NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

PIERCE COUNTY,
Petitioner/Defendant,

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/Plaintiffs

On Petition for Writ of Certiorari
To the Supreme Court of the State of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

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

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

PARTIES TO PROCEEDING

All parties to the proceeding in the Washington Supreme Court, the court whose judgment is the subject of this petition, do not appear in the caption of this case because the case of Whitmer v. Yuk had been consolidated with the instant case for appellate purposes and has since settled and been dismissed. See App. I. The parties to the proceeding in the Washington Supreme court were:

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

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

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

4. The Estate of Clementina Guillen-Alejandre (defendant in Guillen v. Pierce County);

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

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

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

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

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

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of 23 U.S.C. §409, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) is applicable.

I. REPORT OF OPINIONS

The opinion of the Supreme Court of Washington in this case is published at Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628 (2001). The opinion of the Washington Court of Appeals in this case is published at Guillen v. Pierce County, 96 Wn.App. 862, 982 P.2d 123 (1999).

II. JURISDICTION

The opinion by the Supreme Court of Washington in this case was entered on September 13, 2001, see App. A, and rehearing was denied on November 27, 2001. See App. B. This Court has jurisdiction under 28 U.S.C. §1257.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS (SEE APPENDIX "I")

A. U.S. Constitution, Article I, § 8, clause 1

B. U.S. Constitution, Article I, § 8, clause 3

C. U.S. Constitution, Article I, § 8, clause 18

D. U.S. Constitution, Article VI, clause 2

E. U.S. Constitution, Amendment X

F. 23 U.S.C. § 152

G. 23 U.S.C. § 402

H. 23 U.S.C. § 409

I. RCW 47.04.050

J. RCW 47.04.060

K. RCW 47.04.070

IV. STATEMENT OF THE CASE

In May of 1995, Pierce County applied for federal highway safety improvement funds under 23 U.S.C. §152 for one of its intersections and supported its application with data from accident reports, collision diagrams and other similar material that it had collected and compiled pursuant to that statute. See Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628, 633 (2001). The request was administered through the state's Department of Transportation, but was found not to warrant federal hazard elimination funds. See id. at 633 & 645. The County again applied in the next fiscal year of 1996, but while this second application was pending Clementina Guillen-Alejandre ran a stop sign at the intersection on July 5, 1996 causing her pick up truck to collide with another car -- killing Guillen-Alejandre and injuring to some degree her two daughters and two nieces who were her passengers. See id. at 633.

In December of that year Ignacio Guillen, as the survivor of Guillen-Alejandre and in an effort to find grounds for a personal injury lawsuit against Pierce County, filed a "Complaint to Require Public Disclosure of Documents" which sought materials pertaining to, among other things, the accident history at the subject intersection. Id. Because those materials were gathered and maintained by the County for the purpose of applying for federal safety enhancement funds, the County asserted 23 U.S.C. §409 which protects such documents and moved for summary judgment, but the trial court ordered disclosure and the County appealed. Id. at 634; App. C.

A few months later, on April 14, 1998, Ignacio Guillen (now on behalf of his daughters) and Mariano Guillen (on behalf of Guillen-Alejandre's nieces) filed suit against Guillen-Alejandre's estate and Pierce County as well as served requests for

production and interrogatories on the County -- seeking the same material whose availability under the public disclosure act was being appealed. Id. at 634-35. On October 23, 1998, the County's motion for a protective order against discovery of data protected by §409 was denied and plaintiffs' motion to compel granted. Id. at 635; App. D & E. On November 20, 1998, production of the requested documents was ordered. See App. F. On January 15, 1999, the County's motions for Discretionary Review and consolidation with its pending public disclosure appeal were granted because "the majority of other jurisdictions reporting appear to support the County's interpretation of 23 U.S.C. §409." Guillen v. Pierce County, 96 Wn. App. 862, 868, 982 P.2d 123 (1999); App. G at 4-5.

