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REVERSE PRESUMPTIONS: *GUILLEN V. PIERCE* COUNTY DISREGARDS REASONABLE CONSTITUTIONAL INTERPRETATIONS OF 23 U.S.C. § 409

Megan Walseth

Abstract: To prove that dangerous roadways caused their traffic accidents, plaintiffs often seek discovery of highway information from state and local governments. Title 23 U.S.C. § 409 bars discovery of some of that information; it creates an evidentiary privilege for materials and data collected for certain federal highway safety funding programs. For example, state and local governments receiving funds through the federal hazard elimination program codified at 23 U.S.C. § 152 must maintain an engineering survey of all state public roads. Section 409, in turn, makes certain data and materials compiled or collected for § 152 exempt from discovery and inadmissible at trial. Courts have differed in interpreting § 409's scope, with some state courts initially construing the privilege narrowly. Congress amended the statute in 1995, expressing its intent to broaden those narrow interpretations. In *Guillen v. Pierce County*, the Washington State Supreme Court held that this amendment—interpreted as a significant expansion of the privilege—exceeded Congress' authority under the United States Constitution and violated state sovereignty. This Note argues that the court's approach to interpreting § 409 disregarded judicial principles that favor narrowly construing evidentiary privileges and avoiding constitutional holdings. A narrow interpretation of the 1995 amendment would protect the integrity of state tort systems while fulfilling congressional intent and adhering to established principles for construing statutes and evidentiary privileges.

Evidentiary privileges contradict the “ancient proposition of law” that evidence is to be made freely available for the administration of justice.¹ As such, judges created privileges only when necessary to protect relationships and interests of overriding social importance.² Legislatures have created privileges extending beyond those of the common law;³ yet like their common law counterparts, these statutory privileges are construed narrowly.⁴ Courts apply an evidentiary privilege only to the extent necessary to achieve its purpose.⁵

1. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

2. *See* 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 72, at 299 (5th ed. 1999).

3. *See id.* § 75, at 312.

4. *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961) (“Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result.”).

5. *See, e.g., Coburn v. Seda*, 101 Wash. 2d 270, 276–78, 677 P.2d 173, 177–78 (1984) (limiting application of evidentiary statute to information likely to affect statute's purpose of promoting candor in hospital peer reviews).

Title 23 U.S.C. § 409 creates a statutory privilege for certain data and materials collected for federal highway safety programs.⁶ State and local governments may assert this federal privilege in state tort cases, defending against allegations that their design or maintenance of a roadway caused a traffic accident.⁷ Plaintiffs pursuing negligent highway design claims may seek government highway data to demonstrate that their accident sites were inherently hazardous⁸ or to prove that road authorities had knowledge of dangerous conditions.⁹ A court's construction of the § 409 privilege may determine whether such evidence is discoverable.¹⁰

In *Guillen v. Pierce County*,¹¹ the Washington State Supreme Court reviewed a trial court's application of § 409 to a discovery dispute.¹² In this case of first impression in Washington,¹³ the court interpreted a 1995 amendment to § 409 as a broad expansion of the privilege, extending the statute's scope to encompass much of the state's publicly collected highway data.¹⁴ Having broadly interpreted the 1995 amendment, the Washington State Supreme Court declined to enforce the amended statute, holding instead that the amendment exceeded the authority

6. 23 U.S.C. § 409 (2000).

7. *See, e.g., Ex parte Ala. Dep't of Transp.*, 757 So. 2d 371, 372 (Ala. 1999) (claiming privilege for accident reports sought by plaintiff to show that intersection's design caused hydroplaning).

8. *See, e.g., id.* Proving that a roadway did not meet design standards, which are often adopted by statute, may require evidence of traffic volume and accident history. *See, e.g., FEDERAL HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES § 4C* (1988 ed.) [hereinafter MUTCD]. *See also* WASH. ADMIN. CODE § 468-95-010 (2001) (enacted pursuant to WASH. REV. CODE § 47.36.020 (2001)) (adopting MUTCD as uniform state standard for roadway signing).

9. *See* WILLIAM E. KENWORTHY, *KILLER ROADS: FROM CRASH TO VERDICT* § 1-3, 9 (2nd ed. 1999 & 2001 supp.). Notice is not officially an element of a negligent design claim, because governments are alleged to have committed an affirmative act of negligence—failure to adhere to design standards when constructing a road. *See id.* § 6-1, at 151. However, plaintiffs unable to prove negligence according to historical design standards may use accident data to prove that governments knew or should have known that a road had become unsafe, and should have updated it according to modern standards. *See id.* § 1-3, at 9.

10. *Compare, e.g., Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993) (holding that section 409 protects state highway accident data from discovery) *with* *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170, 173 (La. 1994) (holding that section 409 does not protect unedited factual material such as accident reports).

11. 144 Wash. 2d 696, 31 P.3d 628 (2001), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

12. *See id.* at 706, 31 P.3d at 635.

13. *Id.* at 717, 31 P.3d at 640.

14. *See id.* at 727, 31 P.3d at 646.

granted to Congress by the United States Constitution.¹⁵ The statute, according to the court, was constitutional only in its pre-1995 form.¹⁶

The Washington State Supreme Court's approach to interpreting § 409 disregards judicial principles that evidentiary privileges should be construed narrowly and that constitutional holdings should be avoided where reasonable alternative statutory interpretations exist. This Note argues that a narrow interpretation of the 1995 amendment would protect the integrity of state tort systems while implementing congressional intent and adhering to established principles of construction. After reviewing federal and state laws requiring highway data collection, Part I of this Note introduces § 409. Part II discusses judicial principles favoring the narrow construction of evidentiary privileges and the avoidance of constitutional questions. Part III provides an overview of other state and federal court interpretations of § 409. Part IV situates prior cases upholding § 409's constitutionality within the context of Congress' spending power. Part V describes *Guillen v. Pierce County*. Part VI argues that congressional intent and principles of construction dictate a narrow interpretation of § 409, and that the statute is constitutional.

I. FEDERAL AND STATE LAWS REQUIRE COLLECTION OF HIGHWAY DATA

Federal funding programs, enacted to improve national highway safety, require participating states to report highway data and maintain engineering surveys.¹⁷ The surveys may utilize highway data whose collection is also required by Washington State statutes and regulations.¹⁸ Section 409 creates a privilege for highway data collected for certain federal programs, preempting state discovery rules.¹⁹

15. *Id.* at 743-44, 31 P.3d at 655.

16. *Id.*

17. *See infra* Part I.A.

18. *See infra* Part I.B

19. *See infra* Part I.C.

A. *Federal Highway Safety Programs Require Comprehensive Data Collection*

Introducing its first major highway safety initiative in 1966, Congress reported that more Americans had died on the country's highways than in all its wars combined; in 1965 alone, highway accidents caused 49,000 deaths.²⁰ In response to a finding that inadequate research, resources, and national coordination had been devoted to this problem, the Highway Safety Act of 1966 directed states to develop comprehensive programs to reduce traffic accidents, in conformity with federal standards.²¹ The 1966 Act provided funding and established standards for training and education, vehicle inspection, highway design and surveillance systems, and accident record-keeping systems.²² It also directed states to collect and report such data as the federal government required.²³

Since 1966, Congress has expanded federal highway safety funding to cover actual roadway improvement projects and has correspondingly increased data collection requirements.²⁴ In 1973, reporting that highway deaths had climbed to 56,000 in 1972 and threatened to rise to 80,000 by 1980,²⁵ Congress established several ongoing safety enhancement funding programs for hazard elimination,²⁶ railroad crossings,²⁷ and highway bridge projects.²⁸ Extensive evaluation and reporting requirements accompanied these programs.²⁹

The hazard elimination program, in particular, aimed to encourage states to systematically identify and eliminate hazardous locations and roadside obstacles.³⁰ Accordingly, to receive federal funds,³¹ states must

20. S. REP. NO. 89-1302, at 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2741, 2743.

21. Highway Safety Act of 1966, Pub. L. No. 89-564, § 101, 80 Stat. 731 (1966) (codified as amended at 23 U.S.C. §§ 402-403 and other scattered sections).

22. *See* S. REP. NO. 89-1302, at 5, 7, 10-11.

23. 23 USC § 402(a) (2000).

24. *See* Highway Safety Act of 1973, Pub. L. No. 93-87, §201, 87 Stat. 250, 282 (1973).

25. H.R. REP. NO. 93-118, at 31 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888.

26. 23 U.S.C. § 152 (2000).

27. *Id.* § 130.

28. *Id.* § 144. The five original "action programs" are described at H.R. REP. NO. 93-118, at 32 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1889-90.

29. *See* H.R. REP. NO. 93-118, at 37.

30. *See* H.R. REP. NO. 93-118, at 39-41.

31. Federal funds provide ninety percent of § 152 project costs. 23 U.S.C. § 152(d). Funds were originally restricted to projects on the federal-aid highway system, but were made available for

develop and maintain an engineering survey of all state public roads, identifying hazardous locations and implementing improvement projects according to prioritized schedules.³² In Washington, the state Department of Transportation disburses federal funds to local governments whose applications comply with the program's conditions.³³ The applications require information on accident history, traffic volumes, and proposed solutions for particular sites.³⁴

B. Washington State Laws and Regulations also Require Data Collection

Some of the data used for federal programs, including accident statistics and traffic volume data, may be routinely gathered by state and local governments to comply with state law mandates.³⁵ For instance, Washington law requires law enforcement officers to report significant accidents to the Washington State Patrol.³⁶ The Washington State Patrol must analyze all accident reports, publish a monthly statistical report, and make the reports available to other public entities for further analysis.³⁷

Other Washington statutes are less specific, but may likewise require the collection and analysis of highway data. For example, state adoption of roadway signing standards³⁸ implies data-gathering requirements: before installing a traffic signal at an intersection, transportation authorities must analyze traffic volume data or accident history to show that design standards warrant a signal.³⁹ Other statutes direct all counties

projects on any state road in 1982. Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 125, 96 Stat. 2097, 2113 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3639, 3657.

