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

REPLY BRIEF ON THE MERITS FOR PETITIONER

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SUMMARY OF ARGUMENTS

All parties agree the Washington Supreme Court erred in *Guillen v. Pierce County*, 31 P.3d 628 (2001). *See e.g.* Pet's Br. at 17-35; U.S. Br. at 28-36, 45 n. 34; Resp. Br. at 24-25. The only dispute concerns the *nature* of that error: did *Guillen* err (as petitioner, its amici and the United States note) in imposing unprecedented limitations on Congress, or did it err (as respondents and their state plaintiffs bar amici argue) in refusing to hold 23 U.S.C. §409 is narrower than its language, history and purpose indicate?

As to *Guillen*'s holding that Congress did not have the authority to enact §409, the briefs divide into two camps. Pierce County, the States, the United States and the private sector amici *all agree* the *Guillen* decision should be reversed because the statutory protection of documents advocated by petitioner is well within the power of Congress. See Pet. Br. at 23-35; U.S. Br. at 45 n. 34; Wn. *et al* Br. at 11-18; La. Br. at 4-11; AAR Br. at 13-25; PLAC Br. at 8-12. In contrast, respondents and their amici claim such federal protection is outside Congressional power. *See* Resp. Br. at 30-47. *See also* ATLA Br.; Whitmer Br.; Baker Br.

As to the second issue, concerning the statute's meaning and application, the briefs can be divided into three groups. Petitioner County, the States and the private sector amici are united in asserting not only that §409 protects the documents in question, the fact of their collection and the information within them, but also that such protection cannot be evaded by requesting data from a third party. *See* Pet. Br. at 37-47; Wn. *et al*. Br. at 13-23; La. Br. at 11-25; AAR Br. at 28-30, PLAC Br. at 15-19. Though the United States also agrees the documents possessed by County Public Works and information therein are likely protected here, *see* U.S. Br. at 39 n. 30, it asserts those otherwise privileged documents are *not* protected *in the hands of third parties* unless they are acquired from Public Works or a data base created in part for federal record keeping. *See id.* at 28-39. Finally, respondents and

their plaintiffs bar amicus [1] argue a third position that *Guillen's* statutory interpretation is wrong because §409 should protect only "data *generated* by a state agency for the *sole* purpose of seeking federal highway funds." *See* Resp. Br. at 17, 24-25 (emphasis added). *See also* WSTLAF Br. at 17-28.

As demonstrated below, the positions of respondents and their amici conflict with the record, Constitution, rules of statutory construction and this Court's precedent.

ARGUMENT

I. ARGUMENTS OF PLAINTIFFS AND THEIR AMICI ARE FOUNDED ON FALSE PREMISES

In their various arguments, plaintiffs and their amici repeatedly assume the compelled documents would have been generated and retained *by the State* regardless of federal law. *See e.g.* Baker Br. at 5-6. This apparently is based on state law circa 1937 that required police to produce—and the State Patrol to file, tabulate and analyze—accident reports. *See* Resp. Br. at 3; WSTLAF Br. at 6-13. Ignoring—as do plaintiffs and their *amici*—that such state-specific objections to a nationally applicable program are legally irrelevant,[2] they do not dispute these early Washington requirements—like those of most states prior to the federal highway safety acts—required only vague and rudimentary data collection while modern reports contain far more systematically detailed information *solely* because police now collect data to comply with the cooperative highway safety program. *See* U.S. Br. at

[1] After imagining "putative ambiguities"—none of which are raised by the facts and most of which have never been raised in *any* case, *see* Baker Br. at 10-14—one of *plaintiffs'* other amici agrees with the County that the language of §409 requires "the broad interpretation . . . adopted by the Washington Supreme Court and two thirds of the other courts to take up the issue." *Id.* at 15-16. *See also id* at 6-7, 10.

[2] Identical state-centered arguments have been rejected as "strained and illogical." *See Conlker v. New York*, 181 Misc.2d 801, 695 N.Y.S.2d 492, 496 (N.Y.Ct.Cl. 1999); Pet. Br. at 34; La. Br. at 19.

