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 the Supreme Court of the State of Washington

BRIEF ON THE MERITS FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 23 U.S.C. § 409, which protects certain documents "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted in federal or state trials "for damages arising from any occurrence at a location mentioned or addressed" in those documents, is a valid exercise of Congress' power under the Supremacy, Spending, Commerce or Necessary and Proper Clauses of the United States Constitution.

2. Whether private plaintiffs have standing to assert "states' rights" under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question.

PARTIES TO PROCEEDING BELOW

All parties to the proceeding in the Washington Supreme Court, the court whose judgment is the subject of this petition, do not appear in the caption of this case. In *Guillen v. Pierce County* co-defendant estate of Clementina Guillen-Alejandre settled with plaintiffs before suit and has no interest in the case. *See* 10/23/98 CR 21 Motion Aff., Ex's "1-4." Similarly, all parties to *Whitmer v. Yuk*, which had been consolidated with *Guillen* only for appellate purposes, have since also settled as well as been dismissed. *See* Cert. App. "I." Nevertheless, the parties to the proceeding in the Washington Supreme Court were:

1. Pierce County, a municipal corporation (defendant in *Guillen* and *Whitmer*);

2. Ignacio Guillen as legal guardian for Jennifer and Alma Guillen (plaintiff in *Guillen*);

3. Mariano Guillen as legal guardian for Paulina and Fatima Guillen (plaintiff in *Guillen*);

4. The Estate of Clementina Guillen-Alejandre (settling defendant in *Guillen*);

5. Robert and LuAnn Whitmer, individually and as guardians of Shana, Hanna and Denel Whitmer (plaintiff in *Whitmer*);

6. Chin S. and "Jane Doe" Yuk (defendant in *Whitmer*);

7. Chang and "Jane Doe" Choi (defendant in *Whitmer*);

8. City of Lakewood, a municipal corporation (defendant in *Whitmer*);

9. City of Tacoma, a municipal corporation (defendant in *Whitmer*).

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OPINIONS AND ORDERS BELOW

The opinion of the Washington Supreme Court (Cert. App. "A") is published at 144 Wn.2d 696, 31 P.3d 628 (2001), and its denial of reconsideration (Cert. App. "B") is published at 35 P.3d 1218 (2001). The opinion of the Washington Court of Appeals (Cert. App. "H") is published at 96 Wn.App. 862, 982 P.2d 123 (1999), but its commissioner's order granting discretionary review (Cert. App. "G") is unpublished. The orders of the Pierce County Superior Court on summary judgment (Cert. App. "C"), denying a protective order (Cert. App. "D"), granting motion to compel (Cert. App. "E"), amending its order to compel (Cert. App. "F") and denying reconsideration (J.A. 87) are unpublished.

JURISDICTION

The Supreme Court of Washington's opinion in this case was entered September 13, 2001, and rehearing was denied November 27, 2001. The petition for writ of certiorari was filed February 22, 2002, and granted April 29, 2002. This Court has jurisdiction under 28 U.S.C. Section 1257.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The relevant constitutional, statutory and regulatory provisions are set out in the Appendix to the Petition for Certiorari and the Appendix to this brief.

STATEMENT OF THE CASE

A. Creation of Coordinated State Safety Program

In 1966—a year in which 50,894 (or 25.9 of every 100,000) people were killed in traffic accidents on the nation's roadways—Congress enacted the first federal legislation concerning highway safety. U.S. Dept. Of Trans., *1999 Status of the Nation's Highways, Bridges and Transit: Conditions And Performance*, at 5-3 to 5-4. The Highway

Safety Act of 1966 provided that each participating state should "have a highway safety program" pursuant to uniform standards promulgated by the Secretary of Transportation. *See* 23 U.S.C. § 402(a). Thereafter the United States Department of Transportation (hereinafter "USDOT") established highway safety program standards, including "data systems program" standards for "routinely collected information" that "comprise the data base for all aspects of a coordinated State traffic safety program." U.S. Dept. Of Trans., *Highway Safety Program Standards*, at 16. The "objective of this data systems program" was to "upgrade all aspects of the accident information system, starting with the *collection of raw data*, followed by its encoding, storage, retrieval, analysis, and ultimate dissemination to users." *Id.* (emphasis added). As a 1966 Congressional report noted, the collection and storage of "[u]niform, complete and accurate accident reports, . . ., subject to rapid retrieval and analysis" was not only necessary to the safety program, but "[n]o other part of the State program is as basic to ultimate success, nor as demanding of complete cooperation at every jurisdictional level . . . ." *Id.* (quoting Report No. 1700, House of Representative 89th Congress, 2nd Session, July 15, 1966, p. 11). Expressly pursuant to this federal legislation, the state of Washington incorporated these standards for raw accident data into its Administrative Code and thereby dictated procedures for all subsequent accident reports in the state. *See* WAC 136-28 *et seq.*

In 1972 accidents on the nation's highways had resulted in 56,000 deaths, over 4 million injuries and $40 billion in economic loss. H.R. Rep., No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89. Noting this "escalating tide of mayhem on our highways," *id.*, Congress enacted the Highway Safety Act of 1973. Pub. L. No. 93-87, 87 Stat. 282 (codified as amended at 23 U.S.C. 101 *et seq.*) This program necessitated "improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors" so

there could be a "multi-pronged attack on those highway-related factors which contribute to most accidents." H.R. Rep., No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89. Accordingly, an essential part of this funding program included the now express statutory requirement that participating states gather data identifying and evaluating potential accident sites and hazardous highway conditions. *See* 23 U.S.C. §130 (d)(Rail-Highway Crossing Program); 23 U.S.C. §152 (a) (Hazard Elimination Program); 23 U.S.C. § 144(a) (Highway Bridge Program). This allows participating states to apply for and obtain federal funds for those state roadways most deserving of attention. *See generally* 23 U.S.C. §121; J.A. 22-23.

Even before the 1966 Highway Safety Act, the Washington State legislature had "assent[ed] to the purposes, provisions, terms and conditions of the grant of money provided" to an earlier version of the federal statute, as well as "all acts, grants and appropriations amendatory and supplementary thereto and affecting the State of Washington." *See* RCW 47.04.050. Likewise, both before and after the 1973 Highway Safety Act, the state legislature expressly authorized the state's Department of Transportation to enter into agreements with the United States government to secure such federal money for county roads. *See* RCW 47.04.060. *See also* 47.04.070 (Conforming with federal requirements in cooperative construction or improvement of roads). However, Congressional funding alone was not sufficient to induce total participation. States were "very concerned" and "expressed strong objection" to the absence of any confidentiality for their compliance efforts "because of legal actions resulting from accidents at these locations before an improvement can be made." *1976 Second Annual Report on Highway Safety Improvement Programs*, House Document No. 94-386, p. 36. Indeed, it was consistently brought to the attention of the USDOT that states' "highway departments are reluctant to [compile information to identify and prioritize roadway

hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." *See* Louisiana App.: 5/4/83 USDOT Memo. *See* also Brief for the United States as *Amicus Curiae* at 10, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991). Accordingly, in 1983 the USDOT recommended enactment of legislation "to prevent the unauthorized disclosure of *information* that States *compile* in good faith to meet the purposes of Federal aid highway programs to eliminate or reduce hazardous roadway conditions." *Id* (emphasis added).

In 1984 Congress added section (k) to 23 U.S.C. § 402—which conditioned a state's eligibility for highway safety funds under that statute on "if" it either "certifies to the Secretary that it has in operation a computerized traffic safety recordkeeping system" or "provides . . . a plan . . . for establishing and maintaining a computerized traffic safety recordkeeping system." § 402(k)(4). It further provided:

> Notwithstanding any other provision of law, if a report, list, schedule, or survey is *prepared by or for* a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

23 U.S.C. § 402(k)(1) (emphasis added). Having already protected documents "*prepared* . . . under" Section 402, in 1987 Congress enacted Section 409 which extends the same protection to all "reports, surveys, schedules, lists, *or data compiled* for the purpose of . . . Sections 130, 144 and 152 of this title," as well as for "*any* highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds." As the United States Solicitor General thereafter noted: "In enacting Section 409, Congress recognized that state highway departments, as well as private entities such as railroads, are reluctant to compile detailed and accurate information about highway safety problems if there

is a significant risk that the information will be used against them in actions for damages arising out of highway accidents." *See* Brief for the United States as *Amicus Curiae* at 12, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991) (emphasis added).

B. Congress Strengthens Section 409 Protection

Though the cooperative traffic safety program became popular with state and local governments, some courts tried to limit Section 409 by ruling it did not bar civil *discovery* of the identified documents in damage suits against states for traffic accidents. *See* e.g. *Ex parte Alabama Highway Dept.*, 572 So.2d 389 (Ala.1990), *cert. denied*, 502 U.S. 937 (1991). In response, the United States requested this Court grant certiorari and reverse because "[i]f reports and data concerning potential highway safety hazards are subject to discovery in tort actions, State and private parties will likely be *deterred from compiling* complete and accurate information about such hazards" and "[a]s a result, information about safety programs—which depend on information about safety problems supplied by the States and private entities such as railroads—will be jeopardized." *See Palacios v. Louisiana and Delta Railroad Inc.*, 740 So. 2d 95, 98 n. 6 (La. 1999) (quoting Brief for the United States as *Amicus Curiae* at 10, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991) (emphasis added). More significantly, Congress itself responded in 1991 by amending Section 409 to make clear the protected documents could not be "subject to *discovery or admitted* into evidence in a Federal or State court proceeding." *See* 23 U.S.C. § 409 (prior to 1995 amendment). Thereafter the "clear weight of authority" held that "all records *used or usable* in identifying, evaluating or planning safety of highway or rail-highway crossings pursuant to Sections 130, 144, and 152 are so immune to examination." *Seaton v. Johnson*, 898 S.W.2d 232, 235-37 (Tenn. App. 1995) (emphasis added). *See also* cases cited *infra* at n. 3.

However, ignoring the history and language of Section 409, a minority of courts next refused to apply the statutory privilege to "accident reports" or other "raw data collected by" state governments for the federal program. *See Wiedeman v. Dixie Electric Membership Corp.* 627 So.2d 170, 173 (La. 1993), *cert. denied*, 511 U.S. 1127 (1994). *See also S. Pac Transp. Co. v. Yarnell*, 181 Ariz. 316, 890 P.2d 611, 614 (1995) (§ 409 protects only "documents described and *prepared* under the authority of §§ 130, 144 and 152, and no others.") (emphasis added); *Kitts v. Norfolk & W. Ry*, 152 FRD 78, 81 (S.D. W.Va. 1993) (refusing to protect "documents or data prepared or compiled for some entirely separate and distinct purpose" even if later compiled for the federal program). Accordingly, the states' representatives in Congress—including a near unanimous Washington State delegation, *see* Roll Call 679, H.R. 2274, 104th Cong. (Sept. 20, 1995), *available at http://clerkweb. house.gov/cgibin/vote.exe?year=1995&rollnumber=679*; Roll Call 582, S. 440, 104th Cong. (Nov. 17, 1995), *available at http://www.senate.gov/legislative/vote1041/vote_00582.html* — responded by yet again *overwhelmingly* approving an amendment of Section 409 to add the words "or collected" and this time expressly explained:

> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that *raw data* collected *prior to being made part* of any formal or bound report *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 discussed in such data.

Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591 (emphasis added). *See also* cases cited *infra* at n. 3. Thereafter, until the instant case, "[e]very court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the *collection* and evaluation of highway safety information free from the threat of future tort actions." *Palacios v. Louisiana and Delta Railroad*, 775 So.2d 698, 701 (La.App. 2000) (quoting *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999) *aff'd* 210 F.3d 368 (5th Cir. 2000))(emphasis added). *See* also cases cited *infra* at 27-30.

By 1996, the USDOT reported to Congress that just the hazard elimination program (i.e. 23 U.S.C. § 152) alone had obligated $4.58 billion, implemented 33,500 projects nationwide, and "helped to prevent more than 26,500 deaths and 760,000 nonfatal injuries since 1974." U.S. Dept. of Trans., *1996 Annual Report on Highway Safety Improvement Programs*, at IV-3, IV-5 (Apr. 1996). Though by that year deaths in highway accidents had indeed dropped to 15.86 for every 100,000 people, nevertheless 42,065 people still were killed and 3,483,000 still injured in highway accidents. *See* U.S. Dept. Of Trans., *1999 Status of the Nation's Highways, Bridges and Transit: Conditions And Performance*, at 5-4.

C. Pierce County Applies For Cooperative State Safety Funds And Protection

In May of 1995, Pierce County—a political subdivision of the State of Washington—applied through its Public Works Department (hereinafter "Public Works") for federal hazard elimination funds under 23 U.S.C. Section 152 for one of its intersections. *See Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628, 633 (2001). Its application was supported by the required data from accident reports, collision diagrams and other similar material that it had collected and compiled pursuant to that statute. *See* J.A. 21-25, 39-40, 52, 81-83. The "accident reports" all had been generated pursuant to the federal standards set under the Highway Safety Act of 1966 and practically all produced as the result of investigations by the Washington State Patrol and not the Pierce County Sheriff. *See* Cert. Pet. Reply Br. App. "K" at 4-5; J.A. 47,

53-54, 75-78; WAC 136-28 *et seq.* Public Work's collection of accident witness statements likewise had been exclusively obtained from the state, *see* 10/16/98 Hamilton Aff., at 2; WAC 136-28-020, while collision diagrams were generated by both the State Patrol and Public Works officials. *See* J.A. 47, 53, 75. The remaining supporting documents were generated solely by or to Public Works for exclusively roadway safety purposes. *Id.* at 39, 53. The County's request for federal funds was then submitted to and administered by the Washington State Department of Transportation, which thereafter determined the intersection data did not warrant federal hazard elimination funds. *See* J.A. 82. Nevertheless, the next fiscal year of 1996 the County applied to the state again. *Id.* However, while its second application was pending, Clementina Guillen-Alejandre on July 5, 1996 negligently ran a stop sign at the subject intersection causing her pick up truck to collide with another car—killing Guillen-Alejandre and injuring to some degree her two daughters and two nieces who were her passengers. *See* J.A. 14-15. Three weeks later, the County's application for federal funds was granted. J.A. 24, 82.

Later that month Ignacio and Mariano Guillen—guardians for the minor passengers of Guillen-Alejandre—began settlement negotiations with representatives of her estate. Their settlement ultimately lead to an agreement that the Guillens would nevertheless pursue "joint and several liability" in "any future action against Pierce County."[1] *See* Attach. to

[1] Washington municipalities have little protection in road lawsuits. The state legislature has waived sovereign immunity, *see* RCW 4.92.090; RCW 4.96.010, while the Washington Supreme Court has struck down as unconstitutional tort reform legislation that attempted to place a cap on damage awards. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989). Further, defendants can be held wholly responsible for all damages caused by other party defendants if a fault free plaintiff proves the defendant contributed in some small degree to the accident—no matter how minor. *See e.g. Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994). *See also Bunting v. State*, 87 Wn. App. 647, 654, 943 P.2d 347 (1997) (Court of Appeals criticizes misuse of settlement with a defendant driver in an "attempt to manipulate the system in an effort to obtain payment from the State for [a driver's] fault.") Even some members of the state high court have acknowledged it is "rejecting the traditional scope of a municipality's duty in the design and maintenance of roadways" and "opens the door to . . . unreasonable burdens" on municipalities. *See Keller v. City of Spokane*, 44 P.3d 845, 856 (2002) (Johnson, J. dissenting).

10/23/98 Aff.: Mullineux Dep., at 12 and ex. "1" pp. 1-2 thereto. Accordingly, on August 16, 1996, a law firm retained by Ignacio Guillen wrote to the Pierce County Risk Management Department demanding disclosure of the subject intersection's accident history. *See* J.A. 29. On September 9, 1996, counsel for the County "respectfully den[ied]" this demand and explained that the state's Public Disclosure Act (*i.e.* RCW 42.17.310 (1)(j)) exempts from disclosure any document that would not be available under the rules of discovery, that the requested accident history was compiled for the federal hazard elimination program and that as such it was exempt from discovery under Section 409. *See* J.A. 30-31. Nevertheless, on October 28, 1996, Guillen's counsel expanded the demand to include "all documents that record the accident history that *may have been used in the preparation* of any" federal application. *See* J.A. 32 (emphasis added). Again, the County denied the request and explained that accident history "used in preparation" of applications for Section 152 funds are expressly protected by Section 409 and that this material was compiled by Public Works "for the sole purpose of identifying evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions or for developing highway safety construction improvement projects." *See* J.A. 34.

D. Washington Courts Refuse To Enforce Section 409 Protection

In December of 1996 Ignacio Guillen, as the husband of Guillen-Alejandre, filed a "Complaint to Require Public Disclosure of Documents" which sought materials pertaining to, among other things, the accident history at the subject intersection. J.A. 6-9. Because those materials were gathered and maintained by the County for the purpose of applying for federal highway safety funds, the County moved for summary judgment on the grounds of 23 U.S.C. § 409. *See* J.A. 10-12, 39, 41-42, 75-76; 6/26/97 Mot. for S.J. The trial court however ordered disclosure, *see* Cert. App. "C," explaining:

> [If the] policy of this state is to deny citizens information about which is required by law to be prepared about accidents at intersections, the court of appeals is going to have to tell me that. I just don't think that's the policy of this state. I understand the competing policies, but that's my decision.

See 10/31/97 VT at 8-9. The County immediately obtained review by the Washington State Court of Appeals. *See* 11/14/97 Notice of Appeal.

A few months later, on April 14, 1998, Ignacio Guillen (now on behalf of his daughters) and Mariano Guillen (on behalf of Guillen-Alejandre's nieces) filed a personal injury suit against Ignacio's wife's estate (despite the settlement) and Pierce County seeking joint and several liability for Guillen-Alejhandre's running of the stop sign. *See* J.A. 13-15. Toward this end, plaintiffs served requests for production and interrogatories on the County—seeking both production of the same documents whose availability under the public disclosure act was being appealed as well as disclosure of the *information* contained therein. *See* Cert. Pet. Reply Br., App. "K;" 31 P.3d at 634-35. Plaintiffs also sought disclosure of these same documents from the State Patrol. *See* 10/7/98 Mot. For Prot. Order. The County again objected pursuant to Section 409, *see id.*, and in response plaintiffs moved the trial

court to compel production explaining that "by gathering evidence about the numerous accidents occurring at this intersection, plaintiffs are trying to establish that the *County had notice* of this hazardous condition *and failed to make improvements*." *See* 9/29/98 P's Mem. To Comp., p. 14 (emphasis added). Though the County moved for a protective order to prevent its collection of safety data from being used against it, *see* 1/8/98 Mot. For Prot. Order, the trial court denied the motion and instead granted plaintiffs' motion to compel. *See* Cert. App. "D" & "E." In ordering production, the trial court explained:

> . . . as long as in this state there exists the viable tort of negligent maintenance of hazardous road condition, discovery of governmental entities [sic] *knowledge of accidents* at a particular intersection are [sic] certainly relevant discovery. I don't believe that tort has been immunized or [sic] nor do I believe that information of prior accidents is privileged. I agree with [the trial judge in the then pending public disclosure case] with regard to his reading of [the] federal statute.

See 10/29/98 VT at 3 (emphasis added). *See* also Cert. App. "F;" J.A. 87. The Washington Court of Appeals thereafter granted discretionary review and consolidated review with the pending public disclosure appeal because "the majority of other jurisdictions reporting appear to support the County's interpretation of 23 U.S.C. § 409." *See* Cert. App. "G" at 4-5. Nevertheless, on August 6, 1999, the Court of Appeals essentially affirmed the trial courts' orders compeling disclosure and discovery, holding the County must produce 4 out of the 5 previously compelled categories of documents. The appellate court held these documents were discoverable because—though it found Section 409 protects accident reports "as collected by the road department"—it also decided the statute does not protect those same documents "in the hands" of the County Sheriff because it concluded Section 409 "does not protect reports collected for

other purposes." *See Guillen v. Pierce County*, 96 Wn.App. 862, 871-72, 982 P.2d 123 (1999). Further, though it did not decide the issue "because neither party has raised or briefed [the] question," the Court of Appeals also *sua sponte* concluded:

> It is arguable that Congress lacks the authority to dictate rules of discovery and rules of admissibility for use in state court. In particular, it is at least arguable that Congress lacks the authority to tell this state, or any state, that it "shall not" disclose or admit, in state court litigation, "reports . . . or data compiled or collected" by a state agency (*e.g.* Pierce County's Public Works Department).

Id at 875 n. 26; Cert.App. "H." The County then sought discretionary review to the Washington Supreme Court for both factual[2] and legal[3] error by the Court of Appeals. *See*

[2] The record is undisputed that most accidents at the intersection were investigated *by the state patrol* and *not* the County Sheriff, and there was no evidence the materials were "in the hands" of *any* County agency other than Public Works. *See* Cert. Pet. Reply Br., App. "K" at 4-5; J.A. 47-48, 53-54, 56; 10/8/98 Hamilton Aff. Ex. "C" at 1-2; WAC 136-28 *et seq.* Further, plaintiffs thereafter admitted their intent actually is to obtain "discovery of certain information controlled by the *Pierce County Public Works Department*." 2/7/00 S.Ct.Supp. Br., p. 1 (emphasis added). Plaintiffs' public disclosure demand expressly seeks "all documents that record the accident history that *may have been used in the preparation* of any" federal application—which is assembled *only by Public Works*. J.A. 32. Plaintiffs' likewise admitted discovery in the civil suit was pursued so they could "establish that the County *had notice* of this hazardous condition and *failed to make improvements*," 9/29/98 P's Mem. To Compel., p. 14 (emphasis added)—again, a function only of *Public Works*. Finally, the trial court ordered production precisely because it concluded "governmental entities [sic] *knowledge of accidents* at a particular intersection are [sic] certainly relevant discovery." *See* 10/23/98 VT, at 3.

