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 FOR RESPONDENTS

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QUESTIONS PRESENTED

In 1966 Congress enacted the Federal Highway Safety Act, authorizing the federal government to grant funds to states in exchange for traffic accident information. In 1987 Congress amended the Act, adding Section 409 to create a privilege that, as the statute reads today, protects information "compiled or collected" by states for the purpose of obtaining federal highway funding.

- As Section 409 is a privilege in derogation of the truth, should this Court construe it narrowly or expansively?
- Does Respondent have standing to challenge the authority of Congress to enact Section 409 where he has been adversely affected by its terms?
- Did Congress exceed its authority under the Spending Clause when it amended the Highway Safety Act twenty-one years after its enactment to impose a new condition on the receipt of federal funds that is ambiguous and fails to promote the purposes of the Act?
- Are state court rules of discovery, evidence, and pre-trial procedure economic or commercial endeavors substantially affecting interstate commerce such that Congress may regulate them by Section 409 under the Commerce Clause?

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STATEMENT OF THE CASE

A. Federal highway funding

In 1966 Congress enacted the Federal Highway Safety Act, granting federal highway funds to states in exchange for traffic accident information. By the terms of the Act, if a state failed to gather the required information, it received no federal funds.

In 1987 Congress amended the Act by enacting Section 409 to provide that certain traffic accident information could not be introduced into evidence in state or federal court proceedings. In 1991 Congress amended Section 409 to prohibit discovery of that same information. Congress again amended Section 409 in 1995, broadening the scope of the prohibition. Congress did not, during any of these times, find the amendment was needed to carry out the data-gathering requirement of the Act.

The following briefly summarizes the history of relevant federal highway funding statutes and related state statutes.

1. In 1916 Congress enacted the Federal-Aid Road Act.

On July 11, 1916, Congress passed the precursor to the present Federal Highway Safety Act, the Federal-Aid Road Act. S. REP. No. 89-1410 at 2,801 (1966). Eighteen years later, Congress passed the Hayden-Cartwright Act of 1934, marking the first time Congress granted federal funds to states for surveys, planning, and engineering investigations for future highway improvements. *Id.* at 2802. Congress next passed the Federal-Aid Highway Act of 1944, providing not only for an expanded federal-aid

primary system, but also authorizing funds for a system of secondary highways and arterial extensions in urban areas. *Id*. Congress followed with the Federal-Aid Highway Act of 1956 that, among other things, authorized $25 billion through fiscal year 1969 to complete the federal highway system.

2. In 1917 Washington State, in RCW 47.04.050, accepted the conditions of the Federal-Aid Road Act of 1916. The Washington legislature last amended RCW 47.04.050 in 1961.

In 1917 the Washington legislature enacted RCW 47.04.050, expressing Washington's assent to the federal government's 1916 Federal-Aid Road Act. The Washington legislature last amended RCW 47.04.050 in 1961. Since that time, the Washington legislature has passed no statute demonstrating its assent to new terms or conditions imposed by the federal government for subsequent versions of the federal-aid highway program.

Pierce County argues Washington assented to the terms of the 1966 Highway Safety Act by amending RCW 47.04.060 and 47.04.070 in 1961. Pet. Br. at 3. Those provisions, however, merely set forth how the state will work with the federal government to obtain highway funding. More importantly, because those provisions were last amended in 1984, they cannot be construed as assenting to the subsequent enactment of Section 409 in 1987.

3. Since 1937 Washington State has required its law enforcement agencies to produce reports as a result of automobile accidents.

By statute, Washington law enforcement officers have been required for the past 65 years to prepare accident reports when investigating a traffic accident:

> Any police officer of the state of Washington or of any county, city, town or other political subdivision, present at the scene of any accident or in possession of any facts concerning any accident whether by way of official investigation or otherwise shall make report thereof in the same manner as required of the parties to such accident and as fully as the facts in his possession concerning such accident will permit.

RCW 46.52.070(1).

4. In 1966 Congress enacted the Federal Highway Safety Act that required, as a condition of receiving federal funds, that states compile traffic accident data.

In 1966 Congress passed the Federal-Aid Highway Act. In the 1966 Act, Congress required each state to have highway safety programs designed to reduce highway accidents and deaths. It also required states to develop a system to track accident information:

> The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. . . . In addition such uniform guidelines shall include, but not be limited to, provisions for

> an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light trucks as necessary to improve highway safety, and emergency services.

23 U.S.C. § 402(a).

Significantly, the 1966 Act provided that if a state did not comply with the terms of the 1966 Act, it would receive no federal highway funds:

> The Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section.

23 U.S.C. § 402(c). If a state failed to develop an approved safety program, the Secretary would withhold at least one-half of that state's funds until the state complied. If the state failed to comply, the Secretary was required to reapportion the withheld funds to the other states:

> Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until

> such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. . . . If the Secretary determines that the State did not correct its failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula specified in this subsection not later than 30 days after such determination.

23 U.S.C. § 402(c).

The 1966 Act contained no provision excluding traffic accident data either from discovery or admission into evidence in state court proceedings. Congress nowhere concluded that such a provision was a necessary part of carrying out the purposes of the Act.

5. In 1984 Congress amended 23 U.S.C. § 402, providing federal grants to states to develop computerized record keeping systems. Any reports made as a result of that funding were inadmissible in evidence.

In 1984 Congress enacted subsection (k) to 23 U.S.C. § 402. In that amendment, which is not at issue here, Congress directed the Secretary to:

> make a grant to any State which includes, as part of its highway safety program . . . the use of a comprehensive computerized safety record-keeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety record-keeping system or to obtain and operate components to support highway safety priority

> programs identified by the Secretary under this section.

23 U.S.C. § 402(k)(1). Congress also provided:

> [I]f 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 a report, list, schedule, or survey.

Id.

In other words, Congress excluded from evidence only reports, lists, schedules, and surveys – work product materials. This privilege extended only to those materials produced as a result of the federal grant for computerized record-keeping systems.

6. All fifty states received federal highway funds from 1966 to 1987.

From 1966 to 1987 each state was apportioned, on an annual basis, funds under the Federal-Aid Highway Act. Nothing in the federal statistics indicates the Secretary of Transportation reapportioned any state's federal highway funds because it had failed to comply with Section 402's data-gathering requirement. *See* U.S. DEPARTMENT OF TRANSPORTATION, TABLE FA-4, APPORTIONMENT OF FEDERAL-AID HIGHWAY FUNDS AND ALLOCATION OF OTHER FUNDS ADMINISTERED BY THE BUREAU OF PUBLIC ROADS (1966-1967); U.S. DEPARTMENT OF TRANSPORTATION, TABLE FA-4, APPORTIONMENT OF FEDERAL-AID HIGHWAY FUNDS AND ALLOCATION OF OTHER FUNDS ADMINISTERED BY THE FEDERAL HIGHWAY ADMINISTRATION (1968-1987).