38 n. 27; Wn. *et al.* Br. at 4-6; La. Br. at 15-17. See also U.S. Dept. Of Trans., *State Crash Report Forms Catalog 1995 Update* at 233-34 (lodged with the Clerk). Likewise it is undisputed none of these archaic Washington laws require *Pierce County*—the only entity ordered to produce documents here—to collect such reports. *See e.g.* WSTLAF Br. at 9 n. 3. Indeed, none contest that the *only* legal requirement for the *County's* acquisition and retention of these documents arises as part of its choice to apply for federal highway funds. See 23 U.S.C. §152; JA 21-25, 32, 34, 39-40, 52, 81-83. It also is solely because of federal law that after the compelled accident reports were obtained from the State Patrol and before they were returned to it, the County placed "codes" *directly onto* them that identified the appropriate road number and milepoint, see WAC 136-28 *et seq.*; *Report Forms Catalog 1995 Update* at 233; JA 53-54, 56; Pet. Cert. Reply at 4a-5a—"codes" which enable reports to be retrieved by accident location. See U.S. Br. at 31 n. 23; La. Br. at 14-15; Wn. *et al.* Br. at 7-8, 21. Hence, "but for" *federal law*, the accident reports would: 1) contain far less data and be far less helpful to plaintiffs; 2) not be collected and compiled by the *County* so as to be available for plaintiffs to claim it had "notice of this hazardous condition," 2/7/00 Supp. Br. at 1; and 3) be irretrievable *even from the State* by plaintiffs whose document request was based only on accident location.

Other erroneous assumptions central to various arguments of plaintiffs and their amici are that §152 and §409 were "imposed" on Washington, that the State did not willingly accept them and that any decision not to participate threatens the "loss of 100% of its share of highway funds." *See e.g.* Resp. Br. at 31 n. 9, 36-37; Whitmer Br. at 21-23; ATLA Br. at 12-15; Baker Br. at 17-18, 28. Instead, both before *and* after the 1973 enactment of §152, the Washington State Legislature expressly "authorized and *directed*" a department of the State Executive to enter into agreements with the national government to distribute cooperative federal highway funds consis-

tent with federal law. *See* RCW 47.04.060-.070 (emphasis added); [3] JA 23. Thereafter the State alone chose the project to which those federal funds were distributed, 23 U.S.C. §145(a), though its choice had to be based on *federal* criteria. *See* 23 CFR §1.9(a), 924.11(b). That criteria required the State's implementation process to reflect priorities based on "a record of accident . . . data" and an analysis of "accident experience." *See* 23 CFR 924.9(a)(1) & (2), 924.11(a)(2). Accordingly, Pierce County—by choosing to be eligible for federal funds—had to access accident data derived from documents collected for that purpose. *See e.g.* JA 22.

At the *municipal* level then—where budgets are far more affected by large damage awards, see IMLA Pet. Br. at 5—a municipality's hypothetical sovereign refusal to provide such collected and compiled accident data results in nothing more than the denial of that particular application because it has not demonstrated its eligibility for funds. Indeed, Pierce County's first application for the subject roadway was denied while its second was granted when deemed eligible. *See* JA 22. At the *State* level, the choice to administer § 152 funding requires it to analyze safety improvement results and provide a yearly report addressing "previous and subsequent accident experience" at improved locations. *See* 23 U.S.C. §152(f), (g); CFR 924.13(a)(2). No law provides that a State's choice not to administer the program, conduct an analysis or provide

[3] Plaintiffs and one of its amici assert a *different* statute—RCW 47.04.050("assent[ing]" to "all acts, grants and appropriations amendatory and supplementary" to federal highway grants)—is unenforceable because State courts bar the legislature from adopting future federal laws. See Resp. Br. at 35-37; Whitmer Br. at 21-23. However, both that statute as well as other later statutes and acts of acceptance by duly elected and appointed state officials—previously cited by petitioner and unchallenged by respondents or their amici—demonstrate the cooperative safety program is not "dictated" to or "imposed" on Washington but eagerly enacted, administered and now defended by the duly elected officials of Washington State citizens. See Pet. Br. at 21.

a report under §152 results in a "loss of 100% of its share of highway funds." *See* ATLA Br. at 15; Baker Br. at 28. Such simply means a small portion of a specific highway program's funds would not be used. Both §152 and §133 programs together amount to only 10% of a State's "Surface Transportation Program" funds apportioned under 23 USC §104(b)(3). *See* 23 U.S.C. §133(d)(1). Though §152 funds are exceedingly important to States and municipalities—who in 1996 were apportioned a total of $143 million under that statute—such is only a fraction of one percent of the $20.5 billion of federal funding for highways that year. See *1996 Annual Report on Highway Safety Improvement Programs*, at S-1; *1999 Status of the Nation's Highways, Bridges and Transit: Conditions And Performance*, at 6-6.[4]

Such misunderstandings of §152 explain the similar repeated assertions by plaintiffs and their amici that § 409 was federally "imposed" on Washington's citizens to provide something demanded by a distant and detached federal government. Instead, it was the Congressional delegation elected by that State's citizens that voted almost unanimously to enact §409. See Pet's Br. at 6. Further, by its plain terms §409 applies in pertinent part to "data compiled or collected for the purpose of" complying with section "152 of this title."