[3] The County Sheriff and Public Works Departments are not different entities under Washington law: both are simply parts of the single legal entity "Pierce County." *See* Wash. Const. Art. XI §§ 1, 4 & 5; RCW 4.28.080(1). Therefore the federal privilege as interpreted by the Court of

generally 9/16/99 Pet. For Disc. Review. On January 5, 2000, the Washington Supreme Court granted review, *Guillen*

Appeals would be meaningless for any government having both law enforcement and roadway responsibilities. Further, Section 409 states the documents are protected without limiting that protection only to documents *created* by—or requiring they be *exclusively compiled* by—a *particular* "department." Indeed, this honorable Court holds in the public disclosure context that "compiled" includes documents "generated on an earlier occasion and for a different purpose." *John Doe Agency v. John Doe Corp*, 493 U.S. 146, 155 (1989). *See infra* at 39. Finally, the majority of courts before and after the 1995 amendment hold such documents are protected even where they were "available for other uses and purposes" because "the statute's mandatory language requires exclusion of such evidence at trial." *See Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 n. 3 (8th Cir. 1992)(excluding newspaper article and traffic count). *See also e.g. Ex parte Alabama Dept. of Transp.*, 757 So.2d 371, 374 (Ala. 1999) ("In light of the amendment to the language of §409 and Congress' s stated intent behind the amendment," information from accident reports supplied by one state agency could not be compelled from another state agency that later collected it); *Palacios*, 740 So.2d at 102 (raw data such as "accident reports" and accident histories, "whether from the [state Department of Transportation and Development] or the Louisiana Highway Safety Commission's federally funded accident information data base, is privileged.") *Fry v. So. Pacific Trans. Co.*, 715 So.2d 632, 637 (La. App. 1998)(1995 amendment "clarified that the list of exhibits to be excluded should also encompass accident reports . . . ."); *Reichert v. State*, 694 So.2d 193 (La. 1997) (applying statute to documents not created for federal purposes); *Mackie v. Grand Trunk Western R.R. Co.*, 544 N.W.2d 709, 711 (Mich. Ct. App. 1996)("a document that otherwise falls within the ambit of § 409 must be considered inadmissible even though it fulfills a state as well as a federal function."); *Seaton v. Johnson*, 898 S.W.2d 232, 235-37 (Tenn. Ct. App. 1995) (before the 1995 amendment accident reports protected by the "clear weight of authority" under §409 because "all records *used or usable* in identifying, evaluating or planning safety of highway or rail-highway crossings pursuant to Sections 130, 144, and 152 are so immune to examination.") (emphasis added); *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993)(data from accident reports excluded because "state materials *do not fall outside the scope of §409* merely because they are not compiled *solely for federal reporting purposes and are available for other uses*.") (emphasis added).

v. Pierce County, 139 Wn.2d 1015, 994 P.2d 847 (2000), and thereafter requested supplemental briefing on the constitutional issue raised by the Court of Appeals. *See* 4/9/00 Order.

On September 13, 2001, the Washington Supreme Court ruled that the Court of Appeals analysis was "unsound in principle and unworkable in practice," held the documents at issue "would appear to be covered by § 409" and that "Congress clearly intended that the § 409 privilege preempt state laws and court rules." 31 P.3d 644-47. However, it also ruled that private parties have standing to assert "state's rights" even though "state officials oppose the challenge." *Id* at 648. Further, the Court held that Section 409 violates the Tenth Amendment to the United States Constitution because: 1) under the Spending Clause there is "no valid federal interest" that "is reasonably served" by the privilege, *id* at 651; 2) under the Commerce Clause the "privilege lacks the requisite nexus to § 409's *raison d'etre*," *id.* at 654; and 3) under the Necessary and Proper Clause "it was neither 'necessary' nor 'proper' for Congress" to create the privilege. *Id.* Washington's highest court then adopted the minority view of the 1991 version of Section 409 (a misinterpretation the Court admitted Congress intended to overrule by its 1995 amendment) and held only documents "originally 'compiled'—*i.e.* created, composed, recorded" as part of the application process—are protected. *Id.* at 655. Hence the Court held Ignacio Guillen was "entitled to at least four of the five items to which he was denied access," the County was liable for plaintiff's attorney's fees, and that "[i]f this state court has misconstrued the United States Constitution's limitations upon the federal government's power . . . the United States Supreme Court will so instruct, as is its constitutional role under our federalist system of government." *Id.* at 655-56.

SUMMARY OF ARGUMENT

23 U.S.C. Section 409 protects certain documents "compiled or collected" in connection with federal highway safety programs from being discovered or admitted in federal or state suits "for damages arising from any occurrence at a location mentioned or addressed" in those documents. Though *Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628 (2001) holds the statute violates "states rights," such is contrary to this honorable Court's decisions, jeopardizes an essential cooperative federal/state program and undermines the balance between state and national governmental power established by the Constitution.

First, contrary to the state court's analysis, *Guillen* raises no Tenth Amendment issue. Rather, that amendment imposes structural rather than substantive limits on Congress, *see e.g. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985), and in any case does not apply to state court enforcement of federal privileges such as Section 409. *See* e.g. *Printz v. United States*, 521 U.S. 898, 928-29 (1997). Further, "states rights" cannot be asserted by private individuals where their state's legislative and executive branches expressly approve and accept the benefits and terms of the challenged federal statute. *See Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939).

Second, the *Guillen* decision wrongly strikes down Section 409 despite the fact it falls well within Congress' enumerated powers. Under the Spending Clause, Section 409 honors state sovereignty because compliance with the underlying federal program "remains the prerogative of the States not merely in theory but in fact," *see South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987), and the citizens of Washington have made the ultimate decision through their state legislature, state executive and state delegation to Congress that they accept the federal protection and terms of that federal statutory scheme. *See supra* at 3, 6 & 8. Further, the privilege

"is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds)." *See e.g. Palacios v. Louisiana and Delta Railroad*, 775 So.2d 698, 703 (La.App. 2000). Under the Commerce Clause there admittedly is "a sufficient nexus . . . between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole,'" *Guillen*, 31 P.3d at 654 (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n. 17 (1981), and the entirety of such a scheme is valid "even if some of its provisions were not directly related to the purpose of fostering interstate commerce." *FERC v. Mississippi*, 456 U.S. 742, 757 n. 22 (1982). In any case Section 409 is so "directly related" because without it information upon which the cooperative state traffic safety program relies "will be jeopardized." *See Palacios v. Louisiana and Delta Railroad Inc.*, 740 So.2d 95, 98 n.6 (La. 199) (quoting amicus brief in *Ex parte Alabama Highway Dept.*, 572 So.2d 389). Indeed, the protected data exists in its present form expressly because of the federal statutory scheme. *See* WAC 136-28-010. Finally, under the Necessary and Proper Clause, the state court cannot strike down Section 409 simply because it deems the privilege unnecessary. Rather, "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *See Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963).

Accordingly, the Supremacy Clause requires state courts to enforce Section 409 as written. The language, history and purpose of that statute do not allow discovery and admission of the documents ordered to be produced here. Further, such considerations make clear the statute not only protects these documents and the fact they were collected, but also protects against the forced disclosure from states or third parties of the information contained within those collected documents. *See*

e.g. Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 160 (7th Cir. 1992); *Rodenbeck v. Norfolk and Western Ry. Co.*, 982 F.Supp. 620, 622-25 (N.D. Ind. 1997).

ARGUMENT

A. "States Rights" And The Tenth Amendment Are Not At Issue.

In sustaining a "federalism challenge" to 23 U.S.C. Section 409, the Washington Supreme Court in *Guillen v. Pierce County* declares the federal statute unconstitutional under the Tenth Amendment. 31 Wn.2d at 648 (citing "a renewed commitment to enforcing the principle of dual sovereignty implicit in the American constitutional framework and made explicit in the Tenth Amendment.") *See* also *id.* at 656 (noting the majority holds "§ 409 exceeds Congress' authority under the Tenth Amendment") (Madsen, J., concurring). Of course, plaintiffs did not in the first instance "challenge" the statute on "federalism," Tenth Amendment, or any other supposed Constitutional ground, but had those issues thrust upon them by Washington's appellate courts. *See* 31 P.3d at 646-47 (limits of Congressional power "raised by the Court of Appeals itself in the final footnote of its *Guillen* opinion."); 96 Wn.App. at 875 n. 26 ("neither party has raised or briefed" constitutionality.) *See* also 4/9/00 Order. Nevertheless, this case does not concern "state rights" because the Tenth Amendment is inapplicable.

1. *Tests For Tenth Amendment Violation Are Not Met*

First, this Court has not overruled its decisions holding that "Tenth Amendment limits on Congress' authority to regulate state activities . . . are *structural, not substantive*--i.e., that States must find their protection from congressional regulation *through the national political process, not* through judicially defined spheres of unregulable state activity." *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (emphasis

added). *See also Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) ("the fundamental limitation that the constitutional scheme imposes . . . is one of process rather than one of result.") Hence, where "the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." *See Baker*, 485 U.S. at 513. *See also Garcia*, 469 U.S. at 554. Here, as in *Baker*, plaintiffs cannot claim their state "was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." 485 U.S. 513. *See also e.g. Claypill v. Miss. Pac. R.R. Co.*, 793 S.W.2d 139, 141 (Mo. 1990) ("Appellant's tenth amendment argument fails" against §409 because "there is no argument that Missouri has been deprived of any right to participate in the political process.") Indeed, the 1995 amendment to Section 409 struck down by the Washington court was enacted with the help and support of Washington's Congressional delegation. *See supra* at 6. Because Section 409 is in every way a *benefit* and not a *burden* to states—it was enacted by their representatives "in the national political process" to *protect* them and is enthusiastically *used by* them—numerous other states also have understandably appeared as Amici in support of reversal. *See* Cert. Amicus Brief of Louisiana; Cert. Amicus Brief of Alaska, et al. Further, contrary to the Washington court's disregard for any federal interest in Section 409, nothing in this Court's decisions "or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." *Baker*, 485 U.S. at 513.