32. 23 U.S.C. § 152(a)(1). The railway crossing improvement program requires similar data collection and reporting. *See, e.g.*, 23 U.S.C. § 130(d) (survey and schedule of projects), § 130(g) (annual report).

33. *See* Guillen v. Pierce County, 144 Wash. 2d 696, 725–27, 31 P.3d 628, 645 (2001), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

34. *Id.* at 726, 31 P.3d at 645. Collision diagrams may be used to develop proposed solutions. Third Declaration of Thomas G. Ballard, P.E., County Engineer, Guillen v. Pierce County, No. 96-2-13404-5, Superior Court, 9/30/97.

35. *See infra* notes 36–42 and accompanying text.

36. WASH. REV. CODE § 46.52.030(3) (2001); *Id.* § 46.52.070 (2001).

37. *Id.* § 46.52.060.

38. *See supra* note 8.

39. *See supra* note 8.

to classify county roads according to traffic volume and speed⁴⁰ and develop six-year coordinated transportation plans.⁴¹ The Washington Model Traffic Ordinance instructs local government traffic divisions to maintain suitable systems for filing accident reports.⁴² Though state law would generally permit discovery of these materials in tort suits,⁴³ defendant governments have claimed the § 409 privilege when the materials are also used for federal programs.⁴⁴

C. *Section 409 Was Enacted to Mitigate Litigation Impact of Federally-Required Recordkeeping*

In 1987, recognizing that state compliance with federal safety programs made additional evidence available to tort plaintiffs,⁴⁵ Congress enacted 23 U.S.C. § 409.⁴⁶ Prior to its amendment in 1995, § 409 provided that:

Notwithstanding any other provision of law, reports, 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 railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds *shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding* or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.⁴⁷

40. WASH. REV. CODE § 36.86.070 (2001). *See also* WASH. ADMIN. CODE § 136-60-020 (2001) (describing data required for county road inventories).

41. WASH. REV. CODE § 36.81.121 (2001).

42. WASH. ADMIN. CODE § 308-330-240 (2001). *See also* WASH. ADMIN. CODE § 136-28-010 (2001) (requiring coordination to implement accident reporting requirements of Highway Safety Act of 1966).

43. *See, e.g.*, Guillen v. Pierce County, 144 Wash. 2d 696, 716, 31 P.3d 628, 640 (2001), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

44. *See, e.g., id.* at 725, 31 P.3d at 645.

45. *See id.* at 717-718, 31 P.3d at 641.

46. Federal-Aid Highway Act of 1987, Pub. L. No. 100-17, § 132, 101 Stat. 134, 170 (1987) (codified at 23 U.S.C. § 409).

47. 23 U.S.C. § 409 (1994) (emphasis added).

While agreeing that § 409 has no legislative history,⁴⁸ courts have consistently inferred two purposes for the legislation.⁴⁹ First, Congress sought to prevent federal record-keeping requirements from creating an additional piece of ready-made evidence for private litigants.⁵⁰ Second, Congress wanted to encourage the “free flow” of safety information⁵¹ and the candid evaluation of local safety hazards.⁵² Permitting governments to obtain safety information “free from the fear of future tort actions”⁵³ has been said to promote the federal government’s interest in obtaining complete and accurate highway information⁵⁴ and ensuring deliberative spending of federal funds.⁵⁵

Section 409 expressly preempts state laws and court rules that would allow plaintiffs to obtain and use some government highway data in tort cases,⁵⁶ but the privilege has not been construed to grant governments complete immunity from negligence suits.⁵⁷ Though legislation enacted pursuant to Congress’ constitutional authority preempts inconsistent state laws,⁵⁸ state tort systems have continued to operate alongside federal transportation safety schemes.⁵⁹ Section 409’s impact on state tort

48. See, e.g., *Kitts v. Norfolk and W. Ry.*, 152 F.R.D. 78, 82 n.14 (S.D.W.Va. 1993); *Palacios v. La. and Delta R.R.*, 740 So. 2d 95, 98 (La. 1999). See also H. CONF. REP. NO. 100-27, at 172-73 (1987), *reprinted in* 1987 U.S.C.A.N. 66, 156-57.

49. See *infra* notes 50-52 and accompanying text.

50. *Light v. State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). See also *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992).

51. See *Perkins v. Ohio Dep’t of Transp.*, 584 N.E.2d 794, 802 (Ohio App. 1989), *cause dismissed*, 566 N.E.2d 673, *reh’g denied*, 570 N.E.2d 281 (Ohio 1991).

52. See *Duncan v. Union Pac. R.R.*, 790 P.2d 595, 597 (Utah App. 1990).

53. *Perkins*, 584 N.E.2d at 802.

54. *Palacios*, 740 So. 2d at 98 n.6. This expression of the federal interest comes from the United States’ amicus curiae brief in *Ex parte State Highway Department*, 572 So. 2d 389 (Ala. 1990). *Palacios*, 740 So. 2d at 98 n.6. The Solicitor General argued that disclosing highway hazard reports and data would “jeopardize” federal programs by deterring states from compiling the “complete and accurate information” upon which the programs depend. *Id.* at 98 n.6 (citation omitted).

55. *Martinolich v. S. Pac. Transp. Co.*, 532 So. 2d 435, 438 (La. Ct. App. 1988).

56. *Dep’t of Transp. v. Superior Court (Tate)*, 55 Cal. Rptr. 2d 2, 4 (1996).

57. See *Powers v. CSX Transp., Inc.*, 177 F. Supp. 2d 1276, 1281 (S.D. Ala. 2001).

58. U.S. CONST. art. VI, cl. 2.

59. *Cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993) (noting that the “hit-or-miss common law method [does not necessarily run] counter to a statutory scheme of planned prioritization”).

systems depends upon how broadly courts construe its preemptive scope.⁶⁰

II. COURTS NARROWLY CONSTRUE PRIVILEGES AND AVOID CONSTITUTIONAL HOLDINGS

Judicial principles counsel narrow construction of evidentiary privileges⁶¹ and disfavor constitutional holdings.⁶² Specifically, courts will construe an evidentiary privilege narrowly and apply it to effectuate its purpose.⁶³ In addition, when two interpretations of a statute are reasonable, courts will attempt to adopt an interpretation that sustains the statute's constitutionality.⁶⁴

A. *Evidentiary Privileges Are Construed Narrowly To Promote Particular Goals*

Whether created by judges or by statute, an evidentiary privilege should be construed narrowly⁶⁵ and strictly limited to the purpose for which it exists.⁶⁶ For example, courts apply the attorney-client privilege only to the extent necessary to achieve its purpose of encouraging clients to make full disclosure to their attorneys for the purpose of obtaining legal advice.⁶⁷ Accordingly, the privilege is not applied to pre-existing documents obtainable from the client prior to their transfer to an attorney,⁶⁸ nor to communications made for reasons other than obtaining legal advice.⁶⁹

60. See, e.g., *S. Pac. Transp. Co. v. Yarnell*, 890 P.2d 611, 613 (Ariz. 1995) (noting that broad construction of pre-1995 statute would "sacrifice" state tort system on "altar" of federal scheme); *Miguez v. S. Pac. Transp. Co.*, 645 So. 2d 1184, 1189 (La. Ct. App. 1994) (finding that broad construction would deny accident victims their only system of redress).

61. See *infra* Part II.A.

62. See *infra* Part II.B.

63. See *infra* Part II.A.

64. See *infra* Part II.B.

65. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

66. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403 (1976) (limiting common law privilege to its purpose); *Coburn v. Seda*, 101 Wash. 2d 270, 276, 677 P.2d 173, 177 (1984) (limiting statutory privilege to its purpose).

67. *Fisher*, 425 U.S. at 403.

68. *Id.* (noting that denying the privilege to pre-existing documents held by an attorney, but that would have been obtainable from the client prior to their transfer to the attorney, would not

Statutory evidentiary privileges are also restricted to their purposes. For example, one federal statute provided that “no part” of a National Transportation Safety Board (NTSB) accident investigation report could be used as evidence.⁷⁰ Yet application of the privilege was guided by judicial interpretation of the statute’s purpose—to prevent the NTSB’s conclusions from influencing the fact-finder’s assignment of causation.⁷¹ On the basis of this understanding of the statute’s purpose, and despite the plain language of the statute, some courts permitted introduction of any part of a report that did not reveal the NTSB’s conclusion.⁷² Even when assuming instead that a privilege for investigative reports⁷³ was enacted to promote truthful investigations and reporting, one court admitted factual testimony gathered for a report.⁷⁴ The court reasoned that because preparing for litigation was but one of many reasons for investigating accidents, permitting discovery of factual testimony would not significantly affect the conduct of the investigation or the veracity of its factual findings.⁷⁵

Washington courts apply similar principles.⁷⁶ Interpreting a state statute that protected the reports and proceedings of hospital peer review committees, the Washington State Supreme Court restricted the statute’s

discourage the plaintiff from sharing them with the attorney). *See also* STRONG, *supra* note 2, § 89, at 359–360.