7. In 1987 Congress enacted 23 U.S.C. § 409.

In 1987 Congress enacted 23 U.S.C. § 409. As originally enacted, that section provided:

> [R]eports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, . . . or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be 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.

Pub. L. No. 100-17, 101 Stat. 170 (1987).

Nothing indicates Congress found any state had failed to comply with the data-gathering requirement of the Act. In other words, Congress nowhere found that its conditional allocation of funds had failed to induce 100% participation.[1]

Section 409 occupied less than half a page of Public Law 100-17, a measure totaling 129 pages in length. The

[1] Pierce County asserts that "Congressional funding alone was not sufficient to induce total participation." Pet. Br. at 3. There is simply no support for this assertion. There is no evidence that any state failed to provide the required traffic accident information. Pierce County has not identified a single state that has ever, since 1966, refused to participate in the federal highway aid program because it refused to comply with the accident information reporting requirement.

Senate nowhere discussed Section 409 during either the 99th or 100th Congress. The only legislative history regarding the enactment of Section 409 in 1987 is found in House Report 99-665. There, the concern was raised, with no evidence that it was justified, that the actual lists setting forth the priority of roadside or railroad-highway crossings should receive greater protection to encourage accuracy and completeness:

> This section prohibits the introduction into evidence of any priority listing of roadside or railroad-highway crossing hazards prepared pursuant to section 152 of title 23, U.S. Code (hazard elimination), and section 203 of the Highway Safety Act of 1973 (Railroad-Highway Crossings). This is to encourage greater accuracy and completeness in the compilation of such lists, by preventing these lists from being used in any judicial proceeding, thereby improving their quality as a basis for programming.

H. R. REP. No. 99-665 at 56 (1987).

Section 409 was but a small part of a large appropriations bill. As noted by Senator Moynihan:

> The 5-year reauthorization provides $68.6 billion in budget authority for the interstate construction to be completed, for continued maintenance, the interstate substitute program, and then, of course, the primary and secondary road programs, urban highway programs, bridge programs, and others.
>
> The bill provides more. It is, after all, a surface transportation act, not just a highway bill. In it

> you will find $18.9 billion for mass transit assistance, for a total of $87.5 billion.

133 CONG. REC. S3,480 (1986).

8. In 1991 Congress amended Section 409 to prevent discovery of the enumerated items.

In 1991 Congress amended Section 409 to prevent discovery of the items listed in the section. Once again, Congress made no findings regarding this amendment.

9. In 1995 Congress amended Section 409 to add the term "or collected."

In 1995 Congress amended Section 409 to include the term "or collected." The Conference Committee Report pertaining to all of the 1995 amendments to 23 U.S.C. totals 116 pages in length. *See* H.R. CONF. REP. No. 104-345 (1995). The 1995 amendments to Title 23 included provisions regarding funding, relief from mandates, traffic monitoring, call boxes, preventive maintenance, vehicle weight, toll roads, scenic byways, congestion mitigation and air quality improvement, operation of motor vehicles by intoxicated minors, alcohol-impaired driving countermeasures, use of recycled paving material, roadside barrier technology, high priority corridors, national recreation trails, intelligent transportation systems, accessibility of over-the-road buses to individuals with disabilities, alcohol and controlled substances testing, commercial motor vehicle safety pilot program, winter home heating oil delivery state flexibility program, moratorium on certain emissions testing requirements, state infrastructure bank pilot program, railroad-highway grade crossing safety, collection of bridge tolls, public use of rest areas,

safety belt use law requirements for New Hampshire and Maine, Orange County, California toll roads, and the Woodrow Wilson Memorial Bridge. *See id.*

The amended Section 409 is part of a bill entitled, variously, as the National Highway System Designation Act, the Highway Funding Restoration Act of 1995, National Highway System Designation Act of 1995, National Capital Region Interstate Transportation Authority Act of 1995, National Highway System Designation Act of 1995, Highway Funding Restoration Act of 1995, Federal Highway and Railroad Grade Crossing Safety Act of 1995, National Capital Region Interstate Transportation Authority Act of 1995, and the National Highway System Designation Act of 1995. The final bill, Senate Bill 440 that became Public Law 104-59, was the product of a seven-week long "committee on conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 440) to amend title 23, United States Code, to provide for the designation of the National Highway System, and for other purposes." 141 CONG. REC. S17,203 (1995). Senator Chafee, one of the conferees who negotiated the compromise bill, stated that "[t]he bulk of the matters were settled in the first week, but it was [a] billboard provision that held things up." *Id.* at S17,206.

The final bill contains 411 sections and consumes 66 pages in United States Code Congressional and Administrative News, 104th Congress, First Session, 1995. The amendment to Section 409 covers less than an inch of one page. Section 323 of the final bill is discussed briefly in the Conference Report, which both Houses passed:

DISCOVERY AND ADMISSION AS EVIDENCE OF CERTAIN REPORTS AND SURVEYS

Senate bill

The Senate bill contains no comparable provision.

House amendment

This provision amends section 409 of title 23, United States Code, to clarify that data 'collected' for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.

Conference substitute

The Conference adopts the House provision.

H.R. CONF. REP. No. 104-345 at 90 (1995).

As stated in the Conference Report, the Senate bill contained no comparable provision. In its consideration of the Conference Report, the Senate discussed many issues but never Section 409. Both senators from Washington discussed the report at length but neither senator mentioned Section 409. 141 CONG. REC. S17,209-10, S17,217 (1995). On November 17, 1995, the Senate adopted the Conference Report by a measure of 80-16. Of the Washington senators, Senator Murray voted in favor and Senator Gorton voted against the Conference Report. *Id.* at S17,209, S17,217.

The House version of this bill was reported to the House on September 14, 1995, along with a report from the Transportation Committee addressing Section 409 in its "section by section analysis:"

> *Sec. 328. Discovery and admission as evidence of certain reports and surveys*
>
> This section amends section 409 of title 23 to clarify that data "collected" for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> 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 mention [sic] or addressed in such data.

H. REP. No. 104-246 at 59 (1995).

The House voted on the final bill, H.R. 2274, on September 20, 1995. The Washington representatives voted in support of the Conference Report. *See* Roll Call no. 679, 141 CONG. REC. H9,257 *et seq.* (1995). Randy Tate, the only Washington representative on the House Transportation Committee and the House Subcommittee on Surface Transportation, remained entirely silent on any measure addressed by this bill. *See* 141 CONG. REC. H9,257-9,309 (1995).