Additionally, this Court's more recent treatment of alleged Tenth Amendment violations also is not met here because Section 409:

> . . . does not require the States in their sovereign capacity to regulate their own citizens. The [statute] regulates the States as the owners of databases. It does not require the [State] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Reno v. Condon, 528 U.S. 141, 151 (2000) (federal protection of state drivers license data unobjectionable under Tenth Amendment.) The Tenth Amendment does not bar state judicial enforcement of the federal evidentiary privilege of Section 409 because such only operates on *state judges* to prevent *their* use of court compulsion to *compel states* to produce and use data protected for the benefit of that state.

2. *Tenth Amendment Does Not Allow State Courts To Reject Federal Prescriptions*

Second, whatever limitation the Tenth Amendment is deemed to impose on Congressional authority, it does not bar the *enforcement* of federal privileges in *state courts*. Rather, this Court holds *under the Tenth Amendment*:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, [citations omitted], it may *require state courts* . . . "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power." [Citation omitted].

Alden v. Maine, 527 U.S. 706, 752 (1999) (emphasis added). *See also Printz v. United States*, 521 U.S. 898, 907 & 935 (1997) ("state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause"); *New York v. United States*, 505 U.S. 144, 178-79 & 188(1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."); U.S. Const. Art. VI, cl. 2 ("The Laws of the United States . . . Shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding") (emphasis added). Here both

Washington's legislative and executive branches accept the Section 409 privilege, and enforcing such a discovery and evidentiary privilege undeniably "relate[s] to matters appropriate for the judicial power."

Indeed, *FERC v. Mississippi*, 456 U.S. 742, 760 (1982) rejects a Tenth Amendment challenge to federal legislation that requires state "authorities to adjudicate" pursuant to a federal statute because such "is the very type of activity customarily engaged in by the" adjudicatory entity there involved. As this Court there noted:

> Any other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation, *cf. Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-341 (1816), and the congressional determination that the federal rights granted by [federal statute] *can appropriately be enforced through state adjudicatory machinery*. Such an approach, *Testa [v. Katt*, 330 U.S. 386, 389 (1947)] emphasized, "flies in the face of the fact that the States of the Union constitute a nation," and "disregards the purpose and effect of Article VI of the Constitution."

456 U.S. at 760-61 (emphasis added). In that Congressional *abolition* of a certain type of state tort by a mere *federal regulation promulgated pursuant to 23 U.S.C.* has been held constitutional, *see Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000) (regulation enacted under 23 U.S.C. Sec. 130 preempted state tort action for negligent maintenance of grade crossing), it is difficult to understand how 23 U.S.C. Section 409's express *statutory provision* only of a discovery and evidentiary *protection* in a *specific and limited type* of state tort can be unconstitutional under the Tenth Amendment or any other constitutional provision.

3. *Plaintiffs Cannot Assert "States Rights"*

Finally, individuals simply lack standing to assert the Tenth Amendment absent their state or its officials. To the

extent the *Guillen* case relies on principles of "*state* sovereignty," *see e.g.* 31 P.2d at 655 (emphasis added), a plaintiff "generally must assert his *own* legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939), this honorable Court held that "absent the states or their officers, [individuals] have no standing . . . to raise any question under the [tenth] amendment." Here Washington State is not only absent from any challenge to Section 409, but has actively joined as amicus *in support of Section 409's constitutionality* in both the state court and—along with a dozen other states—in this Court. *See* 10/24/00 Wash. Amicus Br.; Cert. Amicus Br. Of Alaska *et al.* It has accepted and administered Section 409's benefits, *see e.g.* J.A. 21-23, 40; RCW 47.04.050-.070, and its Congressional delegation helped enact Section 409 to begin with. *See supra* at 6. The Washington court however refuses to consider such precedent or facts and instead expressly grants plaintiffs "standing" to raise—or, as here, have the *court raise for them*—such "federalist grounds, even when not joined by a state government." 31 P.3d at 648. The state court justifies doing so because other courts have "explicitly or implicitly" allowed Tenth Amendment challenges by individuals and because "dicta" from *New York v. United States*, 505 U.S. at 181-82, states that "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." 31 P.3d at 648.

However, the cases cited by *Guillen* as "explicitly or implicitly" allowing individuals to make Tenth Amendment challenges, 31 P.3d at 648, either are decisions of this Court that *do not* discuss standing *and* predate *Tennessee Electric Power Co.*, *see Chas C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937), or are exclusively Eleventh Circuit cases which themselves question the correctness of the position cited. *Compare*

Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 n. 6 (11th Cir. 1992)("admitted doubts" that individuals "have standing to advance this Tenth Amendment claim."); *Atlanta Gas Light Co. v. U. S. Dept. of Energy*, 666 F.2d 1359, 1368 (11th Cir. 1982) ("express[ing] our uncertainty about whether the petitioners have standing to raise the Tenth Amendment question.") *with Nance v. Environmental Protection Agency*, 645 F.2d 701, 716 (9th Cir.1981) ("insofar as the Tenth Amendment is designed to protect the interest of states qua states," standing of private party "may be seriously questioned"); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761-62 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981) (only state attorney general has standing to assert Tenth Amendment challenge and it "flatly contradicted" plaintiff's claims); *Vermont Assembly of Home Health Agencies Inc. v. Shalala*, 18 F.Supp. 2d 355, 370-71 (D.Vt. 1998) (no Tenth Amendment standing where state opposed).

As to *Guillen*'s reliance on *New York v. United States*, there the *only* plaintiff *was the state*—an individual's standing was never discussed, indeed the word "standing" is nowhere used—and the cited statement was only made in rejecting an assertion the state had *waived* its Tenth Amendment right by lending its "support to the Act's enactment." Nowhere does *New York* discuss—much less overrule—this Court's holding in *Tennessee Electric Power Co.* Rather, this Court has made clear that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Courts of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989).

Washington courts stand alone in holding this eagerly accepted federal benefit to states is unconstitutional because it is inconsistent with "the policy of this state." *See* 10/31/97 VT at 9. *See also* 96 Wn.App. at 875 n. 26; 31 P.3d at 655. However, this Court has made clear no state court can refuse to enforce federal law on the ground "the act of Congress is not in harmony with the policy of the State . . ." *Testa*, 330 U.S. at 392-93. For these reasons, there is no basis for declaring Section 409 unconstitutional under the Tenth Amendment.

B. Congress' Enumerated Powers Authorize Section 409

In striking down Section 409, the state court did not rely on any supposed constitutional right to court created rules—presumably because this Court has:

> . . . clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). *See* also *Arizona Employers' Liability Cases*, 250 U.S. 400, 419-422 (1919).

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n. 32 (1978)(upholding constitutionality of Congressional imposition of liability ceiling for particular type of tort). *See also e.g. Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)(state common law "no airbag" action statutorily preempted). Rather, the *Guillen* case "evaluate[d] whether Congress acted outside its enumerated powers when it amended 23 U.S.C. § 409 in 1995," 31 P.3d at 649, and concluded "its 1995 amendment of that statute cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government." *Id.* at 655.

In analyzing the constitutionality of a federal statute, this Court holds: "We of course begin with the time-honored presumption that the [federal statute] is a 'constitutional exercise of legislative power.'" *Reno v. Condon*, 528 U.S. at 148 (quoting *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883). *See* also *INS v. Chadha*, 462 U.S. 919, 944 (1983). As demonstrated below, nothing in *Guillen's* analysis of the enumerated powers of Congress comes near to overcoming the presumed constitutionality of Section 409.

1. *Spending Clause Authorizes Section 409 Privilege*

The "Spending Clause," Article I, Section 8, clause 1, empowers Congress to "provide for the . . . general Welfare of the United States," and is held to authorize legislation affecting even state legislatures and executives. Hence, in *New York v. United States*, 505 U.S. at 173, this Court found where Congress "conditioned grants to the States upon the States' attainment of a series of milestones," it acts "well within the authority of Congress under the Commerce and Spending Clauses." Such Congressional "encouragement," as opposed to "compulsion," was held to honor principles of federalism. This is so because "residents of the State retain the ultimate decision as to whether or not the State will comply" so if "a state's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.* at 168. Similarly, in *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) this Court held that "[e]ven if Congress might lack the power to impose a national minimum drinking age directly, . . . encouragement to state action . . . is a valid use of the spending power" because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact."

a. Section 409 Is Part Of Conditional Program

23 U.S.C. Section 409 applies to raw data collected or compiled "pursuant to sections . . . . 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." (Emphasis added). Section 152(a) of Title 23 provides for states to identify hazardous public roads, while Section 152(b) authorizes the federal government to "approve as a project under this section any highway safety improvement project." Likewise, 23 U.S.C. Section 402(k)(4) conditions a state's eligibility for federal aid highway funds on "if" it either "certifies to the Secretary that it has in operation a computerized traffic safety record-keeping system" or "provides . . . a plan . . . for establishing and maintaining a computerized traffic safety recordkeeping system." Hence, under Sections 152 and 402, Congress conditions grants of federal aid highway funds on a state's attainment of the milestone of having a computerized traffic safety record keeping system and using it to identify potentially hazardous roads.

As an additional incentive to do so, Congress under Section 409 protects records so obtained and kept under the program from discovery or admission in suits involving the road in question. *See e.g. Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992) ("the underlying intent of the statute is to 'facilitate candor in administrative evaluations of highway safety hazards,' *and* to prohibit federally required *record-keeping* from being used as a 'tool ... in private litigation.'") (citing *Duncan v. Union Pac. R.R. Co*, 790 P. 2d 595 (Utah App. 1990), *aff'd*, 842 P.2d 832 (Utah 1992) and *Light v. State*, 149 Misc.2d 75, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990))(emphasis added); *Palacios*, 775 So. 2d at 703 ("23 U.S.C. § 409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds.") (emphasis added); *Coniker v. New York*, 181 Misc.

2d 801, 695 N.Y.S.2d 492, 496 (N.Y. Ct.Cl. 1999) (§ 409 arose out of "the Federal Government's decision to *encourage* States to" collect and compile data "by conditioning Federal funding thereon.") (emphasis added). That compliance with Section 152 is "the prerogative of the States not merely in theory but in fact," and encouraging such compliance was the purpose for Section 409, is shown by the fact that this privilege was created because without it highway departments were "reluctant to [compile information to identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." *See* Louisiana App.: 5/4/83 USDOT Memo. *See* also Br. for U.S. as Amicus Curiae at 10, *State of Alabama Highway Dept.*, No. 90-1412. Of course, should a state government *want* their collection and compilation of raw data to be used against them in road suits they can choose not to apply for roadway hazard elimination funds or their attorneys can choose not to assert the privilege in court.