69. Communications made for the purpose of perpetuating a crime or fraud are not privileged. STRONG, *supra* note 2, § 95. Communications with attorneys retained to give business, rather than legal, advice are also not privileged. *See, e.g.,* United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996).

70. 49 U.S.C. § 1154(b) (2000).

71. Lorri E. Badolato, *Opinion, Probable Cause, Factual Investigation: The Admissibility Of NTSB Reports and Investigator’s Opinions In Aviation Accident Litigation*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 25, 30–31 (1999).

72. *See, e.g.,* Curry v. Chevron, USA, 779 F.2d, 272, 274 (5th Cir. 1985). *But see* Prospectus Alpha Navigation v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1986) (excluding report in its entirety).

73. 45 U.S.C. § 41 (1988) (repealed 1994) (privilege for required railroad accident reports).

74. *Yanich v. Pa. R.R. Co.*, 192 F. Supp. 373, 377 (E.D.N.Y. 1961). *But see* Craddock v. Queen City Coach Co., 141 S.E.2d 798, 800 (N.C. 1965) (requiring disclosure of data upon which report was based would violate spirit and purpose of statutory privilege for required automobile accident reports).

75. *See Yanich*, 192 F. Supp. at 377. *Cf. Commonwealth v. Taylor*, 746 A.2d 626, 631 (Pa. 2000) (stating that statutory purpose of promoting candid and accurate accident information not adversely impacted by conditional disclosure of accident data in criminal case).

76. *See, e.g., State v. Harris*, 51 Wash. App. 807, 812, 755 P.2d 825, 828 (1988) (strictly construing statutory privileges).

scope and application to its purposes.⁷⁷ The court indicated that it would prevent the statute from obstructing discovery of information generated outside committee meetings and available from “original sources” merely because it was introduced at a meeting.⁷⁸ In applying the statute, the Washington State Supreme Court considered whether discovery of particular information would interfere with the statutory purpose of preventing an advantage to tort plaintiffs and promoting candid communications.⁷⁹

B. Courts Sustain a Statute’s Constitutionality Where Possible

Statutes are presumed to be constitutional.⁸⁰ Thus, if an otherwise permissible construction of a statute would create serious constitutional problems, and an alternative interpretation is “fairly possible,” courts construe the statute to avoid such problems.⁸¹ This long-established circumspection arises from a prudential policy to avoid making constitutional law unnecessarily, and from the assumption that Congress intended to fulfill its oath to uphold the Constitution.⁸² Though courts will not adopt a saving construction that is strained or plainly contrary to the intent of Congress,⁸³ the “elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”⁸⁴

77. *Coburn v. Seda*, 101 Wash. 2d 270, 276, 677 P.2d 173, 177 (1984).

78. *Id.* at 277.

79. *Id.* at 274–75, 278, 677 P.2d at 176, 178.

80. *See Island County v. State*, 135 Wash. 2d 141, 146, 955 P.2d 377, 380 (1998).

81. *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

82. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). For a statement of the constitutional avoidance doctrine as applied in Washington State courts, see *Island County*, 135 Wash. 2d at 146–47, 955 P.2d at 380 (1998), in which the Washington State Supreme Court stated that legislation must be unconstitutional “beyond a reasonable doubt,” and *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wash. 2d 493, 500, 816 P.2d 725, 729 (1991), which held that a saving construction will be adopted, where possible.

83. *Kim v. Ziglar*, 276 F.3d 523, 538 (9th Cir. 2002). *See also DeBartolo*, 485 U.S. at 575.

84. *DeBartolo*, 485 U.S. at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

III. THE SCOPE OF 23 U.S.C. § 409 IS UNSETTLED

Courts have differed in interpreting the scope of § 409, especially in construing its protection of data “compiled” for a federal purpose.⁸⁵ Though Congress addressed the phrase “data compiled” in a 1995 amendment, divergent interpretations of the necessary federal purpose persist.⁸⁶ Courts have permitted plaintiffs to obtain evidence from sources unconnected to federal funding programs and have continued to scrutinize “the purpose” for which privileged materials must have been collected.⁸⁷

A. *Prior to 1995, a Number of Courts Interpreted § 409’s “Data Compiled” and Federal Purpose Requirements Narrowly*

Before 1995, § 409 protected data and materials “compiled” to identify and design federally funded safety improvement projects.⁸⁸ Courts disagreed about whether data and materials “compiled” included the factual data an agency used to prepare the documents specifically required by federal statutes.⁸⁹ Yet even when courts agreed that this factual data was eligible for the privilege, courts differed as to the federal purpose needed to apply the privilege.⁹⁰

1. *Prior to 1995, Some State Courts Interpreted the Phrase “Data Compiled” to Exclude All Raw Data and Pre-Existing Materials*

Before Congress amended § 409, some state courts interpreted the privilege for materials “compiled” pursuant to a federal program to exclude any raw data or pre-existing documents used in preparing documents specifically required by federal statutes.⁹¹ Using a definition

85. See *infra* Part III.A.

86. See *infra* Parts III.B and III.C.

87. See *infra* Part III.C.

88. 23 U.S.C. § 409 (1994).

89. Compare *Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993) (extending privilege to vehicle count and accident data that state highway department used to comply with federal program), with *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1994) (holding that privilege does not cover raw data, including accident reports and traffic counts, gathered for use in privileged studies and surveys). See also *infra* Part III.A.1.

90. See *infra* Part III.A.2.

91. See, e.g., *Wiedeman*, 627 So. 2d at 173. But see *Seaton v. Johnson*, 898 S.W.2d 232, 237 (Tenn. Ct. App. 1995) (holding that all records “used or usable” for federal program are privileged).

of “compile” that included only the creation of a *new* document from existing sources,⁹² these courts limited the range of documents eligible for the § 409 privilege to “end product[s]” created for a federal program.⁹³ Under this interpretation, § 409 protected data compilations made for a federal program, but did not protect materials gathered to produce the compilations.⁹⁴

In limiting the range of potentially privileged documents, these courts sought to protect state tort systems by preventing § 409 from shielding the underlying facts contained in final federal funding documents.⁹⁵ The courts’ response may have been exaggerated; no court has applied § 409 to all *facts* contained in privileged documents. Even courts taking a broader view of the “compiled” documents to which § 409 might apply have only barred evidence of *facts* contained in those documents when plaintiffs *obtained* the facts from privileged documents.⁹⁶

2. Courts Also Disputed § 409’s Federal Purpose Requirement

Courts taking a broader approach to § 409’s scope—agreeing that “data compiled” included materials other than “end products”—did not reach identical results; these courts applied the privilege differently based on their interpretations of the federal purpose required for § 409 protection.⁹⁷ For example, one federal court implicitly acknowledged that the phrase “data compiled” could include informal collections of data

92. See *Wiedeman*, 627 So. 2d at 173. “Compile” may also signify the less creative process of gathering information and records from various sources into a single collection. Compare *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989) (using “the word ‘compile’ [to refer] to the process of gathering . . . records and information that were generated on an earlier occasion and for a different purpose.”) with *id.* at 161 (Scalia, J., dissenting) (“‘compiled’ does not always refer simply to ‘the process of gathering,’ . . . but often has the connotation of a more creative activity.”).

93. See *Wiedeman*, 627 So. 2d at 173. See also *S. Pac. Transp. Co. v. Yarnell*, 890 P.2d 611, 613 (Ariz. 1995) (holding that the documents section 409 protects are “precisely the documents described and prepared under the authority of §§ 130, 144, and 152, and no others”).

94. *Yarnell*, 890 P.2d at 613.

95. See, e.g., *id.* (noting that to construe statute to cover all facts included in protected documents would impair state tort system).

96. See, e.g., *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992) (extending privilege to all data utilized for purposes of monitoring rail safety, but permitting plaintiff’s expert to rely on own observations and information from the Federal Railroad Administration).

97. Compare *Hickey v. Union Pac. R.R. Co.*, 803 P.2d 275, 279 (Or. App. 1990) (allowing plaintiff to access data and ranking formula routinely used by state since 1968, because not compiled for specific purposes covered by § 409), with *Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993) (protecting state materials even if not compiled solely for federal purposes).

and materials,⁹⁸ but only when gathered “for *the* purpose” of federal safety programs.⁹⁹ The court refused to extend the privilege to information and documents obtained from employees not responsible for federal program activities,¹⁰⁰ but did apply the privilege to “documents or computer data in the possession of [one employee]—a compilation of information” gathered for the federal safety program.¹⁰¹ Thus a collection of documents and digital information was a privileged “compilation,” even though the court strictly construed § 409’s requirement that privileged materials be collected for “the purpose” of a federal program.¹⁰²

In contrast, other courts that applied § 409 to a wide range of documents and information also broadly construed the federal purpose requirement.¹⁰³ For example, the Eighth Circuit extended the privilege to accident data and traffic counts prepared by the state highway department, even though the information was not collected or used solely to obtain federal funding.¹⁰⁴ Instead of looking within the defendant entity to scrutinize the purpose of data collection,¹⁰⁵ the Eighth Circuit held that any data created by the highway department and later used for federal programs met the requisite federal purpose.¹⁰⁶

B. In a 1995 Amendment, Congress Clarified that “Data Compiled” Included Raw Data and Pre-existing Documents

In 1995, Congress registered its disagreement with narrow interpretations of the term “data compiled,”¹⁰⁷ amending § 409 to

98. See *Kitts v. Norfolk & W. Ry.*, 152 F.R.D. 78, 82 (S.D.W.Va. 1993).

99. *Id.* at 81 (quoting 23 U.S.C. § 409) (emphasis in original).

100. *Id.* at 81–82.

101. *Id.* at 82.

