S. Const. art. I, § 8, cl. 18, which allows Congress "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Brief for Petitioner at 35-36.

It is difficult to credit Petitioner's claim that § 409 is "essential" to the operation of the federal highway safety program. *Id* at 35. The program had been in operation for 14 years, growing at a healthy rate with participation of all States.

Nor is it self-evident that shielding defendants from liability results in obtaining more complete information. To the contrary, this Court has suggested:

> In fact, the scheme of negligence liability could just as easily complement these regulations by encouraging railroads -- the entities arguably most familiar with crossing conditions -- to provide current and complete information to the state

> agency responsible for determining priorities for improvement projects

CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 668 (1993).

Had Congress been concerned that state officials or other persons were being less than candid, it could have imposed penalties for submission of false or misleading information in connection with applications for highway aid as it has in other areas. *See United States v. Wells*, 519 U.S. 482, 505-06 & nn. 9 & 10 (1997) (Stevens, J., dissenting) (listing statutes).

The latitude accorded to Congress in selecting the means to carry out its program is limited by the Commerce Clause itself "by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments." *New York v. United States*, 505 U.S. at 180.

As this Court has stated, quoting Chief Justice John Marshall:

> No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.

Alden v. Maine, 527 U.S. 706, 753 (1999), quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

Petitioner insists that § 409 furthers federal interests by offering the States something they want – a shield against the use of evidence in state court damage

actions – as incentive to give the federal government what it needs, accurate hazard information. Brief for Petitioner at 28; Brief for the United States at 42.

In fact, § 409 offers the States no incentive at all that they could not provide for themselves.

The States are clothed with immunity from suit as "a fundamental aspect of [their] sovereignty." *Alden v. Maine, supra* at 713, and so can insulate themselves completely from liability actions. Most States, have adopted tort claim statutes, reflecting "a sense of justice which has continually expanded by consent the suability of the sovereign." *Id.* at 755. *See generally*, Annot., "Liability Of Governmental Entity Or Public Officer For Personal Injury Or Damages Arising Out Of Vehicular Accident Due To Negligent Or Defective Design Of A Highway," 45 ALR 3d 875 (1972). Some have enacted "defective highway" statutes specifically to provide recourse for those injured by negligent roadway maintenance or design. *Id.* at § 9.

The power to consent to suit obviously includes the power to limit or permit the use of state-generated reports and other evidence in such actions. In addition, of course, every State establishes the rules governing discovery and admissibility of evidence in its own courts. Most states, for example, have enacted provisions making industrial or vehicle accident reports inadmissible in defined circumstances. John Henry Wigmore, WIGMORE ON EVIDENCE § 2377(3) (McNaughton rev. 1940); 2 Jack B. Weinstein & Margaret M. Berger, WEINSTEIN'S EVIDENCE, ¶ 502.04[2] (2d ed. 1998).

Absent federal intervention, then, States can choose to allow the use of such evidence, bar it completely, or limit its use in a manner calibrated to

best serve the interests of the State and its people. Sec. 409 adds nothing to a State's ability to protect itself from liability in state courts. Instead, it "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez* at 583 (Kennedy, J., concurring).

The statute takes away every State's ability to balance the competing interests of budgetary constraints, accountability of governmental and private entities, and "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885), which this Court has deemed "[o]ne of the first duties of government" and "the very essence of civil liberty" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). As this Court recently emphasized:

> If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government . . .

Alden v. Maine, 527 U.S. 706, 751 (1999).

B. The Statute is Not a "Proper" Exercise of Power.

The federal government of course has an interest in the effectiveness of its spending programs. It is worth noting, however, that the highway safety program does not pursue a uniquely federal objective, overriding state interests. Congress explicitly established a "federally assisted state program" based on the preservation of State sovereign rights. The statute itself provides:

> **Protection of State sovereignty**.--The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

23 U.S.C. § 145(a).

This Court held in *Alden v. Maine* that Congress cannot disregard state sovereignty to subject a State to liability suits in its own courts without its consent. Nor can Congress properly set aside state sovereignty, as Petitioner argues, to shield a State "from the threat of future tort actions" to which it has consented. Brief for Petitioner at 7.

"No matter how powerful the federal interest involved," this Court has declared, the Constitution simply does not give Congress the authority to treat the States as mere subdepartments of the federal government. *New York v. United States*, 505 U.S. at 188 Rather, "the Constitution protects us from our own best intentions: it divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id*. at 187.

When an Act of Congress "violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause.'" *Alden v. Maine, supra,* at 732-33, quoting *Printz, supra,* at 923-924.