Indeed the statutory scheme of 23 U.S.C. *et. seq.*—of which Sections 152, 402 and 409 are all a part—has been *upheld* by this Court as constitutional under the Spending Clause and given as an example of a proper exercise of Congressional power. *See Dole*, 483 U.S. at 211-12 (23 U.S.C. § 158 imposing national minimum drinking age is constitutional under the Spending Clause). *See* also *Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (conditions imposed on funds apportioned to the states under 23 U.S.C. § 402—which include the §152(e) hazard elimination funds involved here—are valid under Spending Clause). Further, as noted above, in Washington the citizenry has made the ultimate decision through its state legislature, its state executive and state delegation to Congress that they accept the federal protection and terms of Section 409. *See supra* at 3, 6 & 8.

Nevertheless, though the Washington court admits Section 409 is one of the "strings attached" to its state's willing acceptance of federal aid highway funds, 31 P.3d at 651, that court finds such conditions unconstitutional because:

> We find that no valid federal interest in the operation of the federal safety enhancement program is reasonably served by barring the admissibility and discovery in state court of accident reports and other traffic and accident materials and 'raw data' that were originally prepared for routine state and local purposes, simply because they were 'collected,' for, *among other reasons*, pursuant to a federal statute for federal purposes.

Id. However, as demonstrated above, the privilege for such "collected" data serves the essential interest of encouraging state participation in the cooperative traffic safety program. As shown below, not only has every other court considering its purpose so concluded, but so too has the Washington Supreme Court and plaintiffs.

b. "Federal Interest" For Section 409 Well Established

The Washington Supreme Court admits Section "152 requires jurisdictions to 'systematically maintain' complete, *ongoing* collections of all accident related materials and data on 'all public roads,'" 31 P.3d at 646, and that:

> By forcing state and local governments to identify all "public roads" that "may constitute a danger to motorists, bicyclists, and pedestrians," and to rank the most hazardous among them in writing, Congress accorded private tort plaintiffs an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites. In 1987, Congress enacted 23 U.S.C. §409 at least in part to address this problem.

Id. at 641 (emphasis added). The state court further concedes Congress "disagreed with such restricted readings given" prior to Section 409's 1995 clarifying amendment by some

state courts—and now resurrected by *Guillen*—that misapplied the privilege only to documents "created" under the federal program. *Id.* at 644, 655. *See also* 1995 U.S.C.C.A.N. (109 Stat.) 591, and cases cited *supra* at n. 3. Indeed, as the United States informed this honorable Court back in 1991:

> In enacting Section 409, Congress recognized that state highway departments, as well as private entities such as railroads, are *reluctant to compile detailed and accurate information* about highway safety problems if there is a significant risk that *the information will be used against them* in actions for damages arising out of highway accidents.

See Br. for U.S. as Amicus Curiae at 12, *State of Alabama Highway Dept. v. Boone*, No. 90-1412 (U.S. 1991) (emphasis added). *See* also *id.* at 10; *supra* at 5-7.

Hence, both before and after its current language was enacted, Section 409 was intended to "remedy this problem" of municipalities not gathering and retaining data as part of the federal application process out of fear "private tort plaintiffs [would have] an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites." Indeed, Section 409 *rectifies* the harmful expansion of state government tort liability *created* by the record keeping requirement. *See generally* Merits Amicus Br. Of Alaska, *et. al.* Both before and after the 1995 amendment, other courts had no problem recognizing this need to encourage states to *obtain and keep* data is the federal interest behind Section 409's discovery and evidentiary privilege. *See e.g. Palacios*, 775 So. 2d at 703 ("23 U.S.C. § 409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds.") (emphasis added); *Coniker*, 695 N.Y.S. 2d at 496 (§ 409 arose out of "the Federal Government's decision to *encourage States* to" collect and compile data "by conditioning Federal funding thereon."); *Reichert v. State of Louisiana*,

694 So.2d 193, 196 (La. 1997) (quoting *Perkins v. Ohio Dept. of Transp.*, 65 Ohio App. 3d. 487, 584 N.E. 2d 794 (1989), *cause dismissed*, 57 Ohio St.3d 612, 566 NE 2d 673, *rehearing denied*, 58 Ohio St.3d 711, 570 N.E. 2d 281 (1991) ("The interest to be served by such legislation is to *obtain* information with regard to the safety of roadways free from the fear of future tort actions.") (emphasis added); *Harrison v. Burlington Northern Rail Co.*, 965 F.2d 155, 160 (7th Cir. 1992)(quoting *Robertson*, 954 F.2d at 1435)("the underlying intent of the statute is to . . . prohibit federally required *record-keeping* from being used as a 'tool . . . in private litigation.'")

Indeed, this recognized "federal interest" in encouraging states to "obtain information" and conduct "record keeping" also has been expressly upheld as "*reasonably related*" to the accident data privilege and a vital part of the cooperative safety program. As the Solicitor General explained over a decade ago, Section 409 is essential to the highway safety program because otherwise "State and private parties will likely be *deterred from compiling complete and accurate information* about such hazards" and "*information about safety programs*—which depend on information about safety problems supplied by the States and private entities such as railroads—will be *jeopardized*." *See Palacios v. Louisiana and Delta Railroad Inc.*, 740 So. 2d 95, n. 6 (La. 1999) (quoting amicus brief in *Ex parte Alabama Highway Dept.*, 575 So. 2d 389 (Ala.1990), *cert. denied*, 502 U.S. 937 (1991)) (emphasis added).

Other state courts long after the 1995 clarifying amendment likewise have explained:

> Congress has determined that the effect of the prohibition would be to enhance the safety of the nation's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis, and that this goal

> outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries.

Coniker, 695 N.Y.S.2d at 495. Indeed, other state courts find Section 409 constitutional under the Spending Clause because:

> [N]obody made [the state] get into the . . . safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program—in exchange for ninety percent federal funding—and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto.

Sawyer v. Illinois Central Gulf Railroad Co., 606 So.2d 1069, 1074 (Miss. 1992). Hence, as yet another state court explains, Section 409 is valid under the Spending Clause because:

> Congress' intrusion, in this instance, however, is constitutionally permissible because [the state's] participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of "[providing] for the general welfare" as provided in U.S.Const. Art. I, §8, cl. 1 ("spending power"); because it is clear that participation in the funding program requires acquiescence to the intrusion; and finally, because *the intrusion is related to a valid federal interest* (inasmuch as 23 U.S.C. §409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds.) *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 2796, 97 L. Ed. 2d 171 (1987).

See Palacios, 775 So.2d at 703 (quoting *Martinolich v. Southern Pac. Transp.*, 532 So.2d 435, 438 (La.Ct.App. 1988), *cert. denied*, 490 U.S. 1109 (1989))(emphasis added).

c. *Guillen* Defeats Reasonably Related Federal Interest

The Washington court's refusal to enforce Section 409 obviously defeats this well established federal interest in state participation in the safety program. Indeed, even plaintiffs' mistakenly narrow interpretation of Section 409—*i.e.* that it somehow does not extend to "keeping a tort plaintiff from using raw data about a traffic intersection that is kept as a matter of course under state law," Br. In Opp. To Cert. at 25—admits to a federal interest that is demonstrably defeated by *Guillen*. In opposing the grant of certiorari, plaintiffs admitted:

> [K]eeping from the jury the fact that the state compiled and collected accident information regarding a certain intersection for purposes of seeking federal funds is appropriate. It is appropriate because if a party in a tort action is allowed to admit into evidence that the state was gathering information about a certain intersection then a jury could reach an inference that the state admitted the intersection was dangerous. This was the danger in which the federal government has an interest.

Id. Using protected documents to "reach an inference that the state admitted the intersection was dangerous" is *exactly* what plaintiffs seek and *exactly* why the trial court compelled production. Plaintiffs' public disclosure demand expressly seeks "all documents that record the accident history that may have been *used in the preparation* of any" federal application. *See* J.A. 32. Likewise, plaintiffs' civil discovery request was described by them as an attempt to use Public Work's collection of such data to "establish that the County had *notice of this hazardous condition and failed to make improvements*." 9/29/98 P's Mem. To Compel., p. 14 (emphasis added). Indeed, the trial court ordered production *precisely because* it concluded "*governmental entities [sic] knowledge of accidents* at a particular intersection are [sic] certainly relevant discovery." *See* 10/23/98 VT, at 3.

Section 409 therefore is a valid exercise of Congressional Spending Clause power that is undermined by *Guillen*.

2. *Commerce Clause Also Authorizes Section 409*

The "Commerce Clause," Article I, Section 8, clause 3, empowers Congress "[t]o regulate Commerce ... among the several States." Such has been held to extend to regulating "the use of the channels of interstate commerce," to regulating and protecting "the instrumentalities of interstate commerce, . . . even though the threat may come only from intrastate activities," and to regulating "those activities having a substantial relation to interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Here the Washington court admits such encouragement of states to participate in enhancing the safety of roadways across the nation pursuant to Sections 152, 402 and 409 favorably effect "the instrumentalities of interstate commerce" as well as has "a substantial relation to interstate commerce." *See* 31 P.3d at 654 ("Certainly, a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole.'") (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n. 17 (1981); Br. In Opp. To Cert., at 26-27. *See* also *Claspill v. Miss. Pac. R.R. Co.*, 793 S.W.2d 139, 141 (Mo.), *cert. denied*, 498 U.S. 984 (1990) (challenge to §409 rejected because under Commerce Clause States "are not to create 'judicially defined spheres of unregulable state activity.'")

However, the Washington Supreme Court concludes Section 409 is not an "integral part" of the regulatory program because "we fail to see how those vital federal purposes are reasonably served" by the protection of "materials and data that would exist even had a federal safety enhancement program never been created . . . ." *See* 31 P.3d at 654 (citing *Hodel*, 452 U.S. at 329 n. 17). Such a conclusion misapplies this Court's test in *Hodel v. Indiana*, misstates the purpose of

Section 409 and misunderstands the nature of the "materials and data" collected and compiled here.

a. "Direct Relation" To Federal Goal Not Required

In *Hodel*, appellees similarly asserted—as does the state supreme court here—"that a number of the specific provisions challenged in this case cannot be shown to be related to the congressional goal . . . ." 452 U.S. at 329 n. 17. Yet this Court replied:

> This claim, even if correct, is beside the point. A complex regulatory program such as established by the Act can survive a Commerce Clause challenge *without a showing that every single facet of the program is independently and directly related* to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id. (emphasis added). *See also FERC*, 456 U.S. at 757 n. 22 (federal statute valid under Commerce Clause "even if some of its provisions were not directly related to the purpose of fostering interstate commerce"). Hence: "A court may invalidate legislation enacted under the Commerce Clause *only* if it is clear that there is . . . *no reasonable connection* between the regulatory means selected and the asserted ends." *FERC*, 456 U.S. at 754 (quoting *Hodel*, 452 U.S. at 323-324) (emphasis added). However, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel*, 452 U.S. at 331-332. Here, no such showing is possible—much less ever attempted by the state court.