102. See *id.* at 81 (declining to protect materials prepared or compiled for a “separate and distinct purpose” even if parts of them became “ingredients thrown into a soup kettle with a distinct flavor of safety enhancement”).

103. See, e.g., *Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992). Cf. *Grand Trunk Western Railroad Co. v. Blue Cross & Blue Shield of Michigan*, 544 N.W.2d 709 (Mich. Ct. App. 1996) (holding that documents protected by the pre-1995 § 409 are inadmissible even if they “fulfill[] a state as well as a federal function”).

104. *Lusby*, 4 F.3d at 641.

105. See *supra* notes 100–02 and accompanying text.

106. See *Lusby*, 4 F.3d at 641.

107. H.R. REP. NO. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551.

encompass materials and data compiled “*or collected*” for the purposes described.¹⁰⁸ The accompanying House Report is the only legislative history available:

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.¹⁰⁹

While clarifying that “data compiled” could include raw data and pre-existing documents as well as formal, bound documents created for a federal program, Congress did not expressly address the statutory requirement that protected materials be collected “for the purpose of” evaluating projects for federal funding.¹¹⁰

C. After the Amendment, Some Courts Have Continued To Interpret § 409 Narrowly

The 1995 amendment forced courts to extend the § 409 privilege to raw data and pre-existing documents *collected* for the requisite federal purpose.¹¹¹ Yet even where a public entity gathers pre-existing documents for a federal purpose, some courts have permitted plaintiffs to obtain the same documents from their original creators.¹¹² Furthermore, courts have continued to scrutinize the purpose for which agencies collect materials.¹¹³

Some courts have found that data and records originally created by one state entity for state purposes need not become inadmissible because another state entity uses the information to apply for federal funding.¹¹⁴ Courts have indicated that data collected and used by a federal-funding

108. National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 323, 109 Stat. 568, 591 (emphasis added to the statutory amendment).

109. H.R. REP. NO. 104-246, at 59.

110. *See, e.g., Guillen v. Pierce County*, 144 Wash. 2d 696, 750, 31 P.3d 628, 658 (Madsen, J., concurring), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

111. *See, e.g., Isbell ex rel. Isbell v. State*, 9 P.3d 322, 324 (Ariz. 2000).

112. *See infra* notes 114–20.

113. *See infra* notes 122–27.

114. *See, e.g., Ex parte Ala. Dep’t of Transp.*, 757 So. 2d 371, 374 (Ala. 1999); *Palacios v. La. and Delta R.R.*, 775 So. 2d 698, 703 (La. Ct. App. 2000).

applicant may still be obtained from its original source,¹¹⁵ though no case has involved a request from such a source. One court denied discovery of accident records from the defendant highway department, which the court found had collected the records for a federal program,¹¹⁶ but indicated that the plaintiff could obtain the information from the law enforcement agency that had originally created the accident reports.¹¹⁷ Other courts' decisions imply agreement with this position.¹¹⁸ One court that denied discovery from a state highway department emphasized that its holding simply prohibited the plaintiff from relying on the highway department for discovery.¹¹⁹ In the same case, a state appeals court later noted that because the highway department's data had "necessarily been compiled *from various sources*," the data would "undoubtedly" be discoverable from other sources.¹²⁰ The court thus implied that only entities that apply for federal funding may claim the privilege.¹²¹

Other courts interpreting the amended statute have rejected even a federal-funding applicant's assertion that documents were collected or compiled for the requisite federal purpose. One court held that accident reports would be admissible—even though used by the highway department to prepare documents for federal funding—because the state had historically collected and compiled accident reports for purposes other than obtaining federal funding.¹²² Another court reasoned that documents prepared primarily for state purposes are not protected by § 409, even when they refer to a federally-funded project.¹²³ Courts have also required a strict showing that data was collected for the particular

115. See, e.g., *Ex parte Ala. Dep't of Transp.*, 757 So. 2d at 374; *Palacios*, 775 So. 2d at 703.

116. *Ex parte Ala. Dep't of Transp.*, 757 So. 2d at 373–74.

117. *Id.* at 374. *Accord Powers v. CSX Transp., Inc.*, 177 F. Supp. 1276, 1280 n.5 (S.D. Ala. 2001).

118. See *Palacios v. La. & Delta R.R.*, 740 So. 2d 95, 102 (La. 1999); *Palacios v. La. and Delta R.R.*, 775 So. 2d 698, 703 (La. Ct. App. 2000).

119. *Palacios*, 740 So. 2d at 102.

120. *Palacios*, 775 So. 2d at 703 (emphasis in original).

121. See *id.* See also *Guillen v. Pierce County*, 96 Wash. App. 862, 871–72, 982 P.2d 123, 129 (Div. 2 1999) (reasoning that documents would be available from sheriff who created them, but not from highway department who collected them for a federal program).

122. *Irion v. State*, 760 So. 2d 1220, 1226 (La. Ct. App. 2000).

123. See *Isbell ex rel. Isbell v. State*, 9 P.3d 322, 323–24 (Ariz. 2000). "This obligation [to issue orders to repair hazardous crossings] existed with or without federal funding." *Id.* at 323–24. The court's holding was based more on its conclusion that an "order" is not a document type listed in § 409. *Id.*

federal programs referenced in § 409.¹²⁴ Yet even when construing the federal purpose requirement more broadly,¹²⁵ courts have required a “threshold level of causal connection”¹²⁶ or a “substantial nexus”¹²⁷ to a federal program.

IV. COURTS HAVE UPHELD § 409 AS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL SPENDING POWER

When Congress legislates within its constitutional authority, its acts preempt state law;¹²⁸ yet when Congress exceeds its constitutional powers, its laws have no preemptive authority.¹²⁹ Though the present United States Supreme Court has constricted congressional power relative to the states in some areas,¹³⁰ the Court has not altered its broad interpretation of Congress’ spending power.¹³¹ Courts reviewing § 409 have found it a constitutional exercise of the federal spending power, validly preempting state rules of evidence and discovery.¹³²

124. *Dep’t of Transp. v. Superior Court (Tate)*, 55 Cal. Rptr. 2d 2, 5, 6–7 (1996) (denying privilege because of failure to show that data related to hazard elimination, rather than the more comprehensive federal safety programs codified at 23 U.S.C. § 402). *See also Isbell*, 9 P.3d at 323 (holding that protected documents are those described in and prepared for the federal programs referenced in § 409). *See also supra* notes 22–23 and accompanying text.

125. *See Powers v. CSX Transp., Inc.*, 177 F. Supp. 2d 1276, 1278 (S.D. Ala. 2001) (rejecting “but for” purpose requirement); *Coniker v. State*, 695 N.Y.S.2d 492, 496–97 (N.Y. Ct. Cl. 1999) (rejecting “ordinary course of business” exception).

126. *See Powers*, 177 F. Supp. 2d at 1278.

127. *Reynolds v. City of New York*, 679 N.Y.S.2d 372, 373 (N.Y. App. Div. 1998).

128. U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . .”).

129. *Guillen v. Pierce County*, 144 Wash. 2d 696, 730, 31 P.3d 628, 647–48 (2001) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

130. *See, e.g., Lynn A. Baker, The Revival of States’ Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL’Y 95, 95–96 (1998).

131. *See Lynn A. Baker, The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195–97 (2001).

132. U.S. CONST. art. I, § 8, cl. 1. (“Congress shall have Power to . . . provide for the . . . general Welfare of the United States.”). *See Palacios v. La. & Delta R.R.*, 775 So. 2d 698, 703–04 (La. Ct. App. 2000); *Martinolich v. S. Pac. Transp. Co.*, 532 So. 2d 435, 438, (La. Ct. App. 1988), *cert. denied sub nom. La. Dep’t of Transp. & Dev. v. Martinolich*, 490 U.S. 1109 (1989); *Claspill v. Mo. Pac. R.R.*, 793 S.W.2d 139, 140–41 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990).

A. *The Spending Clause Requires Only a Rational Connection Between Funding Condition and Funding Purpose*

Under the Spending Clause, Congress may condition federal funds upon state compliance with federal directives.¹³³ Though the United States Supreme Court has identified some limits on the spending power, the limits are seldom enforced to invalidate a spending condition.¹³⁴ Courts have required only a minimally rational connection between funding conditions and the purpose of federal spending.¹³⁵

The Supreme Court has repeatedly affirmed Congress' power to encourage state regulation by attaching conditions to federal spending.¹³⁶ By offering conditional federal funds to encourage state compliance with federal policies, Congress may achieve results that would have been outside its enumerated powers absent the state's decision to accept the funds.¹³⁷ In exercising its spending power, Congress generates legislation "much in the nature of a contract: in return for federal funds, the [s]tates agree to comply with federally imposed conditions."¹³⁸ Acceptance of the funds by a state or its authorized agent constitutes acceptance of attached conditions, binding the state and its political subdivisions.¹³⁹

Spending conditions are often expressed as an explicit *quid pro quo*, as when Congress requires states to implement a federally funded program according to federal regulations, or risk losing funds.¹⁴⁰ Yet Congress may also legislate under the spending power without expressly threatening to withhold funds.¹⁴¹ For example, Congress has made it a

133. See *infra* notes 136–39 and accompanying text.

134. See *infra* note 145.

135. See *infra* notes 154–60 and accompanying text.

136. See *Kansas v. United States*, 214 F.3d 1196, 1200 (10th Cir. 2000) ("[t]here are no recent relevant instances in which the Supreme Court has invalidated a funding condition.").

137. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). See also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting) (stating that the spending clause permits Congress to legislate in traditional areas of state concern otherwise outside its reach).

138. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). See also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 667 (1993) (describing federal railroad safety act as a "bargain" under which recipient states must take certain steps to ensure that federal funds are efficiently spent).

139. See, e.g., *James Island Pub. Serv. Dist. v. City of Charleston*, 249 F.3d 323, 329, 330 (4th Cir. 2001) (authorizing special purpose district to issue bonds for federal government loans binds state and its political subdivisions to terms of loan agreements); *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1216 (10th Cir. 1988).

140. See *Kansas*, 214 F.3d at 1194, 1198 (describing the Child Support Enforcement Program).

141. See *infra* notes 142–43 and accompanying text.

federal crime to bribe a state or local official in a state or locality that receives more than \$10,000 in federal funds.¹⁴² Courts and commentators have treated the statute as a spending condition because the state or locality can avoid the statute's application by refusing federal funds.¹⁴³

The United States Supreme Court has identified constitutional limitations on spending conditions,¹⁴⁴ but the limitations are so rarely enforced that they may be "more apparent than real" or "not justiciable."¹⁴⁵ First, congressional spending must be in pursuit of the general welfare.¹⁴⁶ Second, the conditions attached to such spending must be unambiguous, enabling states to understand the consequences of their participation.¹⁴⁷ Third, grants and conditions must be related to the federal interest in particular national projects or programs.¹⁴⁸ Fourth, spending conditions may not encourage states to violate other constitutional provisions.¹⁴⁹ The Court has also suggested that financial incentives could be invalid if so coercive as to constitute compulsion rather than encouragement.¹⁵⁰ Of these five limitations, the one concerned with "relatedness" is most important to a spending clause analysis of § 409. In addition to significant commentary advocating a closer nexus between federal interest and condition,¹⁵¹ the relatedness

142. 18 U.S.C. § 666 (2000).

143. See George D. Brown, *Stealth Statute—Corruption, The Spending Power, and The Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 292 (1998). See also *United States v. Suarez*, 263 F.3d 468, 487 n.7 (6th Cir. 2001) (Boggs, C.J., dissenting in part); *United States v. Cantor*, 897 F. Supp. 110, 112-13 (S.D.N.Y. 1995).

144. See *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

145. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-6, at 838 (3rd ed. 2000).

146. *Dole*, 483 U.S. at 207. The Court noted that the high level of deference to Congress' judgment on this element made it unlikely that the restriction is judicially enforceable. *Id.*

147. *Id.* This limitation is essentially synonymous with the "clear statement" rule of statutory construction, under which courts will interpret a statute to alter the traditional federal-state balance only when Congress' intent is unambiguous. See TRIBE, *supra* note 145, § 5-6, at 838 n.23; see also *id.* § 5-9.

148. *Dole*, 483 U.S. at 207-08.

149. *Id.* at 208, 210-11.

150. *Id.* at 211. Though frequently discussed, it is unlikely that the coercion theory is viable. See *id.* ("to hold that motive or temptation is equivalent to coercion would plunge the law in endless difficulties" and require acceptance of "a philosophical determinism by which choice becomes impossible" (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937))); see also *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (upholding threatened withdrawal of ninety-five percent of Nevada's federal highway funds).

151. See, e.g., *Dole*, 483 U.S. at 215-16 (O'Connor, J., dissenting) (noting that the power to attach conditions should extend only to conditions that specify how federal funds should be spent or

limitation is relevant because the Washington State Supreme Court found that Congress lacked Spending Clause authority to amend § 409 because the amended statute served “no valid federal interest.”¹⁵²

Despite the commentary advocating a stricter relatedness limitation,¹⁵³ United States Supreme Court precedent requires only a reasonable or minimally rational relationship between spending condition and spending purpose.¹⁵⁴ In *South Dakota v. Dole*,¹⁵⁵ Congress’ mandate that states adopt a national uniform drinking age was found to be “directly related” to highway safety, a major goal of the federal highway spending.¹⁵⁶ The Court noted simply that the condition was “reasonably calculated” to address one “impediment” to a spending purpose.¹⁵⁷ Affirming this limitation in *New York v. United States*,¹⁵⁸ the Court said only that conditions must “bear some relationship” to the purpose of federal spending.¹⁵⁹ Courts have generally rejected arguments that spending conditions are insufficiently related to spending purposes.¹⁶⁰

B. Courts Have Found § 409 a Legitimate Exercise of Spending Clause Power

Prior to the *Guillen* decision, each court ruling on § 409’s constitutionality had found it a legitimate exercise of congressional spending power.¹⁶¹ In the most detailed *Dole* analysis of § 409, a

that fall within another of Congress’ enumerated powers); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

152. *Guillen v. Pierce County*, 144 Wash. 2d 696, 737, 31 P.3d 628, 651 (2001), cert. granted, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

153. See *supra* note 151.

154. *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000).

155. 483 U.S. 203 (1987).

156. *Id.* at 208.

157. *Id.* at 209.

158. 505 U.S. 144 (1992).

159. *Id.* at 167.

160. See, e.g., *Kansas v. United States*, 214 F.3d 1196, 1199-1200 (10th Cir. 2000) (finding implementation of child support enforcement system sufficiently related to purpose of welfare grants); *Hodges v. Shalala*, 121 F. Supp. 2d 854, 874 (D.S.C. 2000) (same). But see *United States v. McCormack*, 31 F. Supp. 2d 176, 189 (D. Mass. 1998) (declaring 18 U.S.C. § 666 unconstitutional as applied to defendant whose bribe did not involve any federal program).

161. *Palacios v. La. & Delta R.R., Inc.*, 775 So. 2d 698, 703-04 (La. Ct. App. 2000); *Martinolich v. S. Pac. Transp. Co.*, 532 So. 2d 435, 438 (La. Ct. App. 1988), cert. denied sub nom. *La. Dep’t of Transp. & Dev. v. Martinolich*, 490 U.S. 1109 (1989); *Sawyer v. Ill. C.G.R. Co.*, 606 So. 2d 1069,

Louisiana court found that Congress' intrusion into the state's regulation of its court system was constitutional because Louisiana's participation in the federal funding scheme was voluntary.¹⁶² The court found that the condition was related to a federal interest insofar as it encouraged states to participate in a system of prioritization, ensuring deliberative spending of federal highway funds.¹⁶³ After the 1995 amendment, another Louisiana appellate court reaffirmed this analysis.¹⁶⁴ The *Guillen* court is the first to have declared § 409 unconstitutional.¹⁶⁵

V. IN *GUILLEN V. PIERCE COUNTY*, THE WASHINGTON SUPREME COURT DECLARED THE 1995 AMENDMENT TO § 409 UNCONSTITUTIONAL

In *Guillen v. Pierce County*, the Washington State Supreme Court held that the 1995 addition of "or collected" to § 409 exceeded Congress' constitutional powers and violated state sovereignty.¹⁶⁶ Interpreting the amended statute to extend a privilege to any highway data collected for any purpose and held by any public entity once the data is used for federal funding purposes,¹⁶⁷ the court declared the amendment unconstitutional.¹⁶⁸ The court limited § 409's constitutionally permissible reach to its pre-1995 form, in which it covered only documents originally created for the purposes enumerated in § 409.¹⁶⁹

1074 (Miss. 1992); *Claspill v. Mo. Pac. R.R.*, 793 S.W.2d 139, 140-41 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990).

162. *Martinolich*, 532 So. 2d at 438. *See also Sawyer*, 606 So. 2d at 1074 ("[i]t is a voluntary program . . . [d]uly authorized officials of this state, however, have committed us . . . and it does not strike us outrageous that we should accede to the federal government's rules and regulations.").

163. *Martinolich*, 532 So. 2d at 438.

164. *Palacios*, 775 So. 2d at 703.

165. *See Guillen v. Pierce County*, 144 Wash. 2d 696, 744, 31 P.3d 628, 655 (2001), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

166. *Id.* at 743-44, 31 P.3d at 655.

167. *Id.* at 726-28, 31 P.3d at 645-46.

168. *Id.* at 702-03, 31 P.3d at 633.

169. *Id.* at 744, 31 P.3d at 655.

A. *Facts and Procedural History*

The plaintiff in *Guillen* alleged that Pierce County's negligent design of an intersection caused his wife's fatal automobile collision.¹⁷⁰ The intersection provided stop signs for cars entering from one street, but no traffic control signals for cars entering from the other street.¹⁷¹ To advance his theory that the intersection warranted a four-way stop,¹⁷² the plaintiff sought discovery regarding the intersection's accident history and traffic patterns.¹⁷³

Pierce County refused to disclose certain documents relating to the accident history and traffic patterns, invoking 23 U.S.C. § 409.¹⁷⁴ The disputed documents included accident reports and statistics prepared by law enforcement agencies, collision diagrams prepared by a county employee to evaluate the intersection's design, and a draft letter from the director of public works to a city council member,¹⁷⁵ also withheld were vehicle volume summaries, signal warrant evaluations,¹⁷⁶ six-year transportation plans,¹⁷⁷ and traffic impact analyses.¹⁷⁸ According to the county, it had used these documents in an ongoing effort to identify candidates for federal safety enhancement funding.¹⁷⁹ The trial court

170. *Id.* at 706, 31 P.3d at 634. After accepting review in *Guillen*, the Washington State Supreme Court granted direct review of a trial court discovery order in *Whitmer v. Yuk*, consolidating the two cases. *Id.* at 710, 31 P.3d at 637. *Whitmer* involved a similar negligence claim against Pierce County and the City of Lakewood. For purposes of this Note, the important difference between the cases is that the *Whitmer* defendants asserted the § 409 privilege for traffic volume data as well as for accident information.