[4] Plaintiffs also assert a failure "to comply with Section 402's data-gathering requirement" is punished by "reapportion[ing] any state's federal highway funds." Resp. Br. at 6. However, such does *not* affect all "federal highway funds" but *only* "funds under *this subsection*" of *§402*—which relates to funding a State's creation of a "highway safety program"—and even then compliance "shall *not* be construed to require . . . compliance with *every* uniform guideline, or with *every element* of every uniform guideline . . . ." §402(c) (emphasis added). Instead, the *§152* funds at issue are distributed "under section 104(b)," and even there "the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section." See §152(e). In any event, conditions imposed on funds apportioned under *§402* have been cited as *valid* under the Spending Clause. *See Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring).

Hence, §409 by its express terms can apply here only *if* the State voluntarily chooses to administer the §152 program (as Washington did), *if* entities seeking to be eligible for those funds choose to "compile or collect" data (as Pierce County did), and *if* they choose to assert the protection at trial (as done here). Just as the choice to collect and compile accident data pursuant to §152 results in eligibility for the desired benefits of federal funding, so too the choice to participate results in eligibility for the desired protections of §409. If a participating State or municipality deems its sovereignty somehow offended by §409's protections, it can simply "choose" either not to apply or not to assert the protection in court. *See e.g. Walden v. Dept. Of Trans.*, 27 P.3d 297, 305 (Ala. 2001). The fact that Washington and more than a dozen other states actively join in support of petitioner confirms they not only voluntarily accept but also earnestly desire both the life saving benefits of §152 and the protection of §409. *See generally* Wn. *et al* Br.; La. Br.

Indeed, the success of §152 depends on §409 protection. Soon after the 1973 enactment of §152, the Secretary of Transportation's second annual report informed Congress that some "states are 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. Ten years later, the Secretary was still reporting to Congress that an approved process for collecting, maintaining and analyzing accident data as required by the program had not been universally adopted by the States and territories and those who *did* have a process "could make some improvements"—indeed, States were resisting applying the process "uniformly . . . to all public roads," not using "current, reliable accident data . . . to help identify hazardous locations" or performing "adequate evaluations," and the tracking of accident locations in 19

States did "not cover all highways." See *1986 Annual Report on Highway Safety Improvement Programs*, at 17-18. Because State highway departments continued to be "reluctant to [compile information to identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability," in 1984 the Department of Transportation proposed a privilege whose language was enacted almost verbatim as §409 in 1987. See La. Br. at App. "A." Contemporary Congressional reports explained the privilege was intended "to encourage greater accuracy and completeness" in complying with the 1973 Highway Safety Act and to prevent such compliance "from being used in any judicial proceeding, thereby improving their quality as a basis for programming." *See* S. Rep. No. 4, 100th Cong., 1st Sess. 27-28 (1987). *See also* U.S. Br. at 4 n. 3 (citing additional Cong. Records). Accordingly, by the year of plaintiffs' accident—after Congress had repeatedly amended §409 to clarify its broad scope—the Secretary's report made no further mention of compliance problems "[f]or those states *electing* to implement safety management systems . . . ." *1996 Annual Report on Highway Safety Improvement Programs*, at III-2 (emphasis added).

Finally, though the "Constitution does not forbid . . . the abolition of old [rights] recognized by the common law, to attain a permissible legislative object," *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n. 32 (1978) (*quoting Silver v. Silver*, 280 U.S. 117, 122 (1929)), *see also Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (preempting state common law action), nothing supports the hyperbole here that by protecting "data compiled or collected" for §152 purposes §409 somehow "abrogate[s] Washington citizens' decisions to waive sovereign immunity . . . ." Whitmer Br. at 27. *See also* WSTLAF Br. at 21; ATLA Br. at 18. Rather, §409 simply prevents using the County's safety improvement efforts against it, and such does not create "immunity" because proof of municipal "notice" is not

required for liability. Contrary to plaintiffs' erroneous paraphrase of *Russell v. City of Grandview*, 236 P.2d 1061, 1063 (Wa. 1951), Resp. Br. at 15, it and other Washington cases hold that for a "dangerous condition . . . caused by agents of the city in the performance of their duties, the rule of liability is *not based on notice* and failure to repair, but upon the creation of a dangerous condition by the city." (Emphasis added). *See also e.g. Batten v. South Seattle Water Co.*, 398 P.2d 719 (Wash. 1965) (notice unnecessary where condition created by defendant); *Bird v. Walton*, 848 P.2d 1298 (Wash. Ct. App. 1993) (notice necessary where condition not caused by defendant); 6 Wash. Pattern Jury Inst: Civil 140.02, at 634 (3d ed. 1989) (government notice only required where dangerous road condition "was not created by its employees"). Here, it is alleged the County "breached" its "duty" to have "traffic control at the intersection at issue that would provide for the safe and orderly control of traffic through that intersection." *See* JA 15. Such alleged "active negligence" by defective signing neither requires "notice" nor is barred by §409. Indeed, plaintiffs have admitted that a trial "will occur regardless of the posture of discovery orders at issue here." *See* 12/28/98 Resp. To Mot. For Disc. Rev. at 1.