The Congressional Record for the days on which this bill was considered reflects no discussion in the House regarding Section 409. *Id.* Instead, the discussion centered around removing state speed limit requirements and mandatory motorcycle helmet requirements as conditions

to obtaining federal highway funds and billboard limitations on scenic highways. *Id*.

Pierce County is correct that Congress passed the bill in which the current iteration of Section 409 appears by a large majority. The single vote, however, was on the 111-page bill. The amendment to Section 409 occupied a small portion of one page of the bill.

B. The underlying facts of this dispute.

On July 5, 1996, Clementina Guillen-Alejandre, the wife of Respondent Ignacio Guillen, was killed in an automobile accident at an intersection in Pierce County, Washington.

In attempting to investigate the facts about this intersection, Mr. Guillen requested information from Pierce County, invoking Washington's Public Disclosure Act, RCW 42.17. The County, however, produced no information, citing 23 U.S.C. § 409. JA 30-31. Mr. Guillen then modified his original request, specifically excluding any materials created by Pierce County for the purpose of seeking federal highway funding. JA 32-33. Pierce County, again citing 23 U.S.C. § 409, produced no information about the intersection. JA 34-35.

Mr. Guillen filed a lawsuit to compel production of the public records and conducted discovery in an effort to learn the nature of the documents withheld by Pierce County. The parties eventually filed cross motions to determine whether Pierce County was required to produce the requested documents. Although Pierce County eventually produced some of the requested documents, the trial court ordered production of five additional documents,

including accident reports, collision diagrams, and a draft letter written in 1989 by a public employee in response to a citizen's letter of concern regarding an accident at the subject intersection. *See Guillen v. Pierce County*, 982 P.2d 123, 126-27 (Wash. App. 1999). Pierce County sought review by the Washington State Court of Appeals.

While the first appeal was pending, Mr. Guillen filed a lawsuit against Pierce County for failing to use reasonable care in maintaining its intersection. During discovery, he requested (1) the identity of all County employees with knowledge of accidents at the intersection from 1990 to 1996, (2) the identity of all persons within the County's knowledge that have been involved in an accident at the intersection from 1990 to 1996, (3) the identity of all County sheriffs who patrolled the intersection from 1990 to 1996, (4) the identity of all accidents, persons involved, and fatalities at the intersection from 1990 to 1996, (5) photographs in the County's possession of accidents at the intersection from 1990 to 1996, (6) all written statements from witnesses to accidents at the intersection from 1990 to 1996, and (7) all accident reports regarding the intersection from 1990 to 1996. *See id*. at 127-28.

Pierce County produced none of the requested information. Guillen sought an order compelling Pierce County to produce the information. After the trial court granted Guillen's motion, Pierce County sought interlocutory review by the Washington State Court of Appeals.

C. Washington State has a strong public policy of holding state governmental entities accountable for their tortious conduct.

Washington has long protected the right of its citizens to bring actions against municipalities for failing to maintain reasonably safe public roads. As the Washington Supreme Court noted in its decision in this case, Washington statutes "evidence a strong public policy of holding governments accountable for their tortious conduct." *Guillen v. Pierce County*, 31 P.3d 628, 643 n. 19 (Wash. 2001). The Washington Supreme Court has repeatedly held that the state's municipalities have a duty to maintain their public roads and streets in a safe condition:

> "[T]he authority charged with the maintenance and repair of a [road] must use ordinary care to provide against such dangers to the traveling public as may reasonably be anticipated, having due regard to the character of travel, the incidental purposes for which the highway may be lawfully used, and the nature of possible danger at the point in question."

Berglund v. Spokane County, 103 P.2d 355, 358-59 (Wash. 1940) *quoting* 8 Am.Jur. 936 at § 38.

In order to prove a municipality's breach of this duty, the law requires a plaintiff to produce evidence not only showing that the subject roadway was dangerous, but also that the responsible municipality had actual or constructive notice of the hazard. *Russell v. City of Grandview*, 236 P.2d 1061, 1063 (Wash. 1940). Washington courts have also made it clear that such proof cannot be based on speculation or conjecture. *Ruff v. County of King*, 887 P.2d 886, 891 (Wash. 1995).

In virtually every case, accident data and history comprise the central evidence in establishing liability for negligent road maintenance cases. A traffic-engineering expert must rely on those data to evaluate whether the condition of a particular highway location or intersection presents an unreasonable danger. The duration of the danger frequently constitutes the only evidence available to a plaintiff to prove that a municipality had actual or constructive notice that a hazardous condition existed at a specific location.

Washington has adopted as law the standards and warrants set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD). *See* RCW 47.36.020; Chapter 468-95 WAC. These standards and warrants for eliminating dangerous conditions are based on traffic data applicable to a given roadway. If the responsible governmental entity could conceal accident data for a particular highway location, the public, including citizens injured at a hazardous location, could no longer prove that these governmental entities violated the law and thereby caused the injury. The public would not be able to hold a municipality accountable for breaching its duty or for failing to comply with applicable law requiring reasonably safe public roads.

SUMMARY OF ARGUMENT

A. 23 U.S.C. § 409 is ambiguous: its wording makes its intended scope unclear, various courts and entities have interpreted its scope differently, and its legislative history does not clearly indicate the intent of Congress. The one guiding principle to be applied in construing the

scope of Section 409, however, is that because it is a privilege in derogation of the truth, it must be construed restrictively. If this Court construes the statute restrictively and in a functional manner it will find the statute protects opinion evidence and any data generated by a state agency for the sole purpose of seeking federal highway funds. By so construing the statute, the Court will allow state agencies to set forth their opinions freely regarding hazardous intersections without fear that those opinions could later be used against them. It will also allow state agencies seeking federal highway funds to perform studies or generate data that could be used to assess the safety of an intersection without fear that the information they generated solely for that purpose could be used against them. This construction also allows states that have determined their citizens wish to hold their government accountable for improper maintenance of intersections to honor the wishes of their citizens.

B. Because Guillen has been directly and adversely affected by Section 409, he has standing to challenge its constitutionality. But for Pierce County's reliance on Section 409, Guillen already would have obtained the requested discovery and indeed, would have had this case tried by this date. In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), this Court considered challenges by individuals that Congress exceeded its authority under the Commerce Clause in enacting certain federal statutes. Here, Guillen claims Section 409 exceeds the scope of Congress' authority under both the Spending Clause and the Commerce Clause. In addition, Guillen asserts that Section 409 violates the Tenth Amendment. Because the Tenth Amendment was enacted to protect individual citizens'

rights and because Guillen has been adversely affected by Section 409, he has standing to raise a Tenth Amendment challenge to the statute.