171. Plaintiff's Complaint at 2, *Guillen v. Pierce County*, No. 98-2-06119-2 (filed April 10, 1998) (on file with the Washington Law Review).

172. *Id.* See also *supra* notes 8–9.

173. See *Guillen v. Pierce County*, 96 Wash. App. 862, 867, 982 P.2d 123, 127 (1999). Prior to filing their tort claims, both the *Guillen* and *Whitmer* plaintiffs submitted public records requests for similar information. See *Guillen*, 144 Wash. 2d at 711–16, 31 P.3d 637–40. Issues surrounding Washington's Public Disclosure Act are beyond the scope of this Note.

174. *Guillen*, 144 Wash. 2d at 706, 31 P.3d at 634–35.

175. *Id.* at 704–05, 31 P.3d at 634.

176. See *supra* note 39 and accompanying text.

177. See *supra* note 41 and accompanying text.

178. These documents were withheld only in *Whitmer*. See *Guillen*, 144 Wash. 2d at 708, 31 P.3d at 636.

179. *Id.* at 724–25, 31 P.3d at 644–45. In *Guillen*, the county had also used the materials to apply for federal project funding. See *id.* at 703, 31 P.3d at 633. No federal funding had been requested for the *Whitmer* intersection. *Guillen*, 144 Wash. 2d at 725, 31 P.3d at 645.

nevertheless ordered Pierce County to disclose the documents, and the county appealed the order.¹⁸⁰

A Washington state appellate court largely affirmed the trial court's ruling,¹⁸¹ but did not adopt either party's interpretation of § 409's scope. The plaintiff argued that § 409 applied only to materials originally created for the purpose of seeking federal highway funds.¹⁸² The county argued that materials and data were unavailable, "in any form" and from any agency, once an agency had collected them pursuant to § 152.¹⁸³ The appellate court, in contrast, distinguished between agencies that collect or compile information pursuant to § 152, such as county highway departments, and those that collect or compile information for purposes unrelated to § 152, such as county sheriffs' offices.¹⁸⁴ The court concluded that § 409 does not create a privilege for materials held by an agency that collected or compiled them for purposes unrelated to § 152.¹⁸⁵ Noting that the plaintiff limited his request to documents held by law enforcement agencies,¹⁸⁶ the appellate court ordered discovery of documents related to law enforcement accident investigations.¹⁸⁷

B. Broadly Construing the 1995 Amendment, the Washington State Supreme Court Declared the Amended Statute Unconstitutional

On appeal, the Washington State Supreme Court reviewed the scope of the amended § 409 and requested supplemental briefing on its constitutionality.¹⁸⁸ After reviewing § 409 case law from other states and

180. *Id.* at 706, 31 P.3d at 635.

181. *Guillen v. Pierce County*, 96 Wash. App. 862, 874, 982 P.2d 123, 130 (Div. 2 1999).

182. *See* Respondent's Brief at 13, *Guillen v. Pierce County*, 96 Wash. App. 862, 982 P.2d 123 (Div. 2 1999) (No. 22614-6-II).

183. *Guillen*, 96 Wash. App. at 872, 982 P.2d at 129.

184. *Id.* at 871, 982 P.2d at 129.

185. *Id.*

186. *Id.* at 874, 982 P.2d at 130. In its amicus brief, the State of Washington argued that the Court of Appeals misapplied the distinction it proposed, because the plaintiff's request was directed to the attorney representing the county's public works department, and not to the sheriff's office or the state patrol. *See* Brief of Amicus Curiae State of Wash. at 7, *Guillen v. Pierce County*, 144 Wash. 2d 696, 31 P.3d 628 (2001) (No. 68535-5).

187. *Guillen*, 96 Wash. App. at 872, 982 P.2d at 129. The court did apply the privilege to a letter containing federal funding information, and would have protected a collision diagram had the county proved that the diagram's author was engaged in highway planning duties. *Id.* at 873, 982 P.2d at 873. *See supra* note 175 and accompanying text.

188. *Guillen*, 144 Wash. 2d at 710, 31 P.3d at 637.

analyzing the appellate court's holding in *Guillen*, the Washington State Supreme Court found that the 1995 amendment substantially broadened § 409's scope.¹⁸⁹ According to the court, § 409 now covered all materials and data, in all forms and locations, once they had been collected and used to evaluate sites for § 152 funding.¹⁹⁰ Rejecting arguments that the Spending, Commerce, and Necessary and Proper Clauses authorized such an amendment, the court declared the amended statute unconstitutional,¹⁹¹ concluding that § 409 could be enforced only in its pre-1995 form.¹⁹²

Analyzing the 1995 amendment in the context of pre-amendment § 409 case law,¹⁹³ the Washington State Supreme Court concluded that it represented a broad expansion of the privilege. The court first indicated that early state court interpretations of § 409 restricted its scope to materials "specifically created" for federal funding programs, excluding from the privilege reports and data created for a distinct purpose, then collected for use in federal funding materials.¹⁹⁴ After emphasizing these courts' concerns that broader interpretations would result in the exclusion of all facts included in final § 152 reports,¹⁹⁵ the Washington State Supreme Court indicated that congressional disagreement with these "restricted readings" had motivated the 1995 amendment.¹⁹⁶ Presuming that a material change in the wording of a law changes the law,¹⁹⁷ the court cast doubt on Congress' express intent to merely "clarify" § 409 and suggested that a broad change was intended.¹⁹⁸

The Washington State Supreme Court declined to accept the appellate court's distinction between materials created and held by law

189. *Id.* at 726–27, 31 P.3d at 645–46.

190. *Id.*

191. *Id.* at 744, 31 P.3d at 655.

192. *Id.* at 743–44, 31 P.3d at 655. A concurrence of three justices argued that the five-justice majority interpreted the statute too broadly; the concurrence would have adopted the Court of Appeals' distinction and found the statute constitutional. *Id.* at 751–53, 31 P.3d at 658–59 (Madsen, J., concurring).

193. *Id.* at 717–24, 31 P.3d at 640–45.

194. *Id.* at 718–19, 31 P.3d at 641 (emphasis in original).

195. *Id.* at 720–22, 31 P.3d at 642–43. *Cf. supra* notes 95–96.

196. *Id.* at 723, 31 P.3d at 644.

197. *Id.*

198. *See id.* at 723–24, 31 P.3d at 644. The court described the amended statute as "a legal black hole into which state and local governments can drop virtually all accident materials and facts, simply by showing that such materials and 'raw data' are *also* 'collected' and used to identify and rank candidates" for federal projects. *Id.* (emphasis in original).

enforcement agencies and materials held by highway planning agencies.¹⁹⁹ Calling such a distinction “unsound in principle and unworkable in practice,”²⁰⁰ the court reasoned that changes in technology would make such a legal distinction meaningless:²⁰¹ if highway records were created in digital format and stored in a statewide database accessible by various agencies for different purposes, the fact that one agency accessed the database to assess candidates for § 152 funding would bar access to the entire database.²⁰² Rejecting the distinction, the court held that § 409 covered any publicly collected materials or data—in any form or location—that had also been “collected and used” for federal programs.²⁰³

The Washington State Supreme Court next considered and rejected the three sources of congressional authority advanced by the county—the Spending Clause,²⁰⁴ the Commerce Clause,²⁰⁵ and the Necessary and Proper Clause²⁰⁶—holding that Congress could constitutionally restrict only materials and data “originally *created* for” a federal funding program.²⁰⁷ In its analysis of Spending Clause authority, the court stated that extending a privilege to data prepared for routine state purposes, simply because it was *also used* for federal purposes, served “no valid federal interest in the operation of the federal safety enhancement program.”²⁰⁸ The court apparently based its conclusion on *Dole’s* relatedness limitation, concluding that § 409’s evidentiary exclusion was not sufficiently related to the highway safety enhancement purposes of § 152.²⁰⁹

199. *Id.* at 726–27, 31 P.3d at 645–46.

200. *Id.* at 727, 31 P.3d at 646.

201. *Id.* at 727–28, 31 P.3d at 646.

202. *Id.* at 728, 31 P.3d at 646.

203. *See id.* at 727, 31 P.3d at 646.

204. U.S. CONST. art. I, § 8, cl. 1. *See Guillen*, 144 Wash. 2d at 734, 31 P.3d at 649.

205. U.S. CONST. art. I, § 8, cl. 3. *See Guillen*, 144 Wash. 2d at 734, 31 P.3d at 649.

206. U.S. CONST. art. I, § 8, cl. 18. *See Guillen*, 144 Wash. 2d at 734, 31 P.3d at 649. Analysis of this clause was not a major part of the court’s holding. *See id.* at 743, 31 P.3d at 654–55.

207. *Guillen*, 144 Wash. 2d at 746, 31 P.3d at 656 (emphasis in original).

208. *Id.* at 737, 31 P.3d at 651.

209. *See Guillen*, 144 Wash. 2d at 736–37, 31 P.3d at 651; *see also id.* at 735 n.34, 31 P.3d at 650 n.34 (quoting extensively from Justice O’Connor’s *Dole* dissent advocating a stricter relatedness requirement).