Far from creating immunity, enforcing §409 only requires plaintiffs to rely on "sources *apart* from" the collected documents to prove a defect. *See Rodenbeck v. Norfolk and Western Ry. Co*, 982 F. Supp. 620, 623 (N.D. 1997) (emphasis added). *See also* Pet. Br. at 45-47. The effect of invalidating §409, however, will both allow a new breed of municipal tort liability for "failure to improve" roads—a theory unavailable under traditional State common law and made possible solely by the collection of accident data under federal law, *see* Wn. *et al* Br. at 15-18—*and* discourage such data collection and participation in the life saving Hazard Elimination program.

II. §409's CONSTITUTIONALITY CANNOT BE AVOIDED AND SHOULD BE UPHELD

Plaintiffs and their state bar amicus also are mistaken that *Guillen*'s constitutional rulings can be avoided by adopting a statutory misinterpretation of the modern §409 that no Court is cited as supporting—including the *Guillen* minority or Washington Court of Appeals. *See* Resp. Br. at 23 n. 3. *See also id* at 22-25; WSTLAF Br. at 13. However, "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). Here, as demonstrated below and previously, there is no such "ambiguity" concerning the application in this case. *See infra* at 14; Pet. Br. at 38-40; La. Br. at 18-19; AAR Br. at 28-30. Further, even where there is ambiguity, constitutional avoidance only applies where a statute's "fairest reading" raises "grave and doubtful constitutional questions." *See Jones v. United States*, 526 U.S. 227, 239 (1999); AAR Br. at 29. Here—as also demonstrated below and in the briefs of the States, the United States and the private sector amici—no fair reading raises any "grave and doubtful constitutional questions." *See infra* at 10-17; Pet. Br. at 23-35; Wn. *et al* Br. at 11-18; La. Br. at 4-11; U.S. Br. at 44-45 n. 34; AAR Br. at 13-25; PLAC Br. at 8-12. Finally, even the unprecedented narrow reading advocated by respondents itself raises the constitutional question of enforcing a federal privilege in non-diversity state court actions; *i.e.* even plaintiffs' reading creates *some kind* of federal privilege enforceable in state court. *See* Resp. Br. at 22-23; WSTLAF Br. at 18-19. As one of plaintiffs' own amici recognizes, if Congress has no power to require that courts protect "collected" accident data, it has no power to protect in state court *any* accident data and §409—like all federal privileges enforceable in state court [5]—would have

[5] For example, the accident reports and computerized lists *compelled here* also were prepared as part of the State's "highway safety program"

"to be *stricken in its entirety*." *See* Whitmer Br. at 3, 27. Under *any* reading, constitutionality is at issue.

A. No Tenth Amendment Violation

Plaintiffs vaguely assert §409 "violates the Tenth Amendment," Resp. Br. at 17, apparently because they claim the statute "dictates to Washington State what evidence state court litigants may discover and admit" and "state court proceedings for state causes of action regarding state actors are one of the core functions of state government." *Id.* at 45-46.

However as demonstrated above and as held by every court ruling on the matter, "nobody made [the states] get into the ... safety enhancement program" because it "is a voluntary program." *See e.g. Sawyer v. Ill. Cent. Gulf RR Co., 606 So.2d 1069, 1074* (Miss. 1992). *See also supra* at 3-4. Second, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556-57 (1985), this Court expressly rejected attempts to limit Congressional "power in terms of *core governmental functions* and fundamental attributes of state sovereignty" because such was "both impracticable and doctrinally barren." (Emphasis added). Third, neither plaintiffs nor their amici discuss this Court's repeated statements that Congress *can* constitutionally "require state courts . . . 'to enforce federal prescriptions, insofar as those prescriptions relate to matters appropriate for the judicial power,'" *see Alden v. Main*, 527 U.S. 706, 752 (1999), because State courts are viewed "distinctively" from the other two branches of State government in that "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause." *See Printz v. United States*, 521 U.S. 898, 907 & 928 (1997). *See also New York v. United States*,

as required by the Highway Safety Act of 1966, see JA 47, 53-54; 23 U.S.C. §402(k); WAC 136-28 *et seq*; La. Br. at 23-24, and the *independent* federal privilege of 23 USC 402(k)(1) expressly provides the same protection for documents so "prepared."