C. Congress exceeded its authority under the Spending Clause when it enacted 23 U.S.C. § 409. Under *South Dakota v. Dole*, 483 U.S. 203 (1987), Congress may enact conditional spending legislation, imposing otherwise unauthorized conditions on states, if it complies with three requirements. First, Congress must exercise its power under the Spending Clause in pursuit of the general welfare. Here, Congress made no findings to show Section 409 advanced the general welfare. Section 409 does not advance the federal government's interest in having states gather traffic-accident data, as the Federal-Aid Highway Act of 1966 already encouraged compliance – any state refusing to comply would suffer a severe reduction of federal highway funding. There is no evidence any state failed during the ensuing twenty-one years to comply with the traffic-accident data requirement of the 1966 Act. There is likewise no evidence that Section 409 further encouraged states to gather traffic-accident data. Section 409 does nothing to advance the general welfare. For that reason alone, Congress exceeded its authority under the Spending Clause.

The second requirement of *Dole* is that Congress must condition receipt of federal funds unambiguously, enabling states to exercise their choices knowingly, aware of the consequences of their participation. Section 409, however, is ambiguous. Different state courts and different entities have interpreted Section 409 in different ways. Neither the original statute nor the 1995 amendment inform states they must comply with the statute to receive federal highway funds. Neither the original statute nor the 1995

amendment require states to amend their laws to comply with a federal condition. Section 409 does not meet the second *Dole* requirement.

The third requirement of *Dole* is that a condition must be related to the federal interest in a particular national project or program. Section 409 is unrelated to the purposes of the federal highway program because it does not promote the 1966 Act's objective of obtaining safer roads. Because there is no relation between Section 409 and the goals of the federal-aid highway program, Section 409 fails to meet the third *Dole* requirement.

D. In order to comply with the Commerce Clause, federal legislation must regulate economic or commercial activities substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995). State judicial rules regarding discovery and admissibility of evidence for state causes of action are not economic or commercial in nature. Indeed, the hallmark of state sovereignty is the authority of states to determine their own rules regarding state judicial proceedings. Section 409 in no way relates to economic or commercial activities and Congress had no authority under the Commerce Clause to enact it.

ARGUMENT

A. 23 U.S.C. § 409 is an ambiguous statutory privilege that must be construed narrowly.

Pierce County contends Section 409 is unambiguous. Pet. Br. at 38. That contention, however, is belied (1) by case law, as different courts have interpreted Section 409 in vastly different ways, (2) by the fact that the Washington State Supreme Court justices interpreted Section 409

differently among themselves, and (3) by the fact that the Solicitor General interprets Section 409 differently than does Pierce County. The Court must construe this ambiguous statute.

In construing any privilege, this Court has adhered to one central tenet: because privileges are in derogation of the truth, they must be construed restrictively. *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982); *United States v. Nixon*, 418 U.S. 683, 709-10 (1974).

Construing Section 409 restrictively, the issue becomes whether the Act only privileges documents actually compiled or collected by state agencies seeking federal highway funds or whether it has a broader reach. Accordingly, there are four possible ways to construe Section 409: (1) it only applies to reports, surveys, lists, and data that a state agency actually prepares itself to seek federal highway funds; (2) in addition to the above, it applies to all data that the agency has in its possession whether it generated those data itself or received them from another agency; (3) in addition to numbers one and two, it applies to all documents, wherever located, that contain the data used by the agency seeking federal highway funds; (4) in addition to numbers one through three, it provides immunity from discovery or admission into evidence the knowledge of others that may be based on those documents.

The County relies primarily on two cases to support its argument that Section 409 should be interpreted to provide the broadest possible immunity: *Newman v. King County*, 947 P.2d 712 (Wash. 1997) and *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). However, *Newman* is a Washington State Supreme Court case that followed the principles set forth in *John Doe Agency*. As this Court

must construe Section 409, a federal statute, *John Doe Agency*, and not *Newman*, is the case that provides guidance.

In *John Doe Agency*, the John Doe corporation was in 1985 the subject of a grand jury fraud investigation. *John Doe Agency*, 493 U.S. at 149. The corporation made a request under the Freedom of Information Act, seeking disclosure of 1978 correspondence regarding an audit into its accounting practices. *Id.* The agency in possession of the documents denied the request and two days later sent the documents to the FBI. *Id.* The corporation renewed its FOIA request but directed it to the FBI. *Id.* The FBI denied the request citing Exemption 7(a) of FOIA. *Id.*

This Court noted that despite the underlying purpose of FOIA of an informed citizenry and a basic policy of disclosure rather than secrecy, the statutory exemptions must have meaningful reach and application. *Id.* at 152. It acknowledged that Congress realized legitimate governmental interests could be harmed by release of certain types of information. *Id.* It further recognized Congress sought to reach a workable balance between the right of the public to know and the need of the government to keep information in confidence without permitting indiscriminate secrecy. *Id*.

The specific exemption at issue in *John Doe Agency* protected records or information compiled for law enforcement purposes. *See* 5 U.S.C. § 552(b)(7). In construing that exemption, this Court noted that FOIA was not intended to supplement or displace rules of evidence. *Id*. at 153.

This Court held that the exemption included the documents requested by the corporation, concluding the

FBI need not actually have created the documents in order to gain the protection of the statute. However, the Court made it clear that it construed the statute under circumstances that were unique to the FOIA setting:

> This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption. In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect. The statutory provision that records or information must be "compiled for law enforcement purposes" is not to be construed in a nonfunctional way.

Id. at 157 (citations omitted).

Here, by construing Section 409 so that it protects only reports, surveys, lists, and data actually generated by a state agency seeking federal highway funding, the Court would not only accomplish the goals of the Act but also would adhere to the principle of restrictive construction. In other words, the Court would construe the statute in a functional way. On the facts of this case, such a construction would allow the State of Washington freely to state its opinions and conclusions regarding the hazard an intersection poses without having those opinions and conclusions discoverable by an accident victim. It would protect data gathered specifically for federal highway funding

from discovery or admission into evidence. At the same time, it would recognize that the State of Washington generates traffic accident data independently of federal funding purposes and indeed has done so for sixty-five years. It would allow Guillen to obtain all the materials he sought in discovery, thereby making it unnecessary for this Court to decide the constitutionality of Section 409.[2]

Alternatively, this Court could take a slightly broader approach in interpreting Section 409. The Court could interpret Section 409 so that it protects data the agency seeking federal highway funding did not itself create but simply obtained from other sources. This would prevent a plaintiff from obtaining documents in the possession of a state agency seeking federal highway funds but would not preclude discovery of traffic accident data from other governmental agencies.[3] The defect with this approach is that it does not follow the precept that privileges are to be construed narrowly. However, it does follow the statutory

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[2] This narrow construction harmonizes Section 409 with 23 U.S.C. § 402. Section 402(a) requires the states to "collect [ ] and report [ ] . . . data on traffic-related deaths and injuries. . . . " It appears that Washington, along with other states, collects traffic accident reports pursuant to Section 402. Thus, the accident reports withheld from discovery are not collected "pursuant to" Section 152 and are not shielded by Section 409.