The Washington State Supreme Court also rejected authority under the Commerce Clause.²¹⁰ Though it cited recent U.S. Supreme Court decisions in support of the proposition that regulated activities must substantially affect interstate commerce,²¹¹ the court based its decision on the conclusion that § 409 is not an “integral part” of Congress’ legitimate regulation of the federal-aid highway system.²¹² In each aspect of its constitutional analysis, the court concluded that Congress lacked the authority to control the use of state materials in state courts, unless a federal funding program was the but-for cause of their creation.²¹³

Under the Washington State Supreme Court’s holding in *Guillen*, § 409 protects only materials originally created for, and specifically required by particular federal programs.²¹⁴ Because the record contained insufficient facts for the court to apply this standard to the disputed documents, the court remanded the case for further proceedings.²¹⁵ The court’s ruling has been stayed pending a grant of certiorari by the United States Supreme Court.²¹⁶

VI. THE WASHINGTON SUPREME COURT SHOULD HAVE CONSTRUED § 409 NARROWLY, THEREBY AVOIDING A CONSTITUTIONAL HOLDING

In concluding that Congress’ 1995 amendment broadly extended the scope of § 409, the Washington State Supreme Court disregarded reasonable alternative interpretations that would have recognized the constitutionality of the amendment. A narrow interpretation of § 409 is consistent with congressional intent and general principles for construing evidentiary privileges. Interpreted narrowly, in light of its purpose, the amended § 409 protects only documents in the possession of an entity

210. *Id.* at 737–42, 31 P.3d at 651–54.

211. *Id.* at 740–41, 31 P.3d at 653 (citing *United States v. Lopez*, 514 U.S. 549, 565–66 (1995) and *United States v. Morrison*, 529 U.S. 598, 610–11 (2000)).

212. *Id.* The Washington State Supreme Court relied on *Hodel v. Indiana*, in which the U.S. Supreme Court indicated that a complex regulatory program can be constitutional “without a showing that every single facet of the program is independently and directly related to a valid congressional goal [provided that] the challenged provisions are an integral part” of the broader program. 452 U.S. 314, 329 n.17 (1981). See *Guillen*, 144 Wash. 2d at 742, 31 P.3d at 654.

213. See *Guillen*, 144 Wash. 2d at 744, 31 P.3d at 655.

214. *Id.* at 745, 31 P.3d at 655.

215. *Id.* at 746, 31 P.3d at 656

216. *Guillen v. Pierce County*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

that created or obtained them “for *the* purpose” of a federal program. As such, the statute continues to represent a constitutional exercise of Congress’ spending power.

A. *Like Other Evidentiary Privileges, § 409 Should Be Construed Narrowly and Applied To Achieve Its Purpose*

When construing evidentiary privileges, courts should identify the purpose of a privilege and restrict its application accordingly.²¹⁷ Privileges are to be construed narrowly and applied to promote specific activities or behaviors.²¹⁸ Courts have restricted privileges when a given application would not encourage the activities or behaviors the privilege was designed to promote,²¹⁹ or would exclude more evidence than is reasonably necessary to promote the identified purpose.²²⁰ Courts should likewise restrict the § 409 privilege to applications likely to encourage the activities it was designed to promote.

1. *The Purpose of § 409 is to Encourage Data Collection*

Given the lack of direct legislative history,²²¹ § 409 should be interpreted in light of its place within the broader federal highway safety scheme²²² and applied to promote the objectives of particular federal highway safety programs.²²³ Legislative history demonstrates that Congress enacted the relevant highway safety programs to encourage states and localities to engage in record-keeping and prioritization that would permit methodical elimination of specific highway risk factors.²²⁴ Yet because possession of more highway hazard data increases the evidence available to plaintiffs in highway negligence cases,²²⁵ states and

217. See, e.g., *Kitts v. Norfolk and W. Ry.*, 152 F.R.D. 78, 80–81 (S.D.W.Va. 1993) (viewing section 409 in light of principles governing all privileges); see also *supra* notes 65–79 and accompanying text.

218. See *supra* notes 65–66 and accompanying text.

219. See *supra* notes 67–69 and accompanying text.

220. See *supra* notes 70–75 and accompanying text.

221. See *supra* note 48 and accompanying text.

222. The privilege is codified in chapter 4 of Title 23 U.S.C., entitled “Highway Safety.”

223. The relevant programs are those identified in § 409—23 U.S.C. §§ 130, 144, and 152—and adopted in the Highway Safety Act of 1973. See *supra* notes 24–32 and accompanying text.

224. See *supra* note 30 and accompanying text.

225. See *supra* notes 7–9 and accompanying text.

localities may be reluctant to gather some useful data.²²⁶ This reluctance impedes full realization of the federal objective, and § 409 addresses this obstacle.²²⁷ Section 409 promotes the increased collection of highway hazard data by neutralizing the litigation impact of data and materials whose collection is directly motivated by participation in particular federal programs.²²⁸

Though it is possible to infer a broader purpose for § 409, the absence of clear congressional intent to create a sweeping exclusion supports this narrower litigation-neutralizing objective. Conceived expansively, § 409 could be an attempt to ensure the *veracity* of any highway information supplied to the federal government.²²⁹ That is, if litigation availability diminishes the accuracy of all highway information, Congress might have wished to shield any data *used* for a federal program from the time it was first recorded.²³⁰ This conception of the congressional purpose should be rejected. First, it is not clear that a change in litigation availability would increase the accuracy of all highway data.²³¹ Government entities have various reasons for recording basic highway data, many of which provide an incentive to record *accurate* data.²³² For instance, traffic volume data that accurately demonstrates regional transportation growth²³³ might result in increased funding for new construction; likewise, the accuracy of a law enforcement officer's accident reports could be grounds for career promotion. Indeed, if ensuring that the federal government would receive *accurate* data had been Congress' principal objective, it presumably would have extended

226. See, e.g., Brief of Amicus Curiae State of Wash. at 4, *Guillen v. Pierce County*, 144 Wash. 2d 696, 31 P.3d 628 (2001) (No. 68535-5) (stating that use of safety data in tort litigation "provides a disincentive for government to compile the information needed to accurately prioritize and systematically fund highway improvement projects"). See also *supra* note 54.

227. Cf. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (funding condition reasonably calculated to address particular impediment to statutory purpose).

228. The *Guillen* court emphasized that Congress enacted § 409 to avoid altering the balance of litigation advantages between plaintiffs and governments. *Guillen v. Pierce County*, 144 Wash. 2d 696, 717–18, 31 P.3d 628, 641 (2001), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229) (emphasizing congressional intent to avoid giving plaintiffs an *added* advantage).

229. See *supra* note 54.

230. This is the result of the *Guillen* court's statutory interpretation. See *Guillen*, 144 Wash. 2d at 727, 31 P.3d at 646.

231. Cf. *supra* notes 74–75 and accompanying text.

232. See *supra* notes 38–41 and accompanying text.

233. See WASH. ADMIN. CODE § 468-86-110 (2001).

the privilege to data required by other federal highway safety programs.²³⁴

Second, creating a privilege for every piece of highway information used for the hazard elimination program from the time it was first recorded would be a significant federal intrusion into the states' traditional management of their court systems.²³⁵ Courts require a clear statement when adopting a statutory interpretation that alters the traditional federal-state balance.²³⁶ The addition of the words "or collected" does not clearly declare a congressional intent that federal law determine the admissibility, in state court, of highway data routinely collected for state and local purposes, simply because that data is *used* in a federal program.²³⁷

2. *Statutory Ambiguities Should Be Resolved To Achieve the Narrow Goal of Neutralizing Litigation Disadvantages*

Ambiguities concerning the application § 409 should be resolved in light of the statute's purpose of neutralizing litigation advantages. Two principal statutory ambiguities have survived the 1995 amendment: first, the amendment did not address divergent interpretations of "*the purpose*" for which privileged data must have been collected; second, by using the passive voice to describe privileged material ("data . . . collected"), Congress failed to clarify *who* must have collected privileged data. The narrow purpose of making federally-motivated data collection litigation-neutral should guide construction of § 409's federal purpose requirement and identification of documents that may constitute "data . . . collected" for this purpose.

234. 23 U.S.C. § 402 also mandates accident recording and reporting. *See supra* notes 21–23 and accompanying text; *supra* note 42.

235. *See Martinolich v. S. Pac. Transp. Co.*, 532 So. 2d 435 (La. Ct. App. 1988) (finding that the state's regulation of court system is "as fundamental a function of its sovereignty as the normal exercise of its police power"), *cert. denied sub nom. La. Dep't of Transp. and Dev. v. Martinolich*, 490 U.S. 1109 (1989).

236. *See supra* note 147.

237. *Cf. Kitts v. Norfolk and W. Ry.*, 152 F.R.D. 78, 82 (S.D.W.Va. 1993) (noting that if Congress had intended for data routinely collected before federal safety programs existed "to be thrown into the safety enhancement pot and accorded protection," it could have included language or legislative history to this effect).

a. *Defining the Federal Purpose*

Courts should read literally the dictate that privileged materials be compiled or collected for “*the purpose*” of a hazard elimination project.²³⁸ Materials collected to comply with a state law mandate would not have been collected for “*the purpose*” of a federal program.²³⁹ This reading is consistent with the statute’s purpose because a privilege cannot *encourage* reluctant states and localities to collect the very same data that state law *requires* them to collect. Rather than mitigating an obstacle to achievement of the federal program’s objective, applying § 409 to materials required by state law would give defendant governments an advantage unconnected to participation in the federal funding program.²⁴⁰ Courts have the power to limit statutory privileges to the minimum the statutory purpose requires;²⁴¹ courts should exercise their power to implement § 409’s purpose by construing the statute exactly as it reads.²⁴²

b. *Identifying “Data . . . Collected”*

The § 409 privilege for “data . . . collected” should be available only to data-collectors motivated by the requisite federal purpose and to documents in their possession. This interpretation recognizes that data may be “collected” in two distinct acts—first by the entity that originally records it, and again by an entity that gathers copies of the resulting records.²⁴³ The 1995 amendment clarified that when the requisite federal purpose motivates an entity to obtain documents from various sources, courts must grant the § 409 privilege to those pre-existing documents as well as to any documents the entity creates.²⁴⁴ However, the amendment did not require courts to extend the privilege to documents held by the

238. See *supra* notes 99 and 102 and accompanying text.

239. Cf. *supra* notes 122–23 and accompanying text.

240. See *Guillen v. Pierce County*, 144 Wash. 2d 696, 751, 31 P.3d 628, 658 (2001) (Madsen, J., concurring), *cert. granted*, 70 U.S.L.W. 3553 (U.S. Apr. 29, 2002) (No. 01-1229).