505 U.S. 144, 178-79 (1992); *FERC v. Mississippi*, 456 U.S. 742, 760 (1982); U.S. Const. art. VI, cl. 2; Pet. Br. at 19-20.[6]

Likewise, plaintiffs nowhere mention—much less attempt to meet—the actual test for a Tenth Amendment violation established by this Court. *See e.g. South Carolina v. Baker*, 485 U.S. 505, 512 (1988)(under 10th Amendment States "find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *Garcia*, 469 U.S. at 554 ("fundamental limitation . . . is one of process rather than one of result."). *See also* Pet. Br. at 17-19.[7] Indeed, plaintiffs nowhere discuss *Reno v. Condon*, 528 U.S. 141, 143 & 151 (2000), which holds a federal law that also "regulates the disclosure of . . . information contained in the records of state motor vehicle departments" is unobjectionable under the Tenth Amendment because it "regulates *the State* as *the owners of databases*" and "does not require the Legislature to enact any laws or regulations" nor "require state officials to assist in the enforcement of federal statutes regulating private individuals." (Emphasis added)

[6] Plaintiffs' bar amicus apparently imply such statements by this Court are in conflict with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), which stated "Congress has no power to declare substantive rules of common law applicable in a State. . . ." ATLA Br. at 9, 26. However the amicus nowhere asserts §409 is a "substantive rule of common law" and *Erie* notes in the same paragraph that state law is to be applied "*[e]xcept* in matters governed by the Federal Constitution or by Acts of Congress . . . ." (Emphasis added). Indeed, if the §409 privilege constitutes a "substantive" right for railroads, municipalities and states, a "federal right cannot be defeated by the forms of local [state] practice." *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 296 (1949); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

[7] Plaintiffs' amicus ATLA argues *Baker* and *Garcia* are inapplicable because the amicus calls § 409 an "explicit federal command." *See* ATLA Br. at 24. However, the statutory scheme repeatedly has been *shown* and *held* instead to be voluntary. *See supra* at 3-6, 10.

Plaintiffs do at least address their lack of standing by noting individuals in the past have challenged Congressional acts as outside the enumerated powers of Article I, §8. *See* Resp. Br. at 29-30. This appeal, however, only challenges plaintiffs' standing to assert "*states* rights under the *Tenth Amendment*," see Pet. Br. at (i), 20-23, and the Tenth Amendment's restraints are *distinct* from those imposed by *Article I, §8. See e.g. Reno, supra* at 149 ("In *New York* and *Printz*, we held federal statutes invalid, *not* because Congress *lacked legislative authority* over the subject matter, *but* because those statutes violated the *principles of federalism contained in the Tenth Amendment*.") (emphasis added); *South Carolina v. Dole*, 483 U.S. 203, 212 (1987) (even if under the Tenth and other Amendments Congress "*lack[s] the power to impose* a national minimum drinking age directly, we conclude that encouragement to state action . . . is a *valid use of the spending power*.") (emphasis added). In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939), this Court held "absent the states or their officers" there is "no standing . . . to raise any question under the *[tenth] amendment*," [8] and years later in *Flast v. Cohen*, 392 U.S. 83, 106 (1968), it again recognized an individual's standing was affected where she "attempt[s] to assert *the States' interest* in their legislative prerogatives" rather than her own "interest in being free of . . . spending in contravention of specific constitutional limitations imposed upon Congress' . . . spending power." (Emphasis added). *See also*

[8] Plaintiffs charge the County's form of quotation is somehow "false," Resp. Br. at 26, yet numerous courts likewise find the original quotation supports the conclusion for which it is cited: *i.e.* individuals lack standing to assert the Tenth Amendment absent the States or their officers. *See e.g. Lomont v. O'Neill*, 285 F.3d 9, 13 n. 3 (D.C. Cir. 2002); *Gaubert v. Denton*, 1999 U.S. Dist. LEXIS 8207 (E.D. La. May 28, 1999); *Vermont Assembly of Home Health Agencies Inc. v. Shalala*, 18 F.Supp.2d 355, 370 (D.Vt. 1998). *See also* Pet. Br. at 22.

Warth v. Seldin, 422 U.S. 490, 499 (1975)(no standing to assert the constitutional rights of others).