[3] This is the current interpretation of Section 409 by the Alabama Supreme Court. *See Ex Parte Alabama Dep't of Transp.*, 757 So.2d 371 (Ala. 1999) (holding plaintiff may obtain requested information from Alabama Department of Public Safety). This is also the interpretation that the Solicitor General has taken regarding Section 409, Solicitor General's Br. at 35-45, the interpretation by the concurring opinion by the Washington State Supreme Court justices in *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001), and by the Washington State Court of Appeals, *Guillen v. Pierce County*, 982 P.2d 123 (Wash. App. 1999).

construction of the term "compiled" found in *John Doe Agency*. If the Court construes the statute in this fashion, then a remand would be necessary to determine which specific discovery requests would be precluded and which would still be allowed. Under this approach, the Court would have to decide the constitutionality of Section 409.

The Court could also take a third approach in construing Section 409. Under this approach, the Court could rule Section 409 covers not only documents actually possessed by the agency seeking federal highway funds, but also the originals of those documents that were initially generated by another state agency for purposes other than obtaining federal highway funding. Applying this approach, the Court would bar a plaintiff from obtaining discovery of traffic accident data not only from the state agency seeking federal highway funds, but also from law-enforcement agencies that were the original source of that information.[4] Such a construction would disregard the rule that a privilege is to be restrictively construed. As above, if the Court construes the statute in this fashion, then a remand would be necessary to determine which specific discovery requests would be precluded and which would still be allowed. Under this approach, the Court would have to decide the constitutionality of Section 409.

Finally, the Court could adopt a fourth approach in construing Section 409. Under this approach, urged by Pierce County, not only is any document that finds its way into the possession of an agency seeking federal highway

[4] This is the interpretation given to Section 409 by the Washington State Supreme Court.

funds privileged, and not only are the originals of those documents in the possession of other agencies that created those documents for purposes other than federal highway funding privileged. The privilege also would prevent the testimony of any person who may have gained any information by way of those documents. Under this construction, a plaintiff would be precluded from having law enforcement officers testify about their knowledge of prior accidents.[5] Such a construction completely disregards the precept that privileges are to be construed narrowly. If this construction is adopted, no remand is necessary as Guillen would not be entitled to any of the discovery sought. Under this approach, the Court would have to decide the constitutionality of Section 409.

Construing Section 409 under either the first or second options is reasonable, follows rules of statutory construction, and construes the Act in a functional manner. The first option alone, however, recognizes and gives meaning to this Court's time-honored doctrine of constitutional avoidance. Any other construction ignores the central tenet that privileges are to be construed restrictively. And any other construction requires this Court to decide the constitutionality of an ambiguous statute, a result it studiously avoids. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v.*

[5] This is the construction being applied by Pierce County, as it has refused to answer discovery as to law enforcement officers who have knowledge of prior accidents or indeed who even patrolled the intersection in question.

Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001).

B. Guillen has standing to challenge the constitutionality of Section 409.

The County contends that an individual who has, by virtue of a federal statute, been denied discovery of information to which he otherwise would have access in a state cause of action lacks standing to argue the statute exceeds Congress' Article I authority.

Pierce County begins its argument by representing:

> [T]his honorable Court held that "absent the states or their officers, [individuals] have no standing . . . to raise any question under the [tenth] amendment."

Brief of Petitioner at 21 *citing Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 144 (1939). This is false. Pierce County replaced the word "appellants" with the word "individuals," entirely changing the meaning of the quoted passage. *Tennessee Electric Power* did not hold that individuals never have standing to raise any question under the Tenth Amendment. Instead, *Tennessee Electric Power* held that the appellants had no standing *in that case*.

In *Tennessee Electric Power*, the appellants were fourteen companies that generated and distributed electricity in numerous southern states. The companies filed an action against the TVA because it would be providing electricity in competition with them. According to the companies, the plan creating the TVA violated the Fifth, Ninth, and Tenth Amendments because

> the sale of electricity on the scale proposed will deprive the appellants of their property without due process of law, will result in federal regulation of the internal affairs of the states, and will deprive the people of the states of their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation.

Tennessee Electric Power, 306 U.S. at 136.

This Court began its analysis by recognizing that while the appellants each were awarded franchises by various states to operate utilities, none of them were granted the right to be free from competition. *Id*. at 139. The Court accordingly held that the appellants had no legal cause of action merely because a state subsequently authorized the TVA to enter and operate in the same field. *Id*.

The appellants argued that if their franchise rights did not give them standing, they could nonetheless challenge the constitutionality of the grant of power creating the TVA because the TVA would be in competition with them. *Id*. at 139-40. This Court once again held that an entity cannot bring an action against another based on the fact that the other will compete with it where the competition is otherwise lawful. *Id*. at 140.

The passage quoted by Pierce County appears at pages 143 and 144 of the Court's opinion. The appellants had argued they had standing to challenge the constitutionality of the act creating the TVA, as the act allowed the federal government to regulate purely local matters. The Court characterized the appellants' argument thus: because the TVA sold electricity at lower rates than the appellants, those sales resulted in an

indirect regulation of appellants' rates. *Id*. at 143. The Court rejected that argument, noting that under that same analysis, any competition would indirectly regulate rates. In the Court's view, this effect was nothing more than an incident of competition. *Id*. at 144. This Court then stated:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment.

Id.

In contrast to the portion of the opinion quoted by the County, the full text demonstrates that this Court simply held that "in this suit" the appellants, whose sole complaint was that the TVA would sell electricity more cheaply than they would, had no standing to challenge the creation of the TVA. The Court never broadly held that "individuals" never have standing to raise issues under the Tenth Amendment.

In deciding whether a party has standing to assert a claim, this Court asks whether the litigant is entitled to have a court decide the merits of the dispute or particular issue. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This Court has stated:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that

> concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978) (citations omitted).

Pierce County's argument would have some weight if someone other than Guillen argued Section 409 violated the Spending and Commerce Clauses. That, however, is not the case. Guillen has suffered an actual injury: he has been unable to obtain information to which he otherwise would be entitled but for Section 409.

In recent cases, this Court has allowed a litigant to argue that a federal statute imposing criminal sanctions for possessing a gun within a school zone[6] and providing a civil remedy for gender-motivated violence[7] exceeded Congress' authority under the Commerce Clause. In those cases, individuals were subject to direct consequences as a result of those Acts. Here, Guillen is subject to a direct consequence as a result of the application of Section 409: the inability to discover, or have admitted at time of trial, certain evidence to which he otherwise would be entitled.