Nevertheless, on August 6, 1999, the Court of Appeals affirmed the orders compelling disclosure and discovery. Though it did not decide the issue "because neither party has raised or briefed [the] question," that court sua sponte opined as to the constitutionality of 28 U.S.C. §409:

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

96 Wn.App. at 875 n. 26; App. H. On January 5, 2000, the Washington Supreme Court granted review. Guillen v. Pierce County, 139 Wn.2d 1015, 994 P.2d 847 (2000).

On September 13, 2001, Washington's highest court issued its decision acknowleding that the federal statute creates an evidentiary and discovery privilege in favor of state government, that "Congress clearly intended that the §409 privilege preempt state laws and court rules," and that the accident history "sought by the

respondents . . . would appear to be covered by §409." 31 P.3d at 644-47. However, it also ruled that private parties have standing to assert "state's rights" even though "state officials oppose the challenge," id at 648, and that §409 violates the Tenth Amendment to the United States Constitution because under the Spending Clause (U.S. Const. Art. I, §8, cl. 1) there is "no valid federal interest" that "is reasonably served" by the privilege, id at 651, under the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3) the "privilege lacks the requisite nexus to § 409's raison d'etre," id. at 654, and under the Necessary and Proper Clause (U.S. Const. Art. I, § 8, cl. 18) "it was neither 'necessary' nor 'proper' for Congress" to create the privilege. Id. The court then adopted the minority view of an earlier version of §409 -- a view the Court admitted Congress intended to overrule by its present version -- and held only documents "originally 'compiled' -- i.e. created, composed, recorded" as part of the application process are protected. Id. at 655. Hence it held Guillen is "entitled to at least four of the five items to which he was denied access," and "[i]f this state court has misconstrued the United States Constitution's limitations upon the federal government's power . . . the United States Supreme Court will so instruct, as is its constitutional role under our federalist system of government." Id at 655-56.

V. ARGUMENT

Certiorari is necessary because the decision of Washington's court of last resort "invalidated a federal statute on constitutional grounds," United States v. Morrison, 529 U.S. 598, 605, 146 L.Ed.2d 658, 120 S.Ct. 1740 (2000); see also United States v. Lopez, 514 U.S. 549, 552, 131 L.Ed.2d 626, 115 S.Ct. 1624 (1995), "conflicts with [every] decision of []other state court[s] of last resort [and] of United States Court of Appeals"

that has addressed the question, see S.Ct. Rule 10(b), and "conflicts with relevant decisions of this Court." See S.Ct. Rule 10(c). Further, the state court decision not only strikes down a federal privilege whose frequent amendment to counteract such judicially imposed limitations "reflects an obvious Congressional intent to strengthen the protection afforded to materials within its coverage, "Coniker v. New York, 181 Misc.2d 801, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999), but also lessens the ability of state government to protect its traveling public. Accordingly, petitioner respectfully requests this Court accept the state court's challenge and issue a writ of certiorari to review this violation of the Supremacy Clause.

A. STATE COURT VIOLATES SUPREMACY CLAUSE

In 23 U.S.C. §409 Congress expressly provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway/highway crossings, pursuant to Sections 130, 144 and 152 of this title, or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in 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.

(Emphasis added). In Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628, 655 (2001), the Washington Supreme Court refuses to enforce this federal privilege granted the states because it holds "Congress fundamentally lacks authority to intrude upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials and 'raw data' . . . ."

Though §409's privilege is a benefit and not a burden to state government, the Supremacy Clause nevertheless provides:

> [T]he Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI cl. 2 (emphasis added). Hence:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, Printz [v. United States, 521 U.S. 898,] 935 [,138 L.Ed.2d 914, 117 S.Ct. 2365 (1997)]; New York [v. United States], 505 U.S. [144,] 188[, 120 L. Ed.2d 120, 112 S.Ct. 2408 (1992)], it may require state courts . . . "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power." Printz, supra, at 907.

Alden v. Main, 527 U.S. 706, 752, 144 L.Ed.2d 636, 119 S.Ct. 2240 (1999)(emphasis added). See also New York, 505 U.S. at 178-179 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.") Here, Washington's legislative and executive branches have both accepted the §409 privilege, and enforcing rules of discovery and admissibility undeniably "relat[e] to matters appropriate for the judicial power."