B. Enumerated Powers Authorize § 409

1. Spending clause authorizes § 409

Echoing the Washington Court in *Guillen*, 31 P.3d at 651, plaintiffs argue Congress exceeded its Spending Clause power because there is "no known reason related to highway safety for Congress to enact Section 409." *See* Resp. Br. at 38. However both the above discussion and the previous extensive briefing *more* than demonstrate how §409 was intended, and indeed acts, as an *encouragement* to States' candid participation in the federal highway safety program. *See supra* at 6-7; Pet. Br. at 25-32; Wn *et al.* Br. at 12-18; La. Br. at 5-11; U.S. Br. at 3-4, 41-43; AAR Br. at 19-21; PLAC Br. at 11-12. Therefore, *unlike* the Washington court, plaintiffs and their amici *also* argue §409 does not further the "general welfare" nor impose an "unambiguous" condition as required by *South Carolina v. Dole*, 483 U.S. at 207. See Resp. Br. at 32-35; ATLA Br. at 12-14; Whitmer Br. at 17-22; Baker Br. at 8-22.[9] *Dole* however concerned Congressional power to attach conditions to achieve goals that Congress could not legislate directly, 483 U.S. at 206-07, but here—as demonstrated above—§409 is not a coercive "condition" to funding (again, it can simply not be asserted at trial) but a permissive *inducement* for States to participate in a safety spending grant. See *supra* at 5-6. The only other function of §409 is to ensure the "integrity and proper operation of the program"—yet another proper use of Congressional power. *See Salinas v. United States*, 552 U.S. 52, 60-61 (1997). *See also* AAR Br. at 15-17.

[9] Two of plaintiffs' amici also argue §409 is "impermissibly coercive" because failure to enforce it could cause "every penny of federal highway" funds to be "lost." *See* Whitmer Br. at 22-23; ATLA Br. at 15. These amici not only fail to give any statutory or factual basis for this assertion, but are mistaken. *See supra* at 4-5.

Nevertheless, that § 409 pursues the "general welfare" is proven not only by the statute's documented relationship to highway safety, but also by *Dole*'s holding that "courts should defer substantially to the judgment of congress" on that issue and the "level of deference is such that the Court has . . . questioned whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. at 207 (*citing Helvering v. Davis*, 301 U.S. 619, 645 (1937) and *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976)). The claim §409 does not "unambiguously" condition receipt of federal funds again reflects plaintiffs' aforementioned misunderstanding of that statute as being a "condition" rather than an "inducement." The "condition" for "receipt of funds" is the collection and compiling of accident data *under §152*, one of the "inducements" to do so is the protection of such data *under §409*. Hence, the only coercive "condition" for "receipt of federal funds" is compliance with §152—which is what triggers the right to assert §409 protections *if* defendant so *chooses*—and §152's requirements are unambiguous. *See supra* at 4-6. In any case, proof States *are* "cognizant of the consequences of their participation" in §152, *see Dole*, 483 U.S. at 207, is provided by their joining with petitioner to seek reversal of *Guillen*, while none join respondents to affirm.

2. Commerce clause authorizes § 409

Going far beyond the holding of *Guillen* or any other case, plaintiffs and their amici argue the Commerce Clause cannot authorize a federal law affecting "state court proceedings" because "court proceedings" are neither "channels of interstate commerce," nor "instrumentalities of interstate commerce," nor "economic activity" that has "a substantial relation to interstate commerce." *See* Resp. Br. at 38-44; ATLA Br. at 16-18; Whitmer Br. at 4-14; Baker Br. at 22-25. In fact, the Commerce Clause has long been held to authorize federal statutes that affect "state court proceedings." Hence, the Federal Employers' Liability Act (hereinafter "FELA") was enacted pursuant to Congress' "constitutional power to regulate interstate commerce," *see Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184, 190-91 (1964), and is held to *bar State courts* trying FELA cases from applying inconsistent State court procedure. *See Brown v. Western Railway of Alabama*, 338 U.S. 294, 298-99 (1949) (barring state rules of pleading); *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 363 (1952)(barring use of judges as fact finders). *See also Davis v. Wechsler*, 263 U.S. 22, 25 (1923)(State venue provision in railroad suit inapplicable because "local practice shall not be allowed to put unreasonable obstacles in the way" of federal law).

The Commerce Clause analysis of plaintiffs and their amici also share a defect found in the *Guillen* decision: it erroneously takes a particular provision of a federal program out of context and requires it to directly and independently satisfy the Commerce Clause. However, such not only emasculates Congress' ability to regulate interstate commerce but directly contradicts this Court's rulings that a "complex regulatory program . . . 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*" because 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." *Hodel v. Indiana*, 452 U.S. 314, 328 (1981)(emphasis added). *See also FERC. v. Mississippi*, 456 U.S. 742, 757 n. 22 (1982).[10] Even *Guillen* held "a sufficient nexus exists between interstate commerce and the Federal-aid highway

[10] Plaintiffs relegate to a footnote *Guillen*'s assertion that supposedly §409 is not "an 'integral' part of a complex regulatory program." Resp. Br. at 43 n. 14. *See also* Whitmer Br. at 14-17. That argument is rebutted by the above-described origin and function of sections 152 and 409, *see supra* at 6-7, and by previous briefing. *See e.g.* Pet. Br. at 33; AAR Br. at 22-25; PLAC Br. at 8-9.

system to justify the 'regulatory scheme when considered as a whole.'" *See* 31 P.3d at 654.