241. See *supra* notes 70–72 and accompanying text.

242. The *Guillen* court, in contrast, broadened the statute’s narrow purpose by interpreting it to cover all data and materials collected “for, *inter alia*, the § 152 purpose.” *Guillen*, 144 Wash. 2d at 727, 31 P.3d at 646 (emphasis added).

243. See Brief of Amicus Curiae Wash. State Trial Lawyers Ass’n Found. at 11, *Guillen v. Pierce County*, 144 Wash. 2d 696, 31 P.3d 628 (No. 68535-5) (2001).

244. See *supra* notes 107–09 and accompanying text.

data's original "collector," when that entity created the documents for state purposes.²⁴⁵ Documents created for state purposes, and requested from their original creator, should not become privileged simply because another public entity gathers them for § 409's federal purpose.²⁴⁶ This interpretation is consistent with the Washington State Supreme Court's application of the statutory privilege for the proceedings of hospital review committees:²⁴⁷ the statutory purpose of making committee investigations litigation-neutral did not require protection of information available from original sources, simply because it was used in a review-committee meeting.²⁴⁸

An interpretation of § 409 that distinguishes between data as collected by different public entities need not result in a privilege for all state highway records, even if they were kept in a single electronic database.²⁴⁹ Records created for *state* purposes and later accessed for *federal* purposes would remain available. First, the collection of all highway-related documents into a statewide database would not be motivated by "the purpose" of obtaining federal funding, given existing state law data-collection mandates.²⁵⁰ Furthermore, courts could imply a caveat consistent with that applied to other privileges, by refusing to permit a public entity to *create* the privilege simply by transferring its records to a funding applicant for storage. For example, a client cannot *create* the attorney-client privilege by giving pre-existing documents to an attorney, even for the purpose of obtaining legal advice.²⁵¹ Similarly, entities posting documents to a database would not be permitted to claim a privilege for documents created for state purposes simply because they had been "transferred" to another entity. This caveat would also defeat any temptation to shift documents to different offices in order to avoid disclosure.

245. See *supra* notes 114–20 and accompanying text.

246. Section 409 will require plaintiffs' counsel to be "careful and sometimes inventive" in drafting discovery requests, seeking information from several public sources. KENWORTHY, *supra* note 9, § 11-8(C). See also *supra* note 186.

247. See *supra* notes 77–79 and accompanying text.

248. See *supra* notes 77–79 and accompanying text.

249. See *Guillen*, 144 Wash. 2d 698, 727–28, 31 P.3d 628, 646 (2001); see also *supra* notes 199–202 and accompanying text.

250. See, e.g., *supra* notes 36–42 and accompanying text.

251. See *supra* note 68 and accompanying text.

c. *Proposed Interpretation*

With the statutory ambiguities surrounding *purpose* and *possession* resolved to effectuate § 409's narrow purpose, the privilege would apply to (1) all materials created or recorded for "*the purpose*" of a federal program, whether raw data or "end products" specifically required by the program; and (2) materials originally created or recorded for state purposes, when requested from an entity that had obtained the materials for the requisite federal purpose. This interpretation would permit discovery of many of the items requested by the *Guillen* plaintiffs—including accident reports, basic accident statistics, and traffic volume data that state law required the county to collect. Yet this interpretation might preclude discovery of other documents—such as collision diagrams used to plan specific highway improvements²⁵²—that an entity prepared or obtained only because of the federal funding opportunity.

3. *Narrow Interpretation Incorporates the 1995 Amendment*

This interpretation is not only consistent with the original litigation-neutralizing purpose of § 409, but it also incorporates the limited broadening effect of the 1995 amendment. Prior to the amendment, in some courts, "data compiled" did not include factual raw data²⁵³—presumably even if the data had been recorded for the sole purpose of a federal program. In these courts, "data compiled" also excluded pre-existing materials an entity gathered to prepare "end products" for federal funding.²⁵⁴ This interpretation failed to protect an entity from increased risk of liability when it was motivated by a federal program to *produce* or *obtain* new types of data.²⁵⁵ By permitting a funding applicant to claim the § 409 privilege for *any* materials it possessed because of its participation in a federal program—whether it originally created the materials or not—Congress effected a meaningful change to § 409, but did not dictate a change in the requisite federal purpose. As such, courts may interpret the federal purpose requirement narrowly to avoid a constitutional holding.

252. See *supra* note 34 and accompanying text.

253. See *supra* notes 91–94 and accompanying text.

254. See *supra* notes 91–94 and accompanying text.

255. See *Guillen*, 96 Wash. App. 862, 870, 982 P.2d 123, 128 (1999) ("An injured claimant can be aided by reports or data *collected* pursuant to Section 152 as much as by reports or data *compiled* pursuant to Section 152.") (emphasis in original).

B. Narrowly Interpreted, § 409 Is a Valid Exercise of Congressional Spending Power

In addition to conforming to congressional intent and principles for construing evidentiary privileges, a narrow interpretation of § 409 also represents a saving construction that allows courts to avoid a finding of unconstitutionality.²⁵⁶ Section 409 is a spending condition that the state may escape by declining federal highway safety improvement funds. When applied to encourage state and local recordkeeping, § 409 is rationally related to the federal interest in increasing national highway safety.

Section 409 is not a direct congressional mandate; it attaches only upon a state's voluntary decision to apply for federal highway safety improvement funds.²⁵⁷ The Washington legislature has voluntarily applied for and received federal highway safety funds; furthermore, it has affirmatively accepted conditions on federal highway grants.²⁵⁸ In addition to these direct actions, the legislature has authorized the state department of transportation to enter into agreements necessary to secure federal highway funds,²⁵⁹ thus binding the state and its political subdivisions to the conditions of any agreement entered under this authority.²⁶⁰

Still, spending conditions may be unconstitutional if they lack a rational relationship to the federal interest in the particular policy or program that the spending supports.²⁶¹ Although courts have been extremely deferential in scrutinizing this relationship,²⁶² the *Guillen* opinion illustrates serious constitutional problems with construing § 409 expansively. Indeed, the federal programs data-collection objectives are not rationally advanced by a privilege that *encourages* public entities to

256. See *supra* notes 80–84.

257. See *supra* note 162.

258. "The state of Washington hereby assents to the . . . terms and conditions of the grant of money provided in [a 1916 federal highway funding act] . . . and all acts, grants, and appropriations amendatory and supplementary thereto and affecting the state of Washington." WASH. REV. CODE § 47.04.050 (2001). Though this statute predates § 409, the legislature reauthorizes the state transportation budget, including federal appropriations, each biennium. See, e.g., 2000 Wash. Laws, ch. 3, §§ 217, 219, 221–23, 226, 232.

259. *Id.* § 47.04.060.

260. See *supra* note 139 and accompanying text.

261. See *supra* note 148 and accompanying text.

262. See *supra* notes 153–60 and accompanying text.

collect data that state laws²⁶³—and other federal laws²⁶⁴—require them to collect. That is, when state law requires data collection, use of the data in litigation does not impede achievement of federal objectives.²⁶⁵

However, construing § 409 as an attack on a primary impediment to the objective of the federal safety programs—state and local reluctance to collect data—causes it to operate in much the same way as the statute considered in *South Dakota v. Dole*. In *Dole*, the Supreme Court found that because varied drinking ages impaired the federal spending goal of increasing highway safety, the federal government could require states to adopt a national minimum drinking age in exchange for highway safety funds.²⁶⁶ Narrowly construed, § 409 likewise addresses an impediment to a federal spending purpose: it lessens a state or locality's reluctance to create or obtain new types of highway hazard data. Thus, insofar as § 409 encourages funding applicants to create or obtain highway materials that they are not otherwise obligated to create or obtain, it promotes the federal programs' operation and objectives.

VII. CONCLUSION

Courts should adopt a narrow construction of § 409 to avoid a finding of unconstitutionality. Given its sparse legislative history and ambiguous language, courts should interpret 23 U.S.C. § 409 to neutralize litigation disadvantages created by the data-collection requirements of particular federal programs. Applications of the privilege that do not further that purpose, or that exclude more evidence than is necessary to achieve that purpose, should be avoided. In particular, the privilege should not be applied to data and materials that state law requires highway authorities to collect.

This interpretation comports with general principles for construing evidentiary privileges, and allows the court to avoid making unnecessary constitutional law. The doctrine of avoiding constitutional holdings is particularly relevant when one of fifty state high courts reviews the constitutionality of a federal statute. While state courts certainly have the power to invalidate federal laws within their jurisdictions, this power should be reserved for clear cases of unconstitutionality in which no

263. See *supra* Part I.B.

264. See *supra* note 23 and accompanying text.

265. See *supra* notes 238–40 and accompanying text.

266. *Id.* at 207.

reasonable statutory alternative appears. A narrow construction of § 409 is reasonable and eliminates any constitutional defects in Congress' exercise of its broad spending power.