Accordingly, until now courts "[u]niformally ... have held that section 409 is applicable in state court" because "[t]o hold otherwise defeats a significant purpose of the federal act and cannot be justified in light of the supremacy clause." City of Atlanta v. Watson, 267 Ga. 185, 475 S.E.2d 896, 903-4 (1996). As another state's high court recognizes:

> Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution and laws of this state, having to do with rule-making power, inherent authority, ... or anything else.

Sawyer v. Ill. Cent. Gulf RR Co., 606 So.2d 1069, 1073-4 (Miss. 1992). See also Seaton v. Johnson, 898 S.W.2d 232, 237 (Tenn. Ct.App. 1995)("If the forgoing is deemed to be unjust the remedy lies with Congress" citing Art. VI, § 2). In that Congressional abolition of certain types of state torts are routinely upheld as constitutional, see e.g. Geier v. American Honda Motor Co., 529 U.S. 861, 146 L.Ed.2d 914, 120 S.Ct. 1913(2000)(state common law "no airbag" action preempted); Norfolk Southern Railway v. Shanklin, 529 U.S. 344, 146 L.Ed.2d 374, 120 S.Ct. 1467 (2000) (regulation enacted under 23 U.S.C. preempted state tort action for negligent maintenance of grade crossing), it is difficult to understand how 23 U.S.C. §409's discovery and evidentiary protections in a specific type of state tort can be unconstitutional. Nevertheless, even if the Supremacy Clause were not recognized as alone imposing "an obligation on state judges to enforce federal prescriptions," §409 comes within other Congressional authority and universally is held to do so.

1. Spending Clause Authorizes § 409 Privilege

Article I, §8, clause 1 (i.e. the "Spending Clause") empowers Congress to "provide for the ... general Welfare of the United States," and is held to authorize legislation effecting even state legislatures and executives. Hence, in New York v. United States, 505 U.S. 144, 173, 120 L.Ed.2d 120, 112 S.Ct. 2408 (1992), this Court found where Congress "conditioned grants to the States upon the States' attainment of a series of milestones," it acts "well within the authority of Congress under the Commerce and Spending Clauses." Such Congressional "encouragement," as opposed to "compulsion," was held to honor principles of federalism because "residents of the State retain the ultimate decision as to whether or not the State will comply" so if "a state's

citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." Id at 168.

Here, §409 applies to raw data collected or compiled "pursuant to sections .... 152 of this title," and §152(a) provides for states to identify hazardous public roads while §152(b) authorizes the federal government to "approve as a project under this section any highway safety improvement project." Hence, under §152 Congress conditions grants of federal highway safety funds on states' attainment of the milestone of identifying potentially hazardous roads and -- as an additional incentive to gather the data necessary for such identification -- Congress under §409 protects records so obtained and kept under the program from discovery or admission in suits involving the road in question. See e.g. Robertson v. Union Pacific R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992)(citing Duncan v. Union Pac. R.R. Co, 790 P. 2d 595 (Utah App. 1990), aff'd, 842 P.2d 832 (Utah 1992) and Light v. State, 149 Misc.2d 75, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990))("the underlying intent of the statute is to 'facilitate candor in administrative evaluations of highway safety hazards,' and to prohibit federally required record-keeping from being used as a 'tool ... in private litigation.'")(emphasis added).

Indeed, the same statutory scheme of which §152 and §409 are a part -- i.e. 23 U.S.C. et. seq. -- have been upheld by this Court as constitutional under the Spending Clause and been given as an example of a proper exercise of Congressional power. See South Dakota v. Dole, 483 U.S. 203, 211-12, 97 L.Ed.2d 171, 107 S.Ct. 2793 (1987)(23 U.S.C. § 158 constitutional under Spending Clause because, "[e]ven if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in §158 is a valid use of the spending power"

because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact.") See also Printz, 521 U.S. at 936 (O'Connor, J., concurring)(conditions imposed on funds apportioned to the states under 23 U.S.C. §402 -- which include the §152(e) hazard elimination funds involved here -- are valid under Spending Clause).