Second, in any case, §409 *is* "directly" related to promoting the "channels of interstate commerce," protecting the "instrumentalities of interstate commerce," and affecting "economic activity" that has "a substantial relation to interstate commerce." The statute affects state court proceedings precisely because what state courts do with accident "data compiled and collected" pursuant to §152 affects how thoroughly that and other federal highway safety programs are followed and how effectively highway safety is advanced. Congress has expressly found that highway safety promotes commerce, *see* 23 U.S.C. §101(b), and therefore §409's enhancement of highway safety *itself* promotes interstate commerce. Indeed, proof of this is that representatives of the economy's private sector—i.e. the railroads and 126 corporations engaged in interstate commerce—join with the County in seeking to affirm the validity and breadth of § 409. *See* AAR Br; PLAC Br.

3. Necessary and proper clause authorizes § 409

Plaintiffs' assertion the Necessary and Proper Clause only "grants the power for carrying . . . out" any "Article I authority to enact a law," Resp. Br. at 44, is itself *another* basis for rejecting their attempt to dramatically limit Commerce and Spending Clause legislation. *See* U.S. Br. at 42; AAR Br. at 15; PLAC Br. at 10. In any case, *McCulloch v. Maryland*, 4 Wheat. 316, 419-20 (1819), held the Necessary and Proper Clause is "among *the powers* of Congress" and its terms "purport to enlarge . . . the powers vested in government" and "to be an *additional* power . . . ." (Emphasis added).

Plaintiffs' bar amici's theoretical claim that §409 protections are less effective at increasing safety than "the threat of tort liability," *see* ATLA Br. at 18-19; Baker Br. at 21-22, is also an invalid ground for decision because under the Necessary and Proper Clause Congress has "*discretion*, with respect to the *means* by which the powers it confers are to be carried

into execution . . . ." *McCulloch*, *supra* at 421. *See also* citations in Pet. Br. at 36-37. Indeed, Congress enacted these statutes because the non-scheme promoted by plaintiffs' amicus that relied solely on the success of private attorneys to obtain large verdicts from small municipalities *after lives are lost* was an utter failure at preventing deaths. *Id* at 1-2; *supra* at 6-7. Similarly, those amici's additional claim that §409 is not "necessary" because it "offers no incentive at all that [States] could not provide for themselves," see ATLA Br. at 19-20; Baker Br. 28-29, disregards that the term "necessary" is "not among the limitations on [Congressional] powers" and does not "diminish the powers vested in the government." *McCulloch*, *supra* at 419-20. This amici argument would lead to the absurd conclusion that Congress has no power to enact laws if States do not enact them first and therefore the national legislature can only enact *unnecessary* laws.[11]

III. STATUTORY CONSTRUCTION OF § 409 REQUIRES PROTECTION OF DOCUMENTS

A. Narrow Reading Does Not Support Result

Plaintiffs advocate a reading of § 409 that protects only data "generated . . . for the sole purpose of seeking federal

[11] Plaintiffs' amici ATLA finally claims a "general authority to prescribe" state evidentiary rules is outside the enumerated powers because otherwise the "Full Faith And Credit" provision of Article IV §1 (empowering Congress to prescribe rules for proving in state court the "Acts, Records and Judicial Proceedings of every other State") would be "superfluous." *See* ATLA Br. at 27. First, no such "general authority" is at issue—only the *specific* provisions of §409. Second, the Constitution is a *political* document and "[r]edundancy . . . is *built in* to reiterate an important point—to make sure it does not get lost." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 585 (1994)(emphasis added). Hence, the limitations on state courts in Article IV simply "reiterate an important point"—made *also* by reference to "judges in every state" in Article VI's Supremacy Clause *and* by the enumerated powers of Article I—that Congressional power *can* extend to state court procedure.

highway funds." Resp. Br. at 17. However, this is so indefensibly narrow that they cite no court that applies such a reading to § 409's current language *and* admit it is narrower than that proposed by the *Guillen* concurrence, the Washington Court of Appeals or the United States. *Id.* at 23 n. 3. Though even this narrowest of interpretations would still protect Pierce County from disclosure,[12] the misinterpretation has been shown contrary to § 409's language, history and purpose. *See* Pet. Br. at 39-44; La. Br. at 17-22; U.S. Br. at 31, 39-40 n. 30, ARR Br. at 28-30.