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[6] *See United States v. Lopez*, 514 U.S. 549 (1995).

[7] *See United States v. Morrison*, 529 U.S. 598 (2000).

Guillen is adversely affected by the consequences of Section 409. As such, he has standing to challenge the validity of the statute.

C. Section 409 exceeds Congress' power under the Spending Clause.

In *South Dakota v. Dole*, 483 U.S. 203 (1987), South Dakota challenged 23 U.S.C. § 158. That statute directed the Secretary of Transportation to withhold 5% of federal highway funds from any state that allowed persons younger than twenty-one to purchase or possess alcohol. *Dole*, 483 U.S. at 205. There, Congress had found that the differing drinking ages among the states created incentives for young people to combine drinking and driving. *Id*. at 208. Unlike here, in enacting Section 158 Congress did not directly raise the minimum drinking age for any state accepting federal highway funds. Instead, Congress respected the sovereignty of each state legislature to determine whether the condition was acceptable.

In *Dole*, this Court held that the authority of Congress under the Spending Clause is limited by four restrictions.[8] First, Congress must exercise its power under the Spending Clause in pursuit of the general welfare. *Id*. at 207. Second, if Congress wishes to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choices knowingly, cognizant

[8] In fact, there is arguably a fifth restriction set forth in *Dole*. This Court states that under some circumstances the financial inducement offered by Congress may be so coercive as to pass the point at which pressure turns into compulsion. *Dole*, 483 U.S. at 211.

of the consequences of their participation. *Id*. Third, Congress may not impose conditions on federal grants that are unrelated to the federal interest in a particular national project or program. *Id*. Fourth, other constitutional provisions may provide an independent bar to the conditional grant of federal funds. *Id*. at 208.

In *Dole*, the Court held that Congress had the authority under the Spending Clause to enact 23 U.S.C. § 158. According to the Court, the Act was in pursuit of the general welfare, the conditions imposed by the Act "could not be more clearly stated by Congress," *id*. at 208, and even South Dakota could not argue that the condition was unrelated to a federal purpose – safe interstate travel. *Id*.

Because there is absolutely no evidence that states were not complying with the information gathering requirement of the 1966 Highway Safety Act, Congress exceeded its authority under the Spending Clause when it enacted Section 409. There is no evidence that Section 409 serves the general welfare. The conditions set forth in Section 409 are ambiguous. Finally, the conditions imposed by Section 409 are unrelated to any federal interest, i.e., unrelated to the requirement that states gather the data mandated by the 1966 Act.[9]

[9] Moreover, unlike the statute at issue in *Dole*, Section 409 is not a "condition" on spending, instead applying "[n]otwithstanding any other provision of law. . . . " It fails constitutional muster under the Spending Clause for this reason alone, as explained in the brief of Amici Whitmers at 18-20.

1. Section 409 was not enacted to further the general welfare.

No one disputes that the goal of the 1966 Highway Safety Act is safe interstate travel. There is also no dispute that Congress determined in 1966 that requiring states to keep traffic-accident data would help achieve that goal. There should also be no dispute that Congress achieved that goal by threatening to withhold federal funds from states that failed to collect the required traffic-accident data.

Because every state had fully complied with the federal requirements, Section 409, by definition, was not enacted to further that goal. While there was undoubtedly a purpose behind the enactment of Section 409, the legislative record remains largely silent. The only thing for certain is that the purpose was unrelated to obtaining traffic-accident data from the states. The federal government was already obtaining those data. Accordingly, and especially where the Congressional record sheds no light on this issue, there is nothing to support a decision that Congress enacted Section 409 to further the general welfare.[10]

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[10] The only support that Pierce County can cite for its assertion that "Congressional funding alone was not sufficient to induce total participation" (County's brief at 3) is a 1983 memo from Marshall Jacks, Jr., the then Associate Administrator for Safety, Traffic Engineering, and Motor Carriers to Mr. D. L. Ivers, Chief Counsel. In that memorandum, it was Mr. Jacks' opinion (although admittedly it is stated as a fact) that

> It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152 for instance) for fear that acknowledging the existence of hazardous conditions would expose

(Continued on following page)

If the general welfare requirement restricts the conduct of Congress at all, then there must be something upon which this Court may base such a finding. Here, there is nothing. For that reason alone, Congress exceeded its authority under the Spending Clause by enacting Section 409.

2. Because the conditions imposed by Section 409 are ambiguous, the statute fails to meet the second *Dole* requirement.

In *Dole*, this Court held that:

> if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."

> them to liability. The issue has once more been raised, this time by the American Association of Railroads. . . .

(State of Louisiana's Br., Appendix "A" at 1-2.) To make the stretch that Congress ever reached the conclusion that states were not complying with the data-gathering requirement of the 1966 Highway Act based upon this memo is indeed too large. First, there is no evidence that this memo ever was seen, much less considered, by the House of Representatives. Second, Jacks nowhere asserts that highway departments are not complying with the federal mandate, only that they are allegedly "reluctant" to do so. Third, even Jacks does not propose that all "data" be withheld, but instead only "no report, list, schedule or survey compiled by or for a State" should be admitted into evidence. Fourth, there is nothing in the Congressional record indicating any state had not complied with the data-gathering requirement. Fifth, all states apparently complied with the requirement as no state was ever denied funding based on non-compliance. Sixth, there is no Congressional finding one way or the other regarding Jacks' opinion. Pierce County is making an assumption, one that is belied by the record.

Dole, 483 U.S. at 207 (alterations in original). Here, the 1995 amendment fails to meet this requirement.

In *Dole*, the statute, when enacted, clearly put the South Dakota legislature on notice of what was required of it: amend its own laws to raise the minimum legal drinking age to twenty-one. If South Dakota was unwilling to do that, the statute was very clear as to what would occur: South Dakota would lose five percent of its federal funding for highway improvements.

The law in *Dole* was unambiguous. It allowed the South Dakota legislature to exercise its choice. It clearly informed the citizens of South Dakota what would happen if they failed to change their minimum drinking age law.

Here, in enacting Section 409, Congress nowhere stated the conditions with which states must comply before receiving federal highway funds. Section 409 is anything but a model of clarity. From the moment courts began construing Section 409 to the present, different courts have interpreted it differently. The Solicitor General interprets Section 409 differently than Pierce County. The Washington Court of Appeals interprets it differently than the Washington Supreme Court. Of the nine Washington State Supreme Court justices, three interpreted Section 409 differently than the other six. The Washington State Supreme Court interpreted Section 409 differently than other state courts. By definition, Congress failed to meet the second *Dole* requirement in enacting Section 409: the section and its amendments are ambiguous and have been interpreted differently by different entities since its initial enactment.