As noted above, in Washington the citizenry has made the ultimate decision through its state legislature and executive that they accept the federal protection and terms of §409. See supra, n. 6. Nevertheless, though it admits §409 is one of the "strings attached" to the state's willing acceptance of federal safety enhancement funds, 31 P.3d at 651, the Washington Supreme Court argues such conditions also "must be 'relevant' and 'reasonably related' to a valid federal interest in a specific national project or program." Id at 650 (citing Dole, 483 U.S. at 208 and Massachusetts v. United States, 435 U.S. 444, 461, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978)). The state court then asserts:

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

31 P.3d at 651. However, the privilege for such "collected" data serves an essential interest to the operation of the federal program, and every other court considering its purpose has so held.

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

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

Id. at 641 (emphasis added). The Washington court further concedes Congress never intended the narrow interpretation -- given prior to §409's 1995 clarifying amendment by some state courts and now resurrected by Guillen -- that misapplied the privilege only to documents created under the federal program. See Id. at 644, 655. See also Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591; Seaton, 898 S.W.2d at 235-237 (before the 1995 amendment state court holds accident reports protected by "clear weight of authority" because "all records used or useable in identifying, evaluating or planning safety of highways or rail-highway crossings pursuant to Sections 130, 144 and 152 of 23 U.S.C. are so immune to examination.")

Hence, both before and after its current language was enacted, §409 was intended to "remedy this problem" of municipalities not gathering and retaining data as part of the federal application process out of fear "private tort plaintiffs [would have] an added advantage in their efforts to prove negligent governmental design or maintenance of certain traffic sites." Both before and after the 1995 amendment other courts had no problem identifying this obtaining and keeping of information as the federal interest for §409's discovery and evidentiary privilege. See e.g. Reichert v. State of Louisiana, 694 So.2d 193, 196 (La. 1997)(quoting Perkins v. Ohio Dept. of Transp., 65 Ohio App. 3d. 487, 584 N.E. 2d 794 (1989), cause dismissed, 57 Ohio St.3d 612, 566 NE 2d 673, rehearing denied, 58 Ohio St.3d 711, 570 N.E. 2d 281 (1991)("The interest to be served

by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.");Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 160 (7th Cir. 1992)(quoting Robertson, 954 F.2d at 1435)("the underlying intent of the statute is to . . . prohibit federally required record-keeping from being used as a 'tool ... in private litigation.'"). As the Solicitor General explained concerning §409: "If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, State and private parties will likely be deterred from compiling complete and accurate information about such hazards" and "[a]s a result, information about safety programs -- which depend on information about safety problems supplied by the States and private entities such as railroads-- will be jeopardized." See Palacios v. Louisiana and Delta Railroad Inc., 740 So. 2d 95, n. 6 (La. 1999)(quoting amicus brief in Ex parte Alabama Highway Dep't, 575 So.2d 389 (Ala.1990), cert. denied, 502 U.S. 937 (1991))(emphasis added).

This privilege for "compiled and collected" data is "reasonably related" to the "valid federal interest" of encouraging states to "obtain information" and conduct the "record keeping" necessary for them to receive federal roadway safety funds. As one state court explained after the 1995 clarifying amendment:

> ... Congress has determined that the effect of the prohibition would be to enhance the safety of the nation's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis, and that this goal outweighs the barriers that it creates for litigants attempting to prove that a state's negligence contributed to their injuries. . . . . Our system of government assigns the balancing of such competing interests to the legislative branch, and the role of this court is not to second guess the analysis that resulted in this evaluation, or to attempt, in a particular case, to find a way around it, but rather to effectuate Congressional intent.