V. SEC. 409 VIOLATES STATE SOVEREIGNTY UNDER THE TENTH AMENDMENT.

Even if § 409 were deemed to be within Congress's authority under the Commerce Clause, the Tenth Amendment stands as an independent check on congressional intrusion into the sovereignty of States:

> In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.

Reno v. Condon, 528 U.S. 141, 149 (2000).

A. This Court's Decision in *Garcia* Does Not Preclude This Court From Enforcing the Tenth Amendment Protections of State Authority Over State Law.

Petitioner summarily dismisses any Tenth Amendment objection to the statute, relying heavily on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina v. Baker*, 485 U.S. 505 (1988). Pet. Br. at 17-19. Those decisions, involving generally applicable congressional regulations, do not extend to this case.

In those cased, this Court addressed "the extent to which state sovereignty shields the States from generally applicable federal regulations." *Baker*, *supra*, at 514. In directing the States to look to the "effectiveness of the federal political process" rather than "judicially created limitations on federal power," the *Garcia* Court did not reject constitutional protection of the sovereignty of the States. 469 U.S. at 552. Rather, the Court concluded that it was impossible to discern a principled line between "traditional state functions,"

exempt from valid Commerce Clause regulations, and other activities which should be subject to regulations applicable to any other employer, landowner or business enterprise. *Id.* at 538-39. The Court therefore found no Tenth Amendment violation where the Congress imposed "nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Id.* at 554.

Similarly, in *South Carolina v. Baker*, *supra*, the Court upheld a requirement in the Tax Equity and Fiscal Responsibility Act of 1982, that publicly-offered long-term bonds be issued in registered form, whether issued by state or local governments or private corporations. 485 U.S. at 527. More recently, in *Reno v. Condon*, 528 U.S. 141 (2000), the Court held that a Tenth Amendment challenge would not lie against the Driver Privacy Protection Act precisely because it was a statute of general applicability and "does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151.

It is a different matter where Congress has itself drawn the line that proved so elusive to the Court in *Garcia* by enacting legislation directed solely at the States' exercise of their sovereign powers. Indeed, the *Garcia* Court indicated that there are "affirmative limits" to federal actions affecting the States. *Id.* at 556. Significantly, the Court there cited *Coyle v. Smith*, 221 U.S. 559 (1911), holding that Congress may not dictate to a State the location of its capital, an "essentially and peculiarly state power[]." *Id.* at 565.

Sec. 409, like the legislation in *New York v. United States* and in *Printz*, is an explicit federal command to a branch of state government in the exercise of the States'

sovereign power. In neither case was the Court obliged to entrust the protection of state sovereignty to the federal political process. Rather, the Court invalidated congressional commandeering as overstepping the bounds set by the Tenth Amendment. As the Court recently reaffirmed:

> [T]he Constitution has never been understood to confer upon Congress the ability to the require the States to govern according to Congress' instructions.

Reno v. Condon, 528 U.S. at 149. The constitutional protection of state courts from such congressional interference "is not solely a matter of legislative grace." *United States v. Morrison*, 529 U.S. 528, 616 (2000).

B. The Tenth Amendment Protects the Sovereign Right of States to Declare and Apply State Law.

The Founders framed the Constitution to provide for a strong national government, but they were equally concerned with limiting its power and preserving the sovereign states. "Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power." *Alden v. Maine*, 527 U.S. 706, 713-14 (1999).

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X

Most assuredly, "[o]ne of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 285 (1970). State "courts have always been recognized as a coequal part of the State's sovereign decision-making apparatus," exercising "perhaps the quintessential attribute of sovereignty." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 & 762 n.27 (1982).

No delegated power authorizes Congress to prescribe the rule of decision in controversies governed by state law. It is elemental that, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 330-31 (1816). It flows from this principle that:

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law or a part of the law of torts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). That power, Justice Brandeis added, is "reserved by the Constitution to the several States." *Id.* at 80. *Cf. Bernardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956) (under *Erie*, "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (suggesting that an attempt by Congress to establish "a general federal tort law" would founder on "constitutional shoals.").

Nor does the Constitution delegate to Congress any general authority to prescribe the procedural rules for state courts. The right of the States to establish the rules of procedure governing litigation in their own

courts is "unassailable." *Felder v. Casey,* 487 U.S. 131, 138 (1988). *See also Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.,* 284 U.S. 151, 158 (1931) ("the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control"); *Fay v. Noia,* 372 U.S. 391, 466-67 (1963) (Harlan, J., dissenting) ("The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its borders.").