As a corollary to the clarity requirement, Congress nowhere provided the states an opportunity to accept or

reject Section 409 in a clear manner. Section 409 was not part of the 1966 Highway Safety Act as enacted in 1966. Rather, it was not enacted for another twenty-one years. It has since been amended twice: once in 1991 and once in 1995. There is no language in Section 409 putting the states on notice that they would lose federal funding if they failed to abide by its provisions. There is no requirement in Section 409 that the state legislatures, as in *Dole*, enact legislation specifically adopting the restrictions on discovery and admissibility of certain evidence in state court proceedings. In short, Congress, in enacting Section 409 and its amendments, failed to meet the second *Dole* requirement. For that reason alone, Section 409 violates the Spending Clause requirements.

Pierce County claims Washington assented to Section 409 when it enacted RCW 47.04.050.[11] That is incorrect. As a matter of law, Washington State could not assent to Section 409 by enacting RCW 47.04.050 in 1961 – twenty-six years before Section 409 was even enacted. If Pierce County were to properly analyze this issue, instead of simply proclaiming that Washington assented to Section 409, it would have to analyze whether a state may prospectively assent to a federal statute.

RCW 47.04.050 provides:

> The state of Washington hereby assents to the purposes, provisions, terms, and conditions of the grant of money provided in an act of congress

[11] Amicus Product Liability Advisory Council goes further and claims that the Washington legislature "expressly" assented to the terms of § 409. Product Liability Advisory Council Br. at 12, n. 4.

> entitled: "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," approved July 11, 1916, and all acts, grants and appropriations amendatory and supplementary thereto and affecting the state of Washington.

This statute was originally enacted in 1917 and subsequently amended in 1937 and 1961.[12]

As a starting point for the analysis, the Washington legislature never expressly assented to the specific terms of Section 409 – RCW 47.04.050 was last amended twenty-seven years *prior to* Section 409's adoption.

Since Section 409 did not exist when RCW 47.04.050 was last amended, and since it cannot be disputed that Section 409 fundamentally alters the terms and conditions of the Highway Safety Act as it existed in 1961, the question is whether the Washington Legislature could agree to accept future conditions imposed by Congress. Under Washington law, the answer is no.

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[12] In 1917 the statute read: "The State of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an act of Congress entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916." In 1937 the statute read: "The State of Washington hereby assents to the purposes, provisions, terms and conditions of the grant of money provided in an act of Congress entitled: 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916, and all acts, grants and appropriations amendatory and supplementary thereto and affecting the State of Washington."

The Constitution of Washington provides:

> The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington. . . .

Wash. Const., Art. 2, § 1.

The Washington legislature is prohibited from delegating its purely legislative functions. *Diversified Investment v. DSHS*, 775 P.2d 947, 950 (Wash. 1989). Accordingly,

> It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute.

Id. at 25.

Washington is in accord with other states that have found it unconstitutional for a state legislature to attempt to assent to future federal laws. *See, e.g., State v. Carswell*, 557 So.2d 183, 184 (Fla. 1990) ("unlawful to delegate legislative power to enact a statute which incorporates by reference federal law and regulations which will arise in the future"); *State v. Rodriguez*, 379 So.2d 1084, 1086 (La. 1980) ("Louisiana legislature is not authorized to delegate its legislative power to . . . Congress"); *State v. Johnson*, 173 N.W.2d 894, 895 (S.D. 1970) ("attempted adoption of future laws, rules or regulations of . . . the federal government . . . generally have been held unconstitutional").

Under Washington law, if the Washington legislature intended to prospectively assent to any condition Congress could impose, then such an attempt would be an unconstitutional delegation of power.

3. Section 409 is not a reasonable condition that is relevant to the federal interest at stake in the 1966 Highway Safety Act.

The third *Dole* restriction on Congress' power under the Spending Clause requires any condition on federal grants to be related to the federal interest in particular national projects or programs. *Dole*, 483 U.S. at 207. In *Dole*, this Court did not determine how direct a condition must be to satisfy this requirement. *Id*. at 208 n. 3. Regardless of how direct the condition must be, the condition in this case fails to meet this requirement.

Here, there is simply no known reason related to highway safety for Congress to enact Section 409. The federal purpose underlying the Highway Safety Act was safe highways and roadways. In order to achieve that goal, Congress required states to develop a program of documenting accidents on its roadways. If states failed to comply with that condition, then they would lose their federal highway funding. The states, under the 1966 Act, could either accept that condition or reject that condition. Section 409, enacted twenty-one years later, did not further the goal of promoting safe highways and roadways. This is particularly true where nothing indicates states were not complying with the information gathering requirement. Section 409 fails to meet the third *Dole* requirement.

D. Section 409 exceeds Congress' power under the Commerce Clause.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court recognized that:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."

Lopez, 514 U.S. at 552 (citations omitted).

> "[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Id. *quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

> [T]he scope of interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a complex centralized government.

Id. at 557 *quoting N.L.R.B. v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937).

Consistent with that structure, this Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. First, Congress may regulate channels of interstate commerce. Second, Congress may regulate and protect the instruments of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities that have a substantial relationship to interstate commerce. *Lopez*, 514 U.S. at 558-59.

The first issue here is whether Congress has authority under the Commerce Clause to regulate state court proceedings as they affect state causes of actions. State court proceedings are not channels of interstate commerce. Thus, the first category does not apply.

The next question is whether, by regulating state court proceedings, Congress is attempting to protect an instrument of interstate commerce. An instrument of interstate commerce, as the County and its amici argue, would be highways and roads themselves. Section 409 does not protect highways or roads. In fact, as pointed out earlier, the amendment does nothing to further the regulatory goal of promoting safe highways.

Accordingly, the only question is whether state court proceedings substantially affect interstate commerce.

In *Lopez*, this Court reviewed situations in which it upheld congressional acts as proper under the Commerce Clause. *See Lopez*, 514 U.S. at 559-60 *citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (regulation of intrastate coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (intrastate extortionate credit transactions) *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants using substantial interstate supplies); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels catering to interstate guests); and *Wickard v. Filburn*, 317 U.S. 111 (1942) (production and consumption of wheat). After completing its review, this Court held:

> Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Lopez, 514 U.S. at 560.

Applying this tenet, the *Lopez* Court held that Congress exceeded its authority under the Commerce Clause when it enacted the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A). The Court noted that Section 922(q) was a criminal statute that by its terms had nothing to do with commerce or any sort of economic enterprise. *Id*. at 561. This Court further noted that Section 922(q) was not an essential part of a larger regulation of economic activity where the regulatory scheme would be defeated unless the intrastate activity were regulated. *Id*.