Coniker, 695 N.Y.S.2d at 495. Under the Spending Clause, §409 is constitutional simply because, as another state court notes:

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

Sawyer, 606 So.2d at 1074. In summery, §409 is valid under the Spending Clause because, as yet another state court explains:

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

Martinolich v. Southern Pac. Transp., 532 So.2d 435, 437 (La. Ct. App.), cert. denied, 490 U.S. 745 (1988)(emphasis added). The Washington Court however not only acknowledges Congress never intended the narrow interpretation given §409 by some state courts prior to its 1995 "clarifying" amendment, see 2001 W.L. 1045031 * 11-12; Act of November 18, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591; Seaton, 898 S.W.2d at 235-237 (state court holds accident report protected by the "clear weight of authority" under §409 before 1995 amendment), but admits in a footnote that even prior to the 1995 amendment "[f]ederal courts during this period tended to embrace a more expansive understanding of section 409." 2001 W.L. 1045031 * 28 n. 21. Before Guillen v. Pierce County, "[e]very court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection

and evaluation of highway safety information free from the threat of future tort actions." Palacios v. Louisiana and Delta Railroad, 775 So.2d 698, 701 (La.App. 2000)(quoting Gaubert v. Denton, 1999 WL 350103 (E.D.La. May 28, 1999))(emphasis added). The Washington court alone holds this eagerly accepted federal benefit to states is unconstitutional because it is inconsistent with its court procedure, but this Court has made clear no state court can refuse to enforce federal law on the ground "the act of Congress is not in harmony with the policy of the State . . ." Testa v. Katt, 330 U.S. 386, 392-93, 91 L.Ed. 967, 67 S.Ct. 810 (1947).

2. Commerce Clause Also Authorizes §409

Article I, §8, clause 3 (i.e. "Commerce Clause"), also empowers Congress "[t]o regulate Commerce ... among the several States," and is held to authorize Congress to "regulate the use of the channels of interstate commerce," to "regulate and protect the instrumentalities of interstate commerce, ... even though the threat may come only from intrastate activities," and "to regulate those activities having a substantial relation to interstate commerce." Morrison, 529 U.S. 598 (citing, Lopez, 514 U.S. at 558-59)(emphasis added). Here it cannot fairly be disputed that such incentives for states to participate in enhancing the safety of roadways across the nation as those under §152 and §409 favorably effects "the instrumentalities of interstate commerce" as well as has "a substantial relation to interstate commerce." See Claspill v. Miss. Pac. R.R. Co., 793 S.W.2d 139, 141 (Mo.), cert. denied, 498 U.S. 984 (1990)(Tenth Amendment challenge to §409 rejected because under Commerce Clause States "are not to create 'judicially defined spheres of unregulable state activity.'")

Indeed, the Washington Supreme Court concedes "a sufficient nexus exists between interstate commerce and the Federal-aid highway system to justify the 'regulatory scheme when considered as a whole,'" 31 P.3d at 654 (emphasis added), but concludes the §409 protection is not an "integral part" of the regulatory program because "we fail to see how those vital federal purposes are reasonably served" by a privilege protecting "materials and data that would exist even had a federal safety enhancement program never been created . . . ." See Id. (citing Hodel v. Indiana, 452 U.S. 314, 328 n. 17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981)). However, such misapplies this Court's test in Hodel v. Indiana and misstates the purpose of the §409 privilege.

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

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

Id. (emphasis added). See also F. E. R. C. v. Mississippi, 456 U.S. 742, 758 n. 22, 72 L.Ed.2d 532, 102 S.Ct. 2126 (1982)(federal statute valid under Commerce Clause "even if some of its provisions were not directly related to the purpose of fostering interstate commerce"). Hence, under Hodel, a court cannot "substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." 452 U.S. at 327 (emphasis added).

Further, even if this Court's Constitutional jurisprudence were different so that "every single facet of the program" was required to be "independently and directly related

to a valid congressional goal," §409 is so related. In holding otherwise, Washington's highest court disregards overwhelming case law confirming that the "the underlying intent" of §409 is not just "to 'facilitate candor in administrative evaluations of highway safety hazards'" in documents created under the program, but also "to prohibit federally required record-keeping from being used as a 'tool ... in private litigation'" against state and local government. Robertson, 954 F.2d at 1435 (quoting Duncan, supra and Light, 560 N.Y.S.2d at 965). See also Harrison, 965 F.2d at 160 (quoting Robertson, 954 F.2d at 1435)(same); Reichert, 694 So.2d at 196 (quoting Perkins, supra)("interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.") The §409 privilege for "obtaining" and "keeping" (i.e. collecting and compiling) the required information is an "integral part" of the valid Congressional goal of encouraging states to comply with this federal program and thereby "enhance the safety of the nations's highways and, in the long run reduce the number of people killed and injured in accidents that could be avoided by systematic analysis . . . ." See Coniker, 695 N.Y.S.2d at 495, and supra at 16-21.