Where the drafters of the Constitution deemed it appropriate for Congress to prescribe rules concerning the admissibility of evidence in state courts, they delegated that power to Congress explicitly. The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the *Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved,* and the Effect thereof.

U.S. Const., Art. IV, § 1 (emphasis added).

If Congress possessed a general authority to prescribe rules of evidence in state court proceedings, the second sentence of this provision would be superfluous. The drafters, however, determined that Congress could exercise such power only pursuant to an express grant of authority. *See Edmonds v. State,* 39 S.E.2d 24 (Ga. 1949) (apart from the Full Faith and Credit Clause, Congress has no power to prescribe rules of evidence in state courts).

That Congress cannot dictate the rules of evidence and procedure in state courts has long been "accepted as settled constitutional law." *Ex Parte Gounis*, 263 S.W. 988, 990 (Mo. 1924) (in banc); *see also Sulpho-Saline Bath Co. v Allen*, 66 Neb. 295, 92 N.W. 354, 356 (1902) ("Congress has no authority to make rules governing the admission of evidence in the courts of this state").[4]

C. The Tenth Amendment Protects the Right of the People To Organize Their State Governments and Provide for the Separation of Powers As They See Fit.

In many state constitutions, the people have organized their governments and defined the powers of the constitutionally separate branches to provide that the judicial authority to promulgate rules of procedure is paramount over conflicting statutes. The Ohio Constitution, for example, declares that the "supreme court shall prescribe rules governing practice and procedure in all courts of the state," and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Ohio Const. art. IV, § 5(B).

Other States have organized their governments and apportioned authority between the legislative and

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[4] This Court has not squarely addressed the issue of Congress's power to command state courts to apply a congressionally formulated rule in state law cases. Justice Powell warned that to grant Congress "the power to pre-empt state-court rules of civil procedure and judicial review in classes of cases found to affect commerce" would "obliterate" the States by allowing Congress to "nibble away at state sovereignty bit by bit." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 774 (1982) (Powell, J., dissenting in part).

judicial branches in similar fashion. *See People v. Hollis*, 670 P.2d 441 (Colo. App. 1983) (under Colo. Const. art. VI, § 21, statutes governing procedural matters which conflict with rule promulgated by the Supreme Court are invalid as a legislative invasion of the court's rulemaking powers); *People v. Easley*, 152 Ill. App.3d 839, 842, 505 N.E.2d 11, 12, 105 Ill. Dec. 885, 886 (Ct. App. 1987) ("[I]f a statute conflicts with a rule of the supreme court adopted pursuant to constitutional authority, the Supreme Court Rule must prevail."); *Manns v. Commonwealth*, 2002 WL 1307441 at *4 (Ky. 2002) (statute providing for admissibility of juvenile records "is a legislative attempt to invade the rulemaking prerogative of the Supreme Court by legislatively prescribing rules of practice and procedure, [and] violates the separation of powers doctrine enunciated in Section 28 of the Kentucky Constitution."); *McDougall v. Schanz*, 597 N.W.2d 148, 154 (Mich. 1999) ("the authority to determine rules of practice and procedure rests exclusively with this Court" under Mich. Const. art. 6, § 5 and the doctrine of separation of powers); *City of Fargo v. Ruether*, 490 N.W.2d 481, 483 (N.D. 1992) (under N.D. Const. art. VI, § 3, "[t]he legislature cannot repeal the Rules of Evidence or the Rules of Civil Procedure made pursuant to the power provided us in the Constitution."); *State v. Wallace*, 517 S.E.2d 20, 25 (W. Va. 1999) (under W. Va. Const. art. 8, § 8 the "West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence . . . any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect.").

Similarly, in the State of Washington, "[i]t is a well-established principle that the Supreme Court has

implied authority to dictate its own rules, 'even if they contradict rules established by the Legislature.'" *Sackett v. Santilli*, 47 P.3d 948, 951, 146 Wash. 2d 498, 506 (Wash. 2002) (citations omitted); *State v. Ryan*, 103 Wash. 2d 165, 178, 691 P.2d 197, 206 (1984) ("Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme.").

Section 409 effects a structural change in state government that is inconsistent with state sovereignty. By its terms, Congress authorizes a State's legislative or executive branch, by agreeing to accept highway funds, to evade the constitutional limits separating their powers from those of the co-equal judicial branch.

The statute makes Congress complicit in the abrogation of the constitutional covenant by which the people brought their State government into being, and violates the precepts of "Our Federalism," which this Court has enunciated with undeniable clarity.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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