Nevertheless, even if this Court's constitutional jurisprudence were refashioned to now require "every single facet of the program" to be "independently and directly related to a valid congressional goal," Section 409 is so related. *See supra* at 27-31.

b. Data At Issue Exists Because Of Federal Law

Finally, it is neither true nor relevant that supposedly in Washington the protected "materials and data [still] would exist even had a federal safety enhancement program never been created . . . ." *See* 31 P.3d at 654. Rather, in Washington, data such as police accident reports contain the information required by state regulations, and those regulations were enacted in *express compliance with the federal highway safety act. See e.g.* WAC § 136-28-010. *See also* Merits Amicus Br. Of Alaska, *et al.* Further, even had the information contained in Washington state's accident reports been totally independent of federal highway safety standards, it has been recognized as "strained and illogical" to argue such would preclude enforcement of Section 409:

> Apparently, claimant would have this court hold that because the State of New York's realization that systematic analysis and prioritization of accident locations was a worthwhile undertaking predated the Federal Government's decision to encourage States to so act (by conditioning Federal funding thereon), section 409, in effect, does not apply in this State, at least with respect to material "compiled or collected . . . pursuant to section[] . . . 152." There is no logical basis for such a strained and illogical interpretation of congressional intent, and the court declines to adopt claimant's reasoning. . . . . [N]othing in the language of § 409 supports the contention that it was only intended to apply to those states that were not enlightened enough to adopt such a program without the federal carrot-and-stick, and indeed its purpose . . . is equally fostered regardless of whether a particular state decided to initiate such a program before or after the federal government became involved.

Coniker, 695 N.Y.S.2d at 496. Therefore Section 409 also is a valid Congressional exercise of its Commerce Clause power.

3. *Necessary And Proper Clause Authorizes Section 409*

The "Necessary and Proper Clause," Article I, Section 8, clause 18, empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." However, the only consideration the Washington court gave this enumerated power was to summarily conclude "that it was neither 'necessary' nor 'proper' for Congress in 1995 to extend that privilege to traffic and accident materials and raw data created and collected for state and local purposes, simply because they are also collected and used for federal purposes." 31 P.3d at 654-55.

First, as shown above, the 1995 amendment did not "extend" the Section 409 privilege but was a "*clarification* . . . included in response to recent State court" misinterpretations of Section 409. *See* 1995 U.S.C.C.A.N. (109 Stat.) 59; *Reichert*, 694 So.2d at 198 ("clarification was added in response to recent State court decisions, . . . that in the view of Congress, misinterpreted the term 'data compiled.'") (emphasis added); cases cited *supra* at n.3. Second, as also shown above, the Washington court's refusal to acknowledge the essential role of Section 409 in the federal statutory scheme is demonstrably erroneous. *See supra* at 27-31. Third, as demonstrated below, the Necessary and Proper Clause precludes a court from striking down federal legislation simply because a court would have chosen a different means to address a valid federal concern.

Almost two hundred years ago Chief Justice Marshall explained concerning the Necessary and Proper Clause:

> 1st. The clause is placed among *the powers of Congress*, *not* among the limitations on those powers.

> 2nd. Its terms purport to *enlarge*, not to diminish the powers vested in the government. It purports to be an *additional power*, not a restriction on those already granted.

McCulloch v. Maryland, 4 Wheat. 316, 419-20 (1819) (emphasis added). This Court therefore long ago concluded that though "the powers of the government are limited, and that its limits are not to be transcended:"

> [T]he sound construction of the constitution must allow to the national legislature that *discretion*, with respect to the *means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id at 421 (emphasis added). Therefore, it is for *Congress* to "'exercise its best judgment *in the selection of measures*, to carry into execution the constitutional powers of the government,' and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.'" *Id* (emphasis added). *See also e.g. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976) (that another "scheme would have been wiser or more practical under the circumstances *is not a question of constitutional dimension*.") (emphasis added); *Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963)("Under the system of government created by our Constitution, *it is up to legislatures, not courts, to decide on the wisdom and utility of legislation*.")(emphasis added).

As one state court explained in regard to Section 409:

> Our system of government assigns the balancing of such competing interests to the legislative branch, and the role of this court is not to second guess the analysis that

> resulted in this evaluation, or to attempt, in a particular case, to find a way around it, but rather to effectuate congressional intent.

Coniker, 695 N.Y.S.2d at 495. The Washington court, in violation of this principle, *substitutes its judgment* for *Congress' "discretion*, with respect to the means by which the powers [the constitution] confers are to be carried into execution." Though the Washington court relies on Justice O'Connor's dissent in *Dole* to argue Congress cannot condition federal funds on what *Guillen deems* "an attenuated or tangential relationship to highway use or safety," 31 P.3d at 650 n. 34 (citing *Dole*, 483 U.S. at 215) (O'Connor, J., dissenting), the *Dole* court actually *upheld* the constitutionality of the statute and found "any such [undetermined germaneness] limitation on conditional federal grants [was] satisfied" because a uniform drinking age requirement was sufficiently related to the main goal of promoting highway safety—even though it broadly prevented under-aged persons from drinking whether or not they would be driving. *See* 483 U.S. 209 n. 3. Though the protection of collected and compiled raw accident data has been shown *directly related* to the need to encourage state participation in the highway safety program and to rectify its impact on municipal liability, the federal privilege as currently written is *at least* as "germane" to highway safety as the minimum drinking age upheld in *Dole* and *at least* as within Congress' discretion under the Necessary and Proper Clause. *See also* Merits Br. Of *Amicus* Amer. Ass. Of R.R.

C. The Supremacy Clause Requires Enforcement Of Section 409 As Written

By its amendment in 1995, Congress provided in Section 409:

> 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 federal or state court 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.

In their opposition to certiorari, plaintiffs argued the *Guillen* case was mistaken only to the extent "it failed to properly recognize the scope of the Act" and that—as the *Guillen* concurrence argued—the constitutional issues could be avoided by reading Section 409's protection of raw data collected for cooperative state traffic safety purposes as inapplicable where that raw data is also collected "as part of regular state requirements." Resp. Br. In Opp., at 19. *See* also 31 P.3d at 656 (Madsen, J., concurring). However, such neither seeks nor finds support in the rules of statutory construction, the statute's actual language, legislative history or the obvious purpose of Congress.

1. *Section 409 Is Unambiguous And Clearly Applies Here*

This Court holds "the canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). The *Guillen* concurrence however identifies *no* "ambiguity" in Section 409—much less one that supports excluding from its protection raw data where it supposedly also is collected "as part of regular state requirements."[4]

[4] Neither plaintiffs nor the concurring opinion identify any "*state* requirement" that *Pierce County* collect or compile the raw accident data in question.

Indeed, though the "starting point in every case involving construction of a statute is the language itself," *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)(*quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), the concurrence in *Guillen* advocates its alternative reading without bothering to address Section 409's actual language. *See* 31 P.3d at 657.

a. Language of Statute Mandates Protection

Section 409's language nowhere states that protected data must be collected or compiled "solely," "only," or "exclusively" for the specified "federal" purposes. Indeed, the statute does not make provision for *any* exception to the privilege—as do for instance the Federal Rules of Evidence when otherwise privileged evidence is "offered for another purpose." *See e.g.* FRE 407, 408, 412. Rather, Section 409 unambiguously provides that so long as "data [is] compiled or collected for the purpose" specified in the statute, it "*shall not be subject to discovery or admitted into evidence* in federal or state court . . . in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." 23 U.S.C. § 409 (emphasis added). Accordingly, other courts acknowledge Section "409's rather expansive scope," *Rodenbeck v. Norfolk and Western Ry. Co.*, 982 F.Supp. 620, 623 (N.D. Ind. 1997), and hold Section "409 provides a fairly *broad exclusion* . . . ." *Robertson*, 954 F.2d at 1435 (emphasis added). *See also Harrison*, 965 F.2d at 159 ("§409 withdraws the broad latitude of discretion ordinarily allowed judges in evidentiary matters . . . .")

In fact, in a case addressing privileges from disclosure, this Court specifically held "the word 'compile' naturally . . . refer[s] even to the process of gathering at one time records and information that were *generated on an earlier occasion and for a different purpose*." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153-54 (1989) (exemption under the

Freedom of Information Act for records "compiled for law enforcement purposes" included documents not originally so compiled) (emphasis added). Indeed, the Washington Supreme Court's own precedent similarly conflicts with any other interpretation of "compiled." *See Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712, 715 (1997) ("Documents that were created for one 'purpose . . . were not disqualified from being 'compiled' again later for a different purpose.'") There simply "is no logical basis" for the concurring opinion's interpretation because, as noted above, "nothing in the language of §409 supports the contention that it was only intended to apply to those states that were not enlightened enough to adopt such a program without the federal carrot-and-stick . . . ." *Coniker*, 695 N.Y.S.2d at 496.

b. Legislative History Mandates Protection

Nevertheless, even if this Court were to look behind the plain language of Section 409 to its legislative history, no support exists for a reading that excludes raw data when it is also available for state purposes. Congressional intent that the statute *not* be narrowly interpreted is reflected in its repeated willingness to amend Section 409 whenever even a minority of courts attempted a narrow construction. *See* supra at 5-6. More importantly, the alternative reading proposed by the *Guillen* concurrence *directly conflicts* with Congress' express 1995 statement of intent to overrule just such misinterpretations. There Congress explained the current language was enacted "in response to recent State court interpretations of the term 'data compiled'" and that by the amendment it "intended that *raw data* collected *prior* to being made part of any formal or bound report *shall not be subject to discovery or admitted into evidence* in a Federal or State court proceeding . . . ." *See* 1995 U.S.C.C.A.N. (109 Stat.) 59 (emphasis added). Accordingly, such courts as the Louisiana Supreme Court—the same court that *had been* part of the minority by its decision in *Wiedeman v. Dixie Electric*

Membership Corporation, 627 So.2d 170, 172 (La. 1993) that held raw data underlying funding applications was discoverable—thereafter *reversed itself*:

> On November 28, 1995 section 409 was amended to include the words "or collected" after "compiled" *to effectively eliminate the admissibility of '[a]ccident reports, traffic counts, and other raw data collected* by the Department' allowed by the holding in *Wiedeman*. This clarification was added in response to recent State court decisions, like *Wiedeman*, that in the view of Congress, misinterpreted the term 'data compiled.'