Plaintiffs necessarily concede that protecting "data the agency seeking federal highway funding did not itself create but simply obtained from other sources" follows "rules of statutory construction, and construes the Act in a functional manner." Resp. Br. at 23, 25. They nowhere explain how such could be said of their own advocated reading. Rather,

[12] Two of the four document categories ordered produced in the public disclosure (hereinafter "PDA") action are "collision diagrams prepared by a County employee" and "used specifically for the purpose of determining the need for and designing the signalization improvement that was the basis of the Section 152 application . . ." *See* JA 83. See also JA 45, 53; Cert. App. "C" at 3; Cert. Reply App. at 4a, 7a. There being no record these *County generated* documents were used for any other purpose, they are protected even by a statute limited to documents "generated . . . for the sole purpose of seeking federal highway funds." Likewise, the remaining two PDA categories of "accident reports" obtained from the State Patrol, JA 45-46, 53-54, 56-57; Cert. App. "C" at 3; Cert. Reply App. at 4a-5a; 10/8/98 Hamilton Aff., Ex. "C" at 1-2, would be protected because such were "generated" in their present form and accessible by location "solely" because of requirements linked to federal funding. *See supra* at 2-3. Indeed, amicus WSTLAF concedes placement by County Traffic Engineers of "spotting" codes on such reports "may be privileged," WSTLAF Br. at 18-19, and it logically follows the remainder of such reports are also privileged because they would be inaccessible by location *in their entirety* "but for" such federally required coding. For the same reason, information ascertainable only by reference to the otherwise inaccessible reports—such as the names of investigating officers demanded in discovery, *see* Cert. App. "F" at 2-3—would also be protected. *See* Pet. Br. at 45-46.

plaintiffs' only legal justification for ignoring §409's language, history and purpose is that privileges should be construed restrictively. *See id.* at 20. However, the two cases plaintiffs cite do not support their position. In *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974), this Court expressly was "*not* here concerned with" balancing a privilege against "the need for relevant evidence in *civil* litigation" *but* with "only the conflict between . . . a *generalized privilege* . . . and the *constitutional* need for relevant evidence in *criminal trials*." (Emphasis added). Here there is no "generalized" but a *statutory* privilege expressly intended by Congress to bar "discovery or admi[ssion] into evidence." Here there is no balancing against a "*constitutional* need for relevant evidence in [a] *criminal trial*" but an "action *for damages* arising from an[] occurrence at a location mentioned or addressed" in documents protected by § 409. Indeed, after *Nixon*, this Court in *Baldrige v. Shapiro*, 455 U.S. 345, 358 & 361 (1982) protected "collected" data from civil discovery because the statutory language likewise evidenced "congressional intent" to create a privilege.

Even those few courts that once ignored the "ordinary meaning" of "compiled" in §409, *see John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), cannot dispute that Congress meant what it said in 1995 when it added the term "collected" to reject contrary "recent state court interpretations" and "clarify" its intent "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 . . . ."[13] Act of

[13] Thereafter only Arizona erroneously cited its own pre-amendment case *S. Pac Transp. Co. v. Yarnell*, 890 P.2d 611, 614 (Ariz. 1995) that protects only "documents described and prepared under the authority of §§ 130, 144 and 152, and no others." *See Isbell v. Arizona*, 9 P.3d 322, 323-24 (Ariz. 2000). Nevertheless, even *Isbell* admits "the statutory amendment *would protect the raw data that went into* a survey or schedule prepared under" federal law, but that case involved a document col-

November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591 (emphasis added). See also Pet. Br. at 13 n. 3, 39-44.

B. Third Parties In Possession Also Protected

The United States differs with the County only as to *when* plaintiffs are barred from obtaining protected documents *from third parties*. Specifically, the federal government notes that §409 would protect not only the collected subject data "in the hands of the County," but that such would "remain privileged when in the hands of [a] transferee agency," as well as when stored on a "computer-based system . . . used by agencies for *several purposes*—including Section 152-related purposes . . . ." U.S. Br. at 36-40 (emphasis added). *See also id.* at 29, 32 n. 24, 44 n. 34. Though the documents sought here would be protected even under this narrow interpretation,[14] such is unjustified in light of—among other things, *see* Pet. Br. at 12 n. 2, 13 n. 3, 46-47—the statute's language, history and purpose, *see id* at 39-44, and that *from the time of generation* the reports' form and details would not exist and thereafter would be irretrievable "but for" federal law. *See supra* at 2-3.

CONCLUSION

For the above stated reasons, *Guillen* should be reversed and the subject documents and data held privileged.

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lected after "federal funding here was approved" and was therefore not collected "for the purpose" of compliance. *Id* at 324.

[14] Category "1" ordered to be disclosed in the PDA case is "a computerized report that was prepared by the records section of the State Patrol" and sent to County Traffic Engineers for § 152 purposes, JA 45, 47-48, 56, 82-83; Cert. App. "C" at 3; Cert. Reply App. at 6a-7a, and that computer system was established pursuant to federal law. *See* 23 U.S.C. § 402(k)(1); WAC 136-28-010; Wn. *et al.* Br. at 20-21. As to the accident reports, such are filed by the State Patrol only *after* the County "codes" them pursuant to federal law and *transfers* them back so the State Patrol then can access them by location. *See supra* at 3.

Respectfully submitted,

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