The same is true here. State court proceedings are not economic activity. As in *Lopez*, "neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." *Id*. at 611. Section 409 does not regulate commercial or economic activity. Instead, it regulates judicial proceedings. While those judicial proceedings may ultimately have economic effect, that type of tangential effect is an insufficient basis for Congress to exercise its Commerce Clause authority:

> In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.

Id. at 580 (Kennedy, J., concurring). In every case in which this Court has sustained a federal regulation under the aggregation principle, the regulated activity was of an apparent commercial character. *United States v. Morrison*,

529 U.S. 598, 672, n. 4 (2000). Judicial proceedings are not commercial activities.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Court made clear that Congress may exercise its authority under the Commerce Clause only to regulate commercial or economic conduct. There, Morrison challenged the constitutionality of Section 13981 of the Violence Against Women Act of 1994, 42 U.S.C. § 13981(b). The Act allowed a person who was the victim of a crime of violence motivated by gender the right to recover damages against the perpetrator. Morrison, a defendant in an action under the Act, argued Congress exceeded its authority under the Commerce Clause by enacting the statute.

This Court noted that Congress had made specific findings that gender-motivated violence affected interstate commerce. Nevertheless, the Court held that congressional findings are not, by themselves, sufficient to sustain the constitutionality of Commerce Clause legislation. *Id.* at 614. Instead, this Court must determine whether the activity Congress seeks to regulate under the Commerce Clause affects interstate commerce. *Id.*

The *Morrison* Court held Congress had exceeded its authority under the Commerce Clause by attempting to regulate non-economic, criminal conduct based solely on that conduct's aggregate effect on interstate commerce. *Id.* at 617. This Court noted that if the federal government were allowed to use its Commerce Clause authority in such a manner, then it could regulate "other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-16.

As in *Morrison*, state judicial proceedings are neither economic nor commercial activities. Instead, they are a defining aspect of state sovereignty.[13] States, not the federal government, have the power to determine their rules of discovery and rules of evidence:

> [W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Patterson v. New York, 432 U.S. 197, 201 (1977) *quoting Speiser v. Randall*, 357 U.S. 513, 523 (1958).[14]

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[13] Pierce County argues that this Court upheld the federal government's "abolition" of a state tort by federal regulation in *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000) and thus Congress does not violate the Tenth Amendment by dictating prohibitions regarding discovery and evidence for a state court cause of action. *Shanklin*, however, did not raise Tenth Amendment issues or even issues under the Spending or Commerce Clauses. Instead, this Court, following the precedent of *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), held that a plaintiff could not hold a railroad company liable for an accident where the plaintiff alleges that the signage used at a crossing was inadequate where the type of sign placed at the crossing was dictated by federal regulations and those regulations deemed the sign adequate. Here, there is no indication that Congress intended to preempt the state tort cause of action for negligent maintenance of a county street intersection.

[14] Additionally, despite the County's arguments, Section 409 cannot be justified as an "integral" part of a complex regulatory program. *See* Whitmer Br. at 14-17.

Congress exceeded its authority under the Commerce Clause when it enacted Section 409.[15]

CONCLUSION

Pierce County admits the Washington Supreme Court struck down the 1995 amendment to 23 U.S.C. § 409 because it violated principles of dual sovereignty implicit in the Constitution and explicit in the Tenth Amendment. Pet. Br. at 17. Yet the County contends the 1995 amendment raises no Tenth Amendment issues. Despite Pierce County's wishes, a statute prohibiting a state from exercising its sovereign powers to regulate discovery and admissibility in state court proceedings for a state cause of action goes to the heart of the Tenth Amendment. This case goes to the heart of the constitutional framework.

As this Court acknowledged in *Printz*:

> [T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" – "a

[15] Pierce County is apparently arguing that the Necessary and Proper Clause of Article I, Section 8 of the Constitution provides an independent basis for Congress' enactment of Section 409. But Pierce County misunderstands the basic nature of that clause. The Necessary and Proper Clause does not provide an independent basis of constitutional authority. Instead, Congress must have underlying Article I authority to enact a law. If that authority exists, then the Necessary and Proper Clause grants the power for carrying it out. *Printz v. United States*, 521 U.S. 898, 923 (1997).

> legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. . . .
>
> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Printz v. United States, 521 U.S. 898, 920-21 (citations omitted).[16]

Here, Congress dictates to Washington State what evidence state court litigants may discover and admit in state courts in state causes of actions. One defining characteristic of a state acting as a state is the authority to determine its own rules of procedure and rules of evidence for state causes of actions:

> No one disputes the general and unassailable proposition . . . that States may establish the

[16] Although Congress has power to regulate only individuals and not states, *Printz*, 521 U.S. at 920, Section 409 operates directly on the judicial branch of each state in the Union. As pointed out by Amici Whitmers, Congress exceeded its constitutional authority by imposing this regulatory scheme directly on the states.

> rules of procedure governing litigation in their own courts.

Felder v. Casey, 487 U.S. 131, 138 (1988). Unlike other cases that have asked whether an activity has traditionally been a state function, *see, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (disputing whether mass transit has historically been privately or state-run activity), there should be no dispute that state court proceedings for state causes of action regarding state actors are one of the core functions of state government.

This case is almost the polar opposite of *Dole*. In *Dole*, Congress made findings that drivers under the age of twenty-one who consumed alcohol posed a threat not only to their own safety but also to the safety of others. Congress expressly found that drivers under the age of twenty-one who resided in states where the minimum drinking age was twenty-one years would drive to neighboring states with lower drinking ages. Thus, states where the minimum drinking age was twenty-one were powerless to protect their own citizens against this hazard. Accordingly, even though setting the age at which its citizens may lawfully consume alcohol may be a state function, it was a proper use of Congress' power under the Spending Clause to entice states to raise their minimum drinking age for the safety of those living in other states.

Here, there was no evidence, and certainly no Congressional finding, that any state had failed to comply with the 1966 Highway Safety Act's information gathering requirement. But even if there were such a finding, it does not justify a law changing state rules of discovery and evidence. Under our dual system of government, states retain the ability to protect themselves if they feel threatened by gathering this information. They have the option

of refusing to participate in the federal-aid highway program. Or, more fundamentally, they had the authority to enact state laws prohibiting discovery or admissibility of such evidence within their own court system. Unlike *Dole*, where an individual state's decision regarding its alcohol-consumption laws had a direct effect on neighboring states with differing age limits, a state's decision regarding the discovery or admissibility of traffic-accident data has nothing but the most remote effect upon any neighboring states.

The Tenth Amendment exists to protect the political process. When Congress enacted Section 409, changing state rules of procedures and evidence for state causes of actions, it subverted the political process. And more importantly, state governments lost accountability to their own citizens. Given the manner in which Congress enacted Section 409, citizens lost the ability to hold their state governments accountable for the way their state causes of actions would be determined in their own state courts.

Respectfully submitted,

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