Reichert, 694 So.2d at 198 (emphasis added). In fact, the majority of courts even *before* and certainly *after* the 1995 amendment determined Congress had *always* intended to protect raw data created for other purposes and *then* collected for cooperative traffic safety use. *See* cases cited *supra* at n. 3.

c. Legislative Purpose Mandates Protection

Further, the misinterpretation advocated by plaintiffs and the *Guillen* concurrence not only contradicts the clear language and legislative history of Section 409, but *defeats* its purpose. As previously demonstrated, by protecting raw data collected and kept for highway safety purposes, "§ 409 *encourages participation* in a scheme that ensures, by prioritization, deliberative spending of federal funds." *Palacios*, 775 So. 2d at 703 (emphasis added). *See also supra*, at 27-31. Indeed, the language that became Section 409 was first proposed by the USDOT after it learned state "highway departments are reluctant to [compile information to identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." *See* Louisiana App.: 5/4/83 USDOT Memo; Br. for U.S. as *Amicus Curiae* at 10, *State of Alabama Highway Dept.*, No. 90-1412. Any interpretation of Section 409 that does not protect accident raw data originally created for state purposes places Pierce County and other municipalities in a

far worse position than if they had never participated in the federal program. Because the County seeks to obtain federal highway safety funds, its Public Works has become a central location for *all* accident history concerning its roads created by *all* law enforcement—such as the unaffiliated *State* Patrol—that it would not otherwise have collected and compiled. *See* Cert. Pet. Reply Br., App. "K" at 4-5; J.A. 47-48, 53-54, 56; 10/8/98 Hamilton Aff, Ex. "C" at 1-2; WAC 136-28 *et seq*. Absent Section 409 protection, this not only provides plaintiffs a previously unavailable "one stop shopping" for all their discovery needs, but exposes the County to the assertion—being actively pursued here by plaintiffs—"that the County *had notice* of this hazardous condition and *failed to make improvements*." 2/7/00 Supp. Br., at 1 (emphasis added). *See also* 9/29/98 P's Mem. To Compel. at 14; 10/23/98 VT at 3; Merits Amicus Br. Of Alaska, *et al*.

Likewise, the interpretation advocated by plaintiffs and the *Guillen* concurrence also defeats Congressional intent by placing Section 409 on a collision course with itself. The assertion a government may not invoke the privilege where otherwise protected data is also held for purposes other than the highway safety act—such as the *Guillen* case erroneously *supposed*[5] is done by the County Sheriff for law enforcement purposes, 31 P.3d at 658—makes the privilege inapplicable to *every* governmental entity that has both maintenance and law enforcement responsibilities over roadways. Hence, such an interpretation *excludes* most, if not all, states and local municipalities from the privilege and makes Section 409 meaningless. This obviously defeats Section 409's underlying purpose of encouraging participation in the safety program.

[5] Again, the record instead demonstrates most of the accidents in question were investigated by the State Patrol and not the County Sheriff, and that no County entity other than Public Works collected those reports. *See supra* at n. 2.

Finally, the interpretation proposed by plaintiffs and the *Guillen* concurrence fails to acknowledge that the purpose of Section 409—*i.e.* encouraging states to fully participate in the cooperative safety program and its record keeping functions (that are "basic to ultimate success" of the entire program) and to remedy its creation of liability problems for municipalities—is affirmatively *advanced* by protecting raw data even where it also is collected by its law enforcement agencies. A road department is encouraged to participate in the program *also* because its state or county will be protected from having that data used against it no matter in whose governmental hands plaintiffs also can find those documents. Such an incentive to participate in the program is especially compelling where, as the *Guillen* majority notes, such "distinctions" as in what governmental "hands" the documents are found "are already being rendered meaningless by the electronic revolution underway." 31 P.3d at 646.

The interpretation proposed by the *Guillen* concurrence *does not* protect and *encourage* the municipal collection and keeping of accident raw data as Congress intended but instead *punishes* and *discourages* states and municipalities from participating in the hazard elimination program. Again, as the United States has noted, absent the privilege "State and private parties will likely be deterred from compiling complete and accurate information" and the vital supply of such information "will be jeopardized." The Supremacy Clause does not allow a state court to so misinterpret and undermine the purpose of Section 409 simply because it disagrees with how Congress chose to promote that goal. As a state court noted:

> Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution

and laws of this state, having to do with rule-making power, inherent authority, . . . or anything else.

See Sawyer, 606 So.2d at 1073-4. *See also City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996)(courts "[u]niformally . . . have held that section 409 is applicable in state court" because "[t]o hold otherwise defeats a significant purpose of the federal act and cannot be justified in light of the Supremacy Clause."); *Seaton*, 898 S.W.2d at 237 ("If the forgoing is deemed to be unjust the remedy lies with Congress" citing Art. VI, § 2). In short, neither plaintiffs nor the *Guillen* concurrence can avoid reversal by arguing Section 409 does not really mean what it says.

2. *Section 409 Also Protects Against Forced Disclosure Of Information Contained Within Protected Documents And Discovery Of Those Documents From Third Parties*

The result sanctioned by both the *Guillen* majority and concurrence enables plaintiffs in the tort action not only to obtain privileged *documents* and use them to argue "the County had *notice*" of this data but "failed to make improvements," but also to compel answers to interrogatories that can *only* be derived by the County from those privileged accident reports (*i.e.* accident dates, persons involved in accidents, identities of any Sheriff's Deputies who investigated accidents at the intersection and of other County employees who "know" about any accident even if "gained indirectly such as reading reports or other documents.") *See* Cert. Pet.'s Reply Br. App "K" at 3-5 (interog. #s 3-6); 12/07/98 Pet. For Disc. Rev. at 21; 9/16/99 Pet. For Disc. Rev. at 18; 2/4/00 App's Sup. Br. at 17. The result in *Guillen* also enables plaintiffs to enforce their subpoena to the Washington State Patrol and obtain most of these same protected documents. *See* 10/7/98 Mot. For Prot. Order; 10/23/98 VT at 4; Cert.App. "D;" 12/07/98 Pet. For Disc. Rev. at 22; 9/16/99 Pet. For Disc. Rev. at 14-15; 2/4/00 App's Sup. Br. at 13-14.

However, Section 409 and state and federal case law interpreting it preclude such transparent attempts to circumvent its protection.

a. Section 409 Protects Data Within Documents

Section 409 expressly bars discovery and admissibility of not only the listed documents but also "data." The common definition of "data" is: "*things known* or assumed; *facts* or figures *from which* conclusions can be drawn." *Webster's New World Dictionary* 374 (1966) (emphasis added). Hence Section 409 also bars disclosure of *facts within* the collected documents *from which* road departments draw their conclusions. Further, allowing discovery and use in trial of information contained within the otherwise "privileged" documents hardly fulfills the statute's purpose of encouraging states to collect such data but instead again *punishes* the County for participating in the federal program. Hence, a state Supreme Court in *Sawyer v. Ill. Cent.Gulf R.R. Co.*, 606 So.2d at 1073, holds a similar argument that Section 409 "exclude[s] the actual documents, but allow[s] witnesses to testify to their contents . . . is specious." Similarly, a federal circuit court in *Harrison v. Burlington Northern R.R. Co.*, 965 F.2d at 160, holds that "allowing the witnesses to testify as to the content of [material protected by Section 409] would have circumvented the purposes of [Section 409]." Yet again, in *Shots v. CSX Transp.*, 887 F.Supp. 204, 206 (S.D. Ind. 1995), still another federal court finds that where the documents in question are protected by Section 409, any "witness' testimony about the contents of the file is also protected by the statutory privilege."

Section 409 simply requires plaintiffs to prove their claim against the County "arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data" without using those "reports, surveys, schedules, lists *or data*" against the County that it collects and compiles for the purpose of participating in the cooperative safety

program. *Rodenbeck*, 982 F.Supp. at 623. Section 409 does "not preclude testimony, expert or otherwise" so long as it "come[s] from sources apart from" the protected documents. *Id* at 625 (protecting § 409 documents *and testimony based thereon*). *See also Hester v. CSX Transportation, Inc.*, 61 F.3d 382, 387 (5th Cir. 1995) (expert could testify regarding his "personal inventory of the traffic volume" where he did not rely on information collected by the state).

b. Section 409 Protects Documents When Also Held By Third Parties

As to plaintiffs' similar attempt to circumvent the statute by obtaining the same protected documents from the *unaffiliated State* Patrol, Section 409 still remains a bar. As noted above, in Washington even accident reports retained by the State Patrol contain information generated solely for cooperative traffic safety purposes pursuant to the federal highway safety act. *See* WAC § 136-28 *et seq*. *See generally also* Merits Amicus Br. Of Alaska, *et al*. Further, as also previously noted, Section 409 has a "rather expansive scope," *Shots*, 887 F.Supp. at 205, and provides that so long as the "data [is] compiled or collected for the purpose" specified in the statute, it "*shall not* be *subject to discovery or admitted into evidence* . . . in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." 23 U.S.C. § 409 (emphasis added). Hence, in *Rodenbeck v. Norfolk and Western Ry*, 982 F.Supp. at 621-22, plaintiffs obtained documents protected by Section 409 from "a third party during discovery" and defendants sought both to exclude those documents and prohibit any further discovery based on them. Though plaintiff argued Section "409 must be construed restrictively" and in "so doing, she indicates that the documents were supplied to her counsel in response to a discovery request directed to" other governmental entities, *id*. at 622, the court found the documents were protected by

Section 409. *Id*. at 625. Similarly, in *Taylor v. St. Louis S.W. Ry. Co.*, 746 F.Supp. 50, 53-54 (D. Kan. 1990), the court held Section 409 protects documents held by non-parties regardless of from whom they were "obtained." *But See Irion v. State*, 760 So.2d 1120, 1226 (La.App. 2000) (compelling documents not collected for Section 409 purposes that were "acquired . . . *from a third party*, not DOTD.")

The only effect of enforcing Section 409 here is that "[w]ithout hearing the prohibited evidence, the jury will have to decide whether the crossing, as it existed at the time of the accident, was abnormally dangerous . . . ." *St. Louis S.W. Ry. Co. v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir. 1994). Indeed, as plaintiffs conceded to the state court, a trial in their action against Pierce County "will occur regardless of the posture of discovery orders at issue here." *See* 12/28/98 Response To Mot. For Disc. Rev. at 1. However, the effect of *refusing* to enforce Section 409 strikes at the heart of a successful *cooperative* program between the state and federal governments—a program that has saved tens of thousands of lives, hundreds of thousands of injuries and untold millions of dollars in economic losses. Indeed, *Guillen* calls into question the applicability in state court of *any* federal evidentiary rule.[6] Finally, and most troublesome, *Guillen* conflicts with this court's constitutional jurisprudence and upsets the "delicate balance" between state and national power intended by the founders and necessary for our national government to function.