3. Necessary And Proper Clause Authorizes §409

The "Necessary and Proper" Clause, Article I, §8, clause 18, adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States." See Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 272, 13 L.Ed. 2d 258, 85 S.Ct. 348 (1964)(Black, J., concurring). However, the state supreme court again simply summarily "conclude[s] that it was neither 'necessary' nor 'proper' for Congress" to enact

that privilege as presently written. See 31 P.3d at 655. As shown above, such is demonstrably erroneous. See supra at 16-20.

B. INDIVIDUALS LACK STANDING TO CLAIM "STATE'S RIGHTS" OVER STATE'S OBJECTION.

Here plaintiffs did not in the first instance "claim" state's rights but had the issue thrust upon them by the state court. See 31 P.3d at 646-47 (limits of Congressional power "raised by the Court of Appeals itself in the final footnote of its Guillen opinion."); 96 Wn.App. at 875 n. 26 ("neither party has raised or briefed" constitutionality.) More problematical, Guillen bestows standing on plaintiffs to raise "federalist grounds" because "dicta" from New York v. United States, 505 U.S. at 181-2, states that "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." 31 P.3d at 648.

However, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" so that he "has no standing to assert the [constitutional] rights of others." Warth v. Seldin, 422 U.S. 490, 499, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975). Here Washington citizens through both their state legislative and executive branches have willingly accepted the terms for the pertinent federal funding. See supra at n. 1. Further, in New York v. United States the only plaintiff was the state, an individual's standing was never discussed -- indeed the word "standing" is nowhere used -- and the cited statement was only made in rejecting an assertion New York had waived its Tenth Amendment right by lending "their support to the Act's enactment." More importantly, New York nowhere addresses this Court's ruling in Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144, 83

L.Ed.2d 543, 59 S.Ct. 366 (1939), that "absent the states or their officers, [individuals] have no standing ... to raise any question under the [tenth] amendment."

This Court has not overruled its decision in Tennessee Electric Power Co. See also Nance v. Environmental Protection Agency, 645 F.2d 701, 716 (9th Cir.1981)("insofar as the Tenth Amendment is designed to protect the interest of states qua states," standing of private party "may be seriously questioned"); Mountain States Legal Foundation v. Costle, 630 F.2d 754, 761-72 (10th Cir.), cert. denied, 450 U.S. 1050 (1980)(no jurisdiction over Tenth Amendment where state "flatly contradicted" plaintiff's claims); Vermont Assembly of Home Health Agencies Inc. v. Shalala, 18 F.Supp.2d 355 (D.Vt. 1998)(no Tenth Amendment standing where state opposed). Because "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Courts of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions," Agostini v. Felton, 521 U.S. 203, 237, 138 L.Ed.2d 391, 117 S.Ct. 1997 (1997); Rodriguez de Ouijas v. Shearson/ American Express, Inc., 490 U.S. 477, 484, 104 L.Ed.2d 526, 109 S. Ct. 1917 (1989), certiorari is also appropriate on the issue of standing.

VI. CONCLUSION

In §409, Congress foists nothing on a state but rather provides it an incentive to willingly participate in a program that enhances the safety of its traveling public while also protecting its collection and compiling of necessary records. Nevertheless, in the alleged service of "state's rights" a state government's discovery and evidentiary protection -- clearly existing under federal law and previously universally recognized by

state and federal courts -- will be irrevocably lost, that state's federal funding for elimination of roadway hazards and its citizen's safety both jeopardized, and bedrock principles of federalism dangerously undermined. Accordingly, petitioner respectfully requests certiorari be granted.

RESPECTFULLY SUBMITTED THIS __ DAY OF NOVEMBER, 2001.

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