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[6] *See e.g.* 15 U.S.C. §6606(c)(3) (federally required statements "not admissible in evidence, under . . . rule of evidence in any State, in any proceeding to prove liability for, or the invalidity of, a claim or its amount, or otherwise as evidence of conduct or statements made in compromise negotiations."); 42 U.S.C. §1306 (prohibiting disclosure of SSA and DHHS records), and those federal statutory privileges listed at Cert. Amicus Br. Of La. at 15 n. 5 and C. Mueller & L. Kirkpatrick, 2 *Federal Evidence*, §173 at 240-251 (2d Ed. 1994).

CONCLUSION

Congress has determined that Section 409 will "enhance the safety of the nation's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis, and that this goal outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries." *Coniker*, 695 N.Y.S. 2d at 495. In so doing, Congress foists nothing on states but—as a *concession to state interests*—offers them an *incentive* to willingly participate in a voluntary program that enhances the safety of their traveling public while also protecting their collection and compilation of necessary records and data. Nevertheless, in alleged pursuit of "state's rights," the Washington Supreme Court nullifies a *state's* discovery and evidentiary protection, jeopardizes the safety of that state's citizens and undermines bedrock principles of federalism. Indeed, the state court not only rejects its responsibilities under the Supremacy Clause and thereby upsets the balance between federal and state power intended by the framers, but disregards even the authorized policy decisions of its *own state's* legislative and executive branches.

One of Justice Holmes' and history's[7] criticisms of *Lochner v. New York*, 198 U.S. 45 (1905) is that its test for constitutional legislation depended on whether a majority of the Court agreed with the law, when in fact a judge's "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." *Id* at 75 (Homes, J., dissenting). If the Washington State Supreme Court is not reversed and its approach to the relationship between state and national governments is allowed to stand, the foundation for a new "Lochner Era" will have been laid—

[7] *See generally* Bernard Schwartz, *A History Of the Supreme Court* at 190-198 (1993) ("Aside from *Dred Scott* itself, *Lochner v. New York* is now considered the most discredited decision in Supreme Court history.")

this time allowing *every state court* to sit as a super-legislature substituting its judgment for that of *all the states' representatives* in the national Congress. Further, *Guillen* will have done so by establishing an ill defined principle that provides no real guidance for constitutional analysis, imposes no real limit on uncontrolled state court activism and tarnishes "states rights" by using it as mere "cover" for defeating federal laws with which a court disagrees.[8] If so, *Guillen* will have accomplished what the founders strove so hard to avoid in replacing the ineffective and short lived Articles of Confederation with our present more than two hundred year old Constitution. In short, in *Guillen*:

> [T]he world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

The Federalist No. 44, at 281 (C. Rossiter ed. 1961) (J. Madison).

Instead, "the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between state and federal power," *New York v. United States*, 505 U.S. at 159 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991))—especially where as here the exercise of that power creates a *cooperative and voluntary* venture between federal and *state* government, supported by the *states*, beneficial to the *states* and protective of the citizens of the *states*. Because *Guillen v. Pierce County* is in fundamental conflict with both the Supremacy Clause

[8] *See generally* Forrest McDonald, *States Rights and The Union: Imperium in Imperio* (2000) (chronicling, among other things, how "states rights" throughout American history has been used by interest groups when out of national power and ignored by them when in power.)

and this Court's constitutional jurisprudence, petitioner respectfully requests that decision be reversed and the documents and information sought by plaintiffs from petitioner and other governmental agencies be held privileged.

Respectfully submitted,

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APPENDIX

APPENDIX

RCW 4.28.080

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

(3) If against a school or fire district, to the superintendent or commissioner thereof or by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours.

(4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state.

(5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state.

(6) If against a domestic insurance company, to any agent authorized by such company to solicit insurance within this state.

(7) If against a foreign or alien insurance company, as provided in chapter 48.05 RCW.

(8) If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state.

(9) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

(10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

(11) If against a minor under the age of fourteen years, to such minor personally, and also to his or her father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed, if such there be.

(12) If against any person for whom a guardian has been appointed for any cause, then to such guardian.

(13) If against a foreign or alien steamship company or steamship charterer, to any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the state of Washington.

(14) If against a self-insurance program regulated by chapter 48.62 RCW, as provided in chapter 48.62 RCW.

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be

served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.

RCW 4.92.090

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.96.010

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

WAC 136-28-010

RCW 36.78.070(1) authorizes the county road administration board to establish standards of good practice for the administration of county roads and the efficient movement of people and goods over county roads. In order to implement the requirement of the National Highway Safety Act of 1966 that requires all states, in cooperation with their various local governments, to collect, compile and make reports to the National Highway Safety Bureau of Accident Statistics in each state, the county road administration board has acted to coordinate the activities of the county engineers and the state patrol. Each county engineer is to cooperate in this effort by following the procedure outlined below.

WAC 136-28-020

The state patrol collects accident reports from all law enforcement agencies and receives accident reports from individual drivers. Periodically, the state patrol will send or deliver to the county engineer's office in each county reports concerning accidents occurring on county roads in that county.

The county engineer will analyze each report and indicate within the appropriate spaces on the report the county number, the county road number, the milepoint and, if applicable, the road number of the intersecting county road at which the accident occurred. The county engineer shall also indicate in the appropriate space as to whether the location is rural or urban.

The coded reports will be returned to the records section of the state patrol within two weeks of receipt.

Should the county engineer determine any accident report location is not on a road contained within the latest county

road log, he/she shall return the accident report, uncoded, with a transmittal letter indicating to the best of his/her knowledge the appropriate jurisdiction such as private road, state highway, city street, other state agency, federal agency, etc.

WAC 136-28-030

(1) The county number shall be that particular number assigned to each county by the state office of financial management for county identification purposes.

(2) The county road number shall be that particular five-digit number, including both leading and trailing zeros if applicable, assigned to each county road according to the county's latest county road log. No local names or numbers or other nomenclature shall be used in coding.

(3) The milepoint shall be determined as accurately as practicable from a comparison of information on the accident report with the latest county road log.

(4) Accidents at an intersection with a state highway will be coded by the state department of transportation.

(5) To ensure uniformity, accidents at the intersection of any two county roads shall be coded to a road in the following priority order:

(a) The road with the higher functional class;

(b) The road that is the through route;

(c) The road with the lower road number.

(6) Accidents on roads and/or at intersections with dual city-county or county-county responsibilities shall be coded in general accordance with the procedures outlined herein based on a mutual understanding between the several jurisdictions involved.

Washington Constitution, Article 11, Section 1

The several counties of the Territory of Washington existing at the time of the adoption of this Constitution are hereby recognized as legal subdivisions of this state.

Washington Constitution, Article 11, Section 4

The legislature shall establish a system of county government, which shall be uniform throughout the state except as hereinafter provided, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general law.

Any county may frame a "Home Rule" charter for its own government subject to the Constitution and laws of this state, and for such purpose the legislative authority of such county may cause an election to be had, at which election there shall be chosen by the qualified voters of said county not less than fifteen (15) nor more than twenty-five (25) freeholders thereof, as determined by the legislative authority, who shall have been residents of said county for a period of at least five (5) years preceding their election and who are themselves qualified electors, whose duty it shall be to convene within thirty (30) days after their election and prepare and propose a charter for such county. Such proposed charter shall be submitted to the qualified electors of said county, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said county and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, or any existing form of county government, and all special laws inconsistent with

such charter. Said proposed charter shall be published in two (2) legal newspapers published in said county, at least once a week for four (4) consecutive weeks prior to the day of submitting the same to the electors for their approval as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election and shall be given for at least ten (10) days before the day of election in all election districts of said county. Said elections may be general or special elections and except as herein provided, shall be governed by the law regulating and controlling general or special elections in said county. Such charter may be amended by proposals therefor submitted by the legislative authority of said county to the electors thereof at any general election after notice of such submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters and may be voted on separately without prejudice to others.

Any home rule charter proposed as herein provided, may provide for such county officers as may be deemed necessary to carry out and perform all county functions as provided by charter or by general law, and for their compensation, but shall not affect the election of the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, or the jurisdiction of the courts.

Notwithstanding the foregoing provision for the calling of an election by the legislative authority of such county for the election of freeholders to frame a county charter, registered voters equal in number to ten (10) per centum of the voters of any such county voting at the last preceding general election, may at any time propose by petition the calling of an election of freeholders. The petition shall be filed with the county

auditor of the county at least three (3) months before any general election and the proposal that a board of freeholders be elected for the purpose of framing a county charter shall be submitted to the vote of the people at said general election, and at the same election a board of freeholders of not less than fifteen (15) or more than twenty-five (25), as fixed in the petition calling for the election, shall be chosen to draft the new charter. The procedure for the nomination of qualified electors as candidates for said board of freeholders shall be prescribed by the legislative authority of the county, and the procedure for the framing of the charter and the submission of the charter as framed shall be the same as in the case of a board of freeholders chosen at an election initiated by the legislative authority of the county.

In calling for any election of freeholders as provided in this section, the legislative authority of the county shall apportion the number of freeholders to be elected in accordance with either the legislative districts or the county commissioner districts, if any, within said county, the number of said freeholders to be elected from each of said districts to be in proportion to the population of said districts as nearly as may be.

Should the charter proposed receive the affirmative vote of the majority of the electors voting thereon, the legislative authority of the county shall immediately call such special election as may be provided for therein, if any, and the county government shall be established in accordance with the terms of said charter not more than six (6) months after the election at which the charter was adopted.

The terms of all elective officers, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court, and the justices of the peace, who are in office at the time of the adoption of a Home Rule Charter shall terminate as provided in the charter. All appointive

officers in office at the time the charter goes into effect, whose positions are not abolished thereby, shall continue until their successors shall have qualified.

After the adoption of such charter, such county shall continue to have all the rights, powers, privileges and benefits then possessed or thereafter conferred by general law. All the powers, authority and duties granted to and imposed on county officers by general law, except the prosecuting attorney, the county superintendent of schools, the judges of the superior court and the justices of the peace, shall be vested in the legislative authority of the county unless expressly vested in specific officers by the charter. The legislative authority may by resolution delegate any of its executive or administrative powers, authority or duties not expressly vested in specific officers by the charter, to any county officer or officers or county employee or employees.

The provisions of sections 5, 6, 7, and the first sentence of section 8 of this Article as amended shall not apply to counties in which the government has been established by charter adopted under the provisions hereof. The authority conferred on the board of county commissioners by Section 15 of Article II as amended, shall be exercised by the legislative authority of the county.

Washington Constitution, Article 11, Section 5

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys and other county, township or precinct and district officers, as public convenience may require, and shall prescribe their duties, and fix their terms of office: Provided, That the legislature may, by general laws, classify the counties by population and provide for the election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers. It

shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population: Provided, That it may delegate to the legislative authority of the counties the right to prescribe the salaries of its own members and the salaries of other county officers. And